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Bipartisan American Affordability and Jobs Act of 2026 (BAAJA): Analysis of Endangered Species Act Provisions

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SUMMARY

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The Bipartisan American Affordability and Jobs Act of 2026 (BAAJA; S. 5653) was introduced on September 30, 2026. The bill, as introduced, contains seven titles within two divisions that aim to reform certain federal environmental review and permitting processes to expedite a wide range of project types, with an emphasis on energy-related projects.

Some Members of Congress have shown interest in amending the nation's permitting laws to facilitate energy production and expedite a variety of projects and actions (e.g., transportation infrastructure, energy, data center development, ecological restoration, and water conveyance). Some bills have addressed permitting requirements under the Endangered Species Act (ESA; 16 U.S.C. §§1531-1544), notably Section 7 consultation under the act. For example, H.R. 1897 in the 119th Congress would narrow the scope for consultation and potentially increase exemptions from Section 7 consultation.

The ESA aims to conserve species in danger of or threatened with extinction that are listed as endangered or threatened under the act. Species of animals and plants can be listed under the ESA as either endangered or threatened, according to an assessment of the risk of their extinction. Section 7 of the Endangered Species Act (ESA; 16 U.S.C. §1536) requires federal agencies to ensure that actions they undertake, authorize, or fund are not likely to jeopardize threatened or endangered species (i.e., listed species) or adversely modify designated critical habitat for listed species. Section 7 generally requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) (in the Department of the Interior) or the National Marine Fisheries Service (in the Department of Commerce) when their proposed actions may affect listed species or critical habitat.

This report analyzes the provisions in BAAJA specific to the ESA (Division A, Title III of BAAJA). These provisions include sections that would define "best scientific and commercial data available" and "best scientific data available" (Section 1301) to mean all existing scientific and commercial information available at the time of the agency action and to include data, analyses, and models that are applied using existing standards of practice and without presumptions or policy prescriptions that bias the application. Sections 1302 and 1303 would shorten timelines for consultation and exempt certain transportation projects from consultation. Section 1304 would authorize the Secretary of the Interior to establish a program that would allow states to take on the consultation responsibilities of the Secretary if they can verify that they have the financial, personnel, and legal resources to carry out Section 7 consultations, among other factors. This section would apply to consultations done by the FWS and to projects and actions that occur within the boundaries of a state. Section 1305 would amend judicial review for biological opinions issued during consultation. Section 1306 would allow for state data to be accepted and integrated into species listing or delisting determinations pursuant to the ESA. Section 1307 would authorize $150 million in appropriations for Section 7 consultation and the state program authorized under Section 1304 from FY2027 to FY2031. In addition, "project certainty" provisions in BAAJA (Division A, Title IV) would prohibit a federal agency from removing, terminating, suspending, amending, or altering certain federal authorizations or permits (including an applicable biological opinion or incidental take statement) in effect on or after September 16, 2026, absent certain exemptions. Such provisions could have implications for Section 7 consultation under ESA, notably for changing or amending a biological opinion and incidental take statement.

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BAAJA is organized according to two divisions:

- Division A—Committee on Environment and Public Works—has four titles: the National Environmental Policy Act of 1969 (NEPA), the Clean Water Act (CWA), the Endangered Species Act of 1973 (ESA; 16 U.S.C. §§1531-1544), and Project Certainty.
- Division B—Committee on Energy and Natural Resources—has three titles: Electric Transmission, Energy Permitting, and Historic Preservation.

This report examines the following sections in BAAJA specific to the ESA (Division A, Title III):

- Section 1301. Definitions
- Section 1302. Timelines for Section 7 Consultations
- Section 1303. Projects in the Operational Right-of-Way
- Section 1304. State Assumption of Consultation Responsibilities
- Section 1305. Judicial Review
- Section 1306. Listing Determinations
- Section 1307. Authorization of Appropriations

The report provides an overview of the ESA and background on parts of the ESA that would be addressed by BAAJA. The report then summarizes provisions that BAAJA would amend or add to the ESA, compares each ESA-related provision in BAAJA to existing law, and analyzes selected changes to the ESA that the bill would make if enacted. Further, the report discusses the potential implications of Section 1401 of BAAJA on the ESA Section 7 consultation process.

Selected Background on the Endangered Species Act

The ESA aims to conserve species in danger of or threatened with extinction that are listed as endangered or threatened under the act.[1] Under the ESA, it is the policy of Congress that all federal agencies shall seek to conserve threatened and endangered species, use their authorities in furtherance of the ESA, and cooperate with state and local agencies to resolve water resource issues in concert with conserving endangered species.[2] The ESA is administered by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services).[3] Domestic and foreign species of animals (both vertebrate and invertebrate) and plants can be listed under the ESA as either endangered or threatened, according to an assessment of the

[1] For more information on the Endangered Species Act, see CRS Report R46677, *The Endangered Species Act: Overview and Implementation*, by Pervaze A. Sheikh and Erin H. Ward.

[2] 16 U.S.C.§1531(c).

[3] The Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS), generally manages and administers the Endangered Species Act (ESA) with regard to terrestrial, freshwater, and catadromous species (e.g., American eel). Marine and anadromous species (e.g., salmon species) generally are the responsibility of the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS). Management of marine mammals under the ESA is split between the Services following provisions under the Marine Mammal Protection Act (16 U.S.C. §1362(12)), and sea turtles are managed jointly by both Services based on turtles' beach versus marine habitat.

risk of their extinction.[4] Listing determinations are to be made "solely on the basis of the best scientific and commercial data available."[5] When a species is listed, the ESA directs the Services—"to the maximum extent prudent and determinable"—to simultaneously designate critical habitat for the species based on the "best scientific data available," accounting for economic impacts, national security impacts, and any other relevant impacts.[6] Once a species is listed, the act provides tools to aid its conservation and recovery and to protect the species and its habitat. Among these tools are the ESA's prohibition on *take* (e.g., killing or harassing) of and other activities involving endangered species without a permit; its requirement that the Services extend such prohibitions by regulation to threatened species as they deem "necessary and advisable" for the species' conservation; and its requirement that federal agencies, in consultation with FWS or NMFS,[7] as applicable, ensure their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat.[8]

The BAAJA addresses several components of the ESA, namely the meaning of "best scientific and commercial data available" and "best scientific data available," Section 7 consultation, and judicial review. An overview of these concepts under current law is provided below.

Definition of Best Scientific and Commercial Data Available

Pursuant to statutory requirements, the Secretary (of either the Interior or Commerce depending on the species) must decide whether to list species based only on the best available scientific and commercial data, using information to which the agency has access and information obtained from the public through the agency rulemaking process.[9] The statute does not define the phrase "best available scientific and commercial data," and the Services have not interpreted this phrase through regulation. The Services are also directed to use the best available scientific and commercial data to make several other determinations under the ESA, for example designating critical habitat,[10] formulating a *biological opinion* (BiOp) during Section 7 consultation,[11] and delisting a species.[12]

[4] 16 U.S.C. §1532 (6) and (20). The term *endangered species* refers to those species—as defined by the ESA—that are "in danger of extinction throughout all or a significant portion of its range." The term *threatened species* means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

[5] 16 U.S.C. §1533(b)(1)(A).

[6] 16 U.S.C. §1533(a)(3), (b)(2). The ESA defines *critical habitat* to include geographic areas occupied or not occupied (under certain conditions) by the species at the time of listing. Areas occupied by the species at the time of listing must have physical and biological features that (1) are essential to the conservation of a species and (2) may require certain management considerations or protection. Areas not occupied by the species at the time of listing may be designated as critical habitat if the Secretary determines that such additional areas are "essential for the conservation of the species" (16 U.S.C. §1532(5)). If the critical habitat of a species is not determinable at the time of listing, the Services may extend the designation of critical habitat by up to one year, at which point they must designate "to the maximum extent prudent" critical habitat at that time "based on such data as may be available at that time" (16 U.S.C. §1533(b)(6)(C)).

[7] The ESA defines the term *take* to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. §1532(19)).

[8] 16 U.S.C. §1538.

[9] 16 U.S.C. §1534(b)(1)(A). Formally, this determination is made by the Secretary of the Interior, but for species under NMFS's jurisdiction, the determination to list, delist, or change the status of a species cannot be made without "prior favorable determination ... by the Secretary of Commerce" (16 U.S.C. §1533(a)(2)(C)).

[10] 16 U.S.C. §1533(b)(2).

[11] 50 C.F.R. §402.14(g).

[12] 50 C.F.R. §424.11.

Section 7 Consultation

Section 7 of the ESA requires federal agencies to ensure that their discretionary actions,[13] including authorizing (e.g., issuing a permit) or funding actions of nonfederal parties, are "not likely to jeopardize the continued existence" of any endangered or threatened species or adversely modify or destroy critical habitat.[14] Federal agencies undertaking actions (action agencies), whether directly or through federal approvals, permits, or funding for nonfederal parties,[15] must consult with the Services, as appropriate, if those actions might affect a listed species or designated critical habitat. This process is referred to as *Section 7 consultation* (consultation). Action agencies are, in the first instance, to evaluate possible effects of proposed projects on listed species or designated critical habitat. For major construction activities, this evaluation is known as a *biological assessment* (BA). If the action agency concludes that the action may adversely affect listed species or critical habitat, it initiates formal consultation with the Services. The Services' goal in conducting formal consultation is to determine whether the agency action is likely to jeopardize listed species or adversely modify or destroy their critical habitat and, if so, whether there are *reasonable and prudent alternatives* (RPAs) that would avoid those outcomes. To conclude formal consultation, the Services publish a BiOp articulating their findings with respect to jeopardy and RPAs. So long as the Services determine the action is not likely to jeopardize listed species or there are RPAs, the Services issue an *incidental take statement* (ITS) with a BiOp authorizing a certain amount of unintentional (i.e., incidental) take expected to result from carrying out the action.[16] If that number is exceeded, the action agency must reinitiate consultation.[17] According to a study, the majority of consultations result in *no jeopardy* opinions, and nearly all of the rest identify RPAs that permit the action agencies to go forward with the proposed actions.[18]

The Services generally must conclude consultation within 90 days of receiving an action agency's request for consultation, unless the Services and the action agency mutually agree to a longer period.[19] For consultations involving a nonfederal party (e.g., a permit applicant), the 90-day period may be extended up to an additional 60 days without the nonfederal party's permission; the Services and action agency are to provide the nonfederal party with a written explanation for the delay, any information required to complete consultation, and the estimated time frame for completion.[20] The Services and action agency must obtain the nonfederal party's permission to extend the consultation beyond 150 days from its initiation.[21]

[13] An action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States. It also includes the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid (50 C.F.R. §402.02).

[14] 16 U.S.C. §1536(a)(2).

[15] A nonfederal party that is proposing an action within a federal nexus (e.g., using a federal permit or license) is referred to as a permit or license applicant under regulations implementing the ESA.

[16] 16 U.S.C. §1536(b)(4).

[17] 50 C.F.R. §402.16.

[18] This is derived from a study of Section 7 consultations from 2008 through 2015. See J. W. Malcom and Ya-Wei Li, "Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act," *Proceedings of the National Academy of Sciences*, vol. 112, no. 52 (December 29, 2015), pp. 15844-15849.

[19] 16 U.S.C. §1536(b)(1); and 50 C.F.R. §402.14(e).

[20] 16 U.S.C. §1536(b)(2).

[21] 16 U.S.C. §1536(b)(2).

Judicial Review

The ESA does not specify a particular venue or time frame for legal challenges to BiOps issued by the Services under Section 7. Instead, Section 11(c) assigns federal district courts jurisdiction over "any actions arising" under the ESA, which would include challenges to BiOps.[22] Section 706 of the Administrative Procedure Act (APA) supplies the standards of review for challenges to BiOps issued by the Services.[23] Such actions are subject to a six-year statute of limitations under 28 U.S.C. §2401(a).

Table 1 provides a summary of provisions in BAAJA (Division A, Title III) that would amend the ESA. (The amended section of the ESA is noted where applicable.) The table is organized by section numbers in BAAJA. The first column summarizes the key provisions that address the ESA found in each section. The second column contains selected background information, where relevant. Analysis of changes proposed in BAAJA follows **Table 1**.

Table 1. Summary of Selected Provisions of BAAJA as Introduced that Would Amend or Address the Endangered Species Act (ESA)

Summary of Selected BAAJA Provisions	Selected Background Notes
Section 1301. Definitions. **(Would amend 16 U.S.C. §1532 of the ESA.)**	
The bill would define the terms "best scientific and commercial data available" and "best scientific data available" to "'(A) mean all relevant and objective scientific and commercial information available at the time of the agency action; and '(B) include credible and reliable data, quantitative analyses, conceptual and numerical models, and model results that— '(i) account for known or potential sources of error; '(ii) are applied using prevailing principles, methods, tools, and professional standards of practice; and '(iii) are impartially gathered and objectively applied without presumptions or policy prescriptions that bias the application."	The ESA uses the terms but does not define best scientific and commercial data available or best scientific data available. The statute and regulations direct the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) to use the best scientific and commercial data available or best scientific data available to make decisions on listing species, designating critical habitat, and formulating certain Section 7 consultation documents. For example, see 50 C.F.R. §402.14. The Services have incorporated the standard in other contexts in regulations and policies, such as for Section 10 permits (50 C.F.R. §222.307).
The bill would replace "the Trust Territory of the Pacific Islands" with "the Commonwealth of the Northern Mariana Islands" in the definition of State.	This would change the definition to reflect changes in the status of the Commonwealth of the Northern Mariana Islands.
Section 1302. Timeline for Section 7 consultations. **(Would amend 16 U.S.C. §1536(b)(1) of ESA.)**	
The bill would shorten the deadline for concluding formal Section 7 consultation from 90 days to 60 days.	This would affect the timeline for consultation under Section 7 and not the timeline for preparing a biological opinion (BiOp), which is set by regulation to be completed within 45 days after consultation ends (50 C.F.R. §404.14).

[22] 16 U.S.C. §1540(c). Enforcement of the Services' and private parties' compliance with the ESA is governed by 16 U.S.C. §1540(g). See Bennett v. Spear, 520 U.S. 154, 172 (1997).

[23] 5 U.S.C. §706; *Bennett*, 520 U.S. at 177-78.

Summary of Selected BAAJA Provisions	Selected Background Notes
The bill would shorten the time frame for extensions of the consultation period that require only a written explanation from 150 days to 100 days.	Under the ESA, the written explanation from the Secretary of the Interior or Commerce for an extension of consultation must contain (1) reasons why a longer period is required, (2) the information that is required to complete the consultation, and (3) the date on which consultation will be completed (16 U.S.C. §1536(b)(1)(B)).
The bill would authorize a permit or license applicant to sue if the Secretary of the Interior or Commerce and the consulting agency propose to extend the consultation period beyond 145 days and do not provide a written statement to or obtain consent from the applicant, as applicable.	Under the ESA, if the Services and consulting agency (action agency) agree to extend the consultation period beyond 90 days but for less than 150 days after consultation is initiated, the Services must provide a written statement explaining the need for the extension, any required information, and an estimated end date. If the Services and action agency seek to extend the consultation period so it will end 150 or more days after the date on which consultation was initiated, the Secretary must obtain the consent of the applicant for the extension period. (16 U.S.C. §1536(b)(1)(B)). BAAJA Section 1302 would adjust these time periods to 60 and 100 days, respectively, as noted above.
The bill would require that Section 7 consultation be finished no later than the date of completion of any National Environmental Policy Act (NEPA) documentation required for a project or action, unless the Secretary of the Interior or Commerce approves an extension due to "extraordinary circumstances beyond the control, and not due to any action, of the consulting parties."	Section 7 consultation and the NEPA environmental review process are often done in parallel.
Section 1303. Projects in the operational right-of-way. (Would amend 16 U.S.C. §1536 of the ESA).	
The bill would provide that any project categorically excluded from NEPA pursuant to §1316 of P.L. 112-141 would be exempt from Section 7 consultation.	The categorical exclusion at P.L. 112-141, §1316, covers projects to be undertaken in existing operational rights-of-way related to roadways managed by the Federal Highway Administration (FHWA), such as highways, roads, trails, etc. Categorical exclusions for the FHWA are described in 23 C.F.R. §771.117.
Section 1304. State assumption of consultation responsibilities. (Would create new ESA Section 7A; the consultation responsibilities that would be delegated are found in 16 U.S.C. §1536 of the ESA.)	
The bill would require the Secretary of the Interior to establish a program that would allow the Secretary to assign the consultation responsibilities of the Secretary under Section 7 to states, at the state's election, under certain conditions.	Under the ESA, the Services are responsible for carrying out Section 7 consultation responsibilities (16 U.S.C. §7). This program would only delegate authority to carry out consultations that would otherwise be conducted by the U.S. Fish and Wildlife Service.
The bill would not allow for the assignment of consultation responsibilities for projects or other agency actions that exceed the boundaries of a state.	Under the ESA, the action agency must assess whether listed species or critical habitat may be present in the area affected by the action (known as the action area) and, if present, whether the action may affect any such resources. Under 50 C.F.R. §402.02, *action area* "means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the

Summary of Selected BAAJA Provisions	Selected Background Notes
	action." The action area may extend beyond the boundaries of a single state.
If the project or agency action would occur within one state but affect an area that exceeds state boundaries, the bill would require the state to consult with the other affected states, if they have assumed consultation responsibilities, or with the Secretary of the Interior if those states had not assumed such responsibilities.	Under 50 C.F.R. §402.02, the *effects of an action* are "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action."
The bill would require the Secretary of the Interior to issue a proposed rule within 270 days of enactment of BAAJA containing implementing regulations to establish a program that allows states to carry out consultation and ensures states adequately carry out assumed consultation responsibilities. The bill would require the Secretary of the Interior to provide a public comment period of not less than 60 days for the proposed rule.	No similar provision in current law.
Before assuming Section 7 consultation responsibilities, the bill would require participating states to submit an application that, among other things, verifies that they (1) have the financial, personnel (or plans to hire personnel within a year of approval), and legal resources to carry out Section 7 consultations, (2) will waive sovereign immunity for the responsibilities assumed by the state, and (3) provided for public comment on the state application for consultation consistent with the bill's public notice and comment requirements.	No similar provision in current law.
The bill would require the Secretary of the Interior to respond to a state in writing if an application is denied, identifying the reasons for denial, and to provide technical assistance to the state in addressing those reasons if requested.	No similar provision in current law.
The bill would direct the Secretary of the Interior to approve a state application for consultation responsibilities within 180 days of receiving the application if the state demonstrates legal, financial, and personnel capability to conduct consultations; otherwise meets the requirements described in statute and in implementing regulations for the program; and enters into a written agreement with the Secretary of the Interior that meets certain requirements and is executed by the governor or head of the responsible state agency.	No similar provision in current law.
The bill would give the U.S. district courts exclusive jurisdiction over any civil action against a state for failure to carry out any responsibility of the state under the program and would direct that such actions be governed by the same "legal standards and requirements" that would apply to an action taken by the Secretary of the Interior. Would allow the	Under current law, legal challenges to a BiOp and an attendant incidental take statement (ITS) are brought pursuant to the Administrative Procedure Act against the Service that issued the BiOp. Such suits are subject to a six-year statute of limitations (28 U.S.C. § 2401(a)) and may be brought in the federal district courts in either Washington, DC, or any district where the

Summary of Selected BAAJA Provisions	Selected Background Notes
Secretary of the Interior to intervene in any suit against a state as a matter of right.	action will occur or where the affected species or habitat are present.
The bill would authorize a permit or license applicant to elect to consult with the Secretary of the Interior regardless of state assumption of consultation responsibility.	No similar provision in current law.
The bill would direct the Secretary of the Interior to conduct audits and monitoring of state implementation of the consultation program.	No similar provision in current law.
The bill would provide for the termination of state assumption of consultation responsibilities by either the Secretary of the Interior or the state, subject to notice requirements and other criteria.	No similar provision in current law.
The bill would direct the U.S. Fish and Wildlife Service to conduct outreach and capacity building to assist states participating in the program.	No similar provision in current law.
Section 1305. Judicial review. **(Would amend 16 U.S.C. §1536(n) of the ESA.)**	
The bill would direct any person seeking judicial review of any BiOp issued by the Secretary of the Interior or Commerce to do so in the U.S. Court of Appeals for the District of Columbia Circuit by filing in such court not later than 150 days after the date on which the BiOp is made public.	Under current law, BiOps may be challenged in the federal district courts, subject to a six-year statute of limitations.
Section 1306. Listing determinations. **(Would amend 16 U.S.C. §1533 of the ESA.)**	
The bill would require the Secretary of the Interior or Commerce, as applicable, to accept and integrate state-collected data that met the definition of "best scientific and commercial data available" in making determinations to list or delist a species pursuant to the ESA.	Under the ESA, the best scientific and commercial data available can include state-collected data, which can be used in making listing decisions.[a]
Section 1307. Authorization of appropriations. **(Would not amend the ESA.)**	
The bill would authorize appropriations of $150 million for each fiscal year from FY2027 through FY2031 to carry out ESA Section 7 and support state participation in the program.	This makes no changes to the authorization of appropriations under the ESA (16 U.S.C. §1542). The authorization for appropriations for the ESA ended in 1992. Congress has appropriated funds in each succeeding fiscal year.

Sources: S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), and the Congressional Research Service.

Notes: ESA = Endangered Species Act.

a. For example, see FWS and NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, March 1998, Chapter 2, pp. 2-16 at https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.

Discussion of Selected Changes Proposed in BAAJA

BAAJA's ESA-related provisions propose several amendments to the ESA and would change aspects of its implementation. This section discusses selected changes to the ESA proposed by

BAAJA and provides related stakeholder perspectives and potential congressional considerations. The BAAJA provisions discussed include Section 1301 on the definition of the phrases "best scientific and commercial data available" and "best scientific data available," Section 1304 on the state assumption of consultation responsibilities, and Section 1305 on judicial review. Section 1401, which may affect the ability to modify or revoke BiOps and ITS under Section 7 of the ESA, is also discussed in this section.

Definition of Best Scientific and Commercial Data Available

BAAJA would add a definition of the phrases "best scientific and commercial data available" and "best scientific data available." The phrases would be defined to mean

> all relevant and objective scientific and commercial information available at the time of the agency action; and include credible and reliable data, quantitative analyses, conceptual and numerical models, and model results that account for known or potential sources of error; are applied using prevailing principles, methods, tools, and professional standards of practice; and are impartially gathered and objectively applied without presumptions or policy prescriptions that bias the application.[24]

Some stakeholders contend that this definition would "raise the evidentiary burden" for protecting listed species under the ESA by lowering the ability of FWS and NMFS to make decisions accounting for scientific uncertainty.[25] Some other stakeholders assert that this definition would allow project applicants to work from a "standard set of facts" when completing Section 7 consultations.[26]

While "best scientific and commercial data available" and "best scientific data available" lack a statutory definition in the ESA as currently enacted, the federal courts have construed these terms for decades. As a general matter, courts have held that these phrases require the Services to consider scientific and commercial data available at the time the agency makes its decision,[27] prohibit the Services from ignoring available studies even if they discount or discredit such studies,[28] and do not require an action agency to conduct new tests or generate new data that do not already exist.[29] Some courts have also held that these phrases include a "benefit of the doubt in favor of the species" under conditions of uncertainty,[30] but other courts have rejected this reading of the phrases.[31] The Supreme Court has never explicitly addressed whether the best available science standard includes a "benefit of the doubt" or presumption. In the 1997 case *Bennett v. Spear*, the Court appeared to cast doubt on interpreting the phrase to include that kind

[24] Section 1301 of BAAJA, S. 5653.

[25] Letter from Center for Biological Diversity et al. to Honorable Sheldon Whitehouse, Chuck Schumer, and Martin Heinrich, U.S. Senators, October 6, 2026, https://biologicaldiversity.org/programs/government-affairs/pdfs/Oppose-ESA-attacks-in-permitting-deal.pdf. Hereinafter, Letter from Center for Biological Diversity et al. to Honorable Sheldon Whitehouse, Chuck Schumer, and Martin Heinrich, U.S. Senators.

[26] For example, see Matthew Allen et al., "New Bill Offers a Breakthrough Opportunity for Hydropower," National Hydropower Association, October 13, 2026, https://hydro.org/powerhouse/article/baaja-offers-a-breakthrough-opportunity-for-hydropower/.

[27] Sw. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000).

[28] San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 995 (9th Cir. 2014).

[29] Am. Wildlands v. Kempthorne, 530 F.3d 991, 998-99 (D.C. Cir. 2008).

[30] Connor v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988); Def.s of Wildlife v. Dep't of Interior, 931 F.3d 339, 351 (4th Cir. 2019); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1048-49 (1st Cir. 1982).

[31] Me. Lobstermen's Assoc. v. NMFS, 70 F.4th 582, 599 (D.C. Cir. 2023); Miccosukee Tribe of Indians v. United States, 566 F.3d 1257, 1268 (11th Cir. 2009).

of presumption.[32] The Court wrote, albeit discussing a separate legal issue, that the purpose of the best available science standard

> is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.[33]

Given the disagreement among courts about the existence of any kind of presumption or benefit of the doubt in favor of the species, it is difficult to predict whether the definition proposed in BAAJA would meaningfully change the kind of data the Services are required or permitted to incorporate into some of their decisions under current law. Under one interpretation, the definition would limit the Services' ability to adopt a presumption favoring species protection in situations where data are lacking. Whether this would be a change from current law is contested.[34] The ESA itself contains no explicit language supporting a presumption in favor of species protection in all cases of uncertainty, and even courts that have adopted the "benefit of the doubt" standard demand that the Services justify their decisions based on the particular strengths and gaps in the data relevant to a particular species.[35] There appears to be little to no support in case law applying the ESA for a reflexive presumption in favor of the species in every instance of uncertainty about the future survival of a species.

Members of Congress may have various considerations related to this proposed definition. For example, Members may consider whether this definition would restrict, maintain, or improve the quality and availability of data currently used to make decisions under the ESA. Congress might question whether this definition would change current practices related to collecting and applying the best scientific and commercial data available. Specifically, Members could consider whether this definition would clarify, standardize, or improve the quality of data used to make decisions under the ESA. Members also may consider whether the definition should be changed to apply solely to the data collected, analyses, and models, as compared to the Services' application of that data to decisionmaking.

Program for States to Assume Section 7 Consultation Responsibilities

BAAJA would require the Secretary of the Interior to establish a program that would allow states to assume the responsibility for Section 7 consultations (consultation) under the ESA for projects and actions within their state boundaries.[36] States would apply to the Secretary to assume consultation responsibilities under the program and would have to verify that they have the financial, personnel, and legal resources to carry out consultation.[37] States in the program would

[32] 520 U.S. 154, 177 (1997).

[33] 520 U.S. at 176.

[34] Robert L. Glicksman, 3 *Public Natural Resources Law* § 29:28 (2nd ed.); J.B. Ruhl, "The Battle Over Endangered Species Act Methodology," *Environmental Law*, vol. 34, no. 2 (2004), pp. 555, 593; Natasha Geiling, "Can the Precautionary Principle Save the Endangered Species Act from an Uncertain Climate Future?" *Ecology Law Quarterly*, vol. 47 (2020), p. 305.

[35] See Def's of Wildlife v. Dep't of Interior, 931 F.3d 339, 346-55 (4th Cir. 2019); Ctr. for Biological Diversity v. FWS, 801 F. Supp. 3d 1151, 1187-1205 (D. Mont. 2025).

[36] Under BAAJA, the Secretary of the Interior or Commerce would retain responsibility for consultation on projects that exceed the boundaries of a given participating state.

[37] Section 1304 of BAAJA, S. 5653, would direct the Secretary to issue a proposed rule to establish the program and specify procedures to ensure that participating states adequately carry out consultation requirements under Section 7 not later than 270 days after enactment.

take on the role of FWS for consultation regarding potential impacts on species managed by FWS and would have to adhere to Section 7's requirements. States would also have to waive sovereign immunity for consultation responsibilities, meaning that their actions pursuant to the assumption of Section 7 consultation could be challenged by private citizens in federal court. Licensees or permittees involved with federal agencies for consultation would have the choice of whether to consult with the state or FWS. The Secretary would conduct audits of states participating in the program for the first four years and monitor the program thereafter. The Secretary or the state may terminate the delegation of consultation responsibilities, subject to certain notice and other requirements.

Some stakeholders assert that this program would give states a larger role in consultation.[38] Further, some in favor of the bill contend that states might have a better understanding of listed species and their critical habitat within their state, and a better understanding of how proposed actions affect species and critical habitat, compared with FWS.[39] Other stakeholders who oppose this program contend that there would be inconsistency among states handling consultation for projects and actions that affect the same species. They assert that this may lead to varying levels of protection for the same species located in different states.[40] Further, some argue that states do not have the expertise, financial resources, or personnel to handle Section 7 consultation.[41] Some of the same stakeholders contend that states may be pressured to favor economic interests over the protection of listed species when conducting consultations.[42] Further, these stakeholders assert that states might be pressured to defer to local interests when conducting consultations.[43] For example, some developers might contend that some states could show bias *against* development when carrying out a consultation program, using consultation to place onerous conservation measures on proposed actions related to projects that would affect listed species and critical habitat.

Some critiques of the proposed program noted above are broadly addressed by BAAJA. The bill would require states to verify that they have the financial, legal, and personnel resources to conduct consultations.[44] Further, the bill would direct the Secretary to conduct outreach, education, and capacity building to support state consultation efforts.[45] The Secretary would also be directed to audit and monitor the program, which could provide the Secretary the opportunity to conduct oversight over how states are handling consultation responsibilities and whether the states' resources are adequate in practice.[46] The bill would further give the Secretary the option to

[38] For example, see Olivia Windorf et al., "Comprehensive Summary of the Bipartisan American Affordability and Jobs Act (BAAJA, S. 5653)," Center for Climate and Energy Solutions, September 2026, https://www.c2es.org/document/comprehensive-summary-of-the-bipartisan-american-affordability-and-jobs-act/. Hereinafter Windorf et al., "Comprehensive Summary of BAAJA."

[39] For example, see Windorf et al., "Comprehensive Summary of BAAJA.". National Caucus of Environmental Legislators, "A Natural Legacy for the Future: State Laws for Endangered and Threatened Species," January 2023, https://www.ncelenviro.org/app/uploads/2024/10/SESA-Report-2024-Update.pdf.

[40] Letter from Center for Biological Diversity et al. to Honorable Sheldon Whitehouse, Chuck Schumer, and Martin Heinrich, U.S. Senators.

[41] Letter from Center for Biological Diversity et al. to Honorable Sheldon Whitehouse, Chuck Schumer, and Martin Heinrich, U.S. Senators; Windorf et al., "Comprehensive Summary of BAAJA"; and Earthjustice, "The Impacts of the Bipartisan American Affordability and Jobs Act of 2026," https://earthjustice.org/feature/bipartisan-american-affordability-and-jobs-act-2026-impact-guide. Hereinafter cited as Earthjustice, "The Impacts of BAAJA."

[42] For example, see Earthjustice, "The Impacts of BAAJA."

[43] Earthjustice, "The Impacts of BAAJA."

[44] Section 1304 of BAAJA, S. 5653.

[45] Section 1304 of BAAJA, S. 5653.

[46] Section 1304 of BAAJA, S. 5653.

terminate a state's assumption of consultation responsibilities if the state is not adequately carrying out its responsibilities, subject to certain conditions. The Secretary may clarify the details of how the program is implemented within regulations required by the bill.[47]

Congress may consider several questions about establishing a program that allows states to take over consultation responsibilities from the Secretary of the Interior. Members may consider how many states are willing to enter such a program and whether those states would have sufficient resources to conduct consultations. States that consider entering the program might weigh the costs of consultation against the benefits. For example, conducting consultations could require greater financial and personnel resources from states than already exist. Further, states would be required to waive sovereign immunity and could be sued due to their consultations. In contrast, states may welcome the opportunity to consult on species within their boundaries and prescribe conservation measures that balance their perceived needs for conservation and development. Congress might also consider expanding this program so that consultations of projects and actions on species addressed by the Secretary of Commerce could also be done by states.

Members may question whether this program would increase or decrease the time it would take to complete consultations. Having states responsible for certain consultations could lower the burden for completing consultations on FWS and potentially lower consultation times. However, if states lacked the expertise or institutional knowledge for conducting consultations, or if states needed to consult with neighboring states or FWS, delays could ensue. The bill would direct the Secretary of the Interior to conduct training and outreach to states, which might increase states' capacity to conduct consultations.

Members also may consider whether states can and would conduct informal consultations as part of assuming consultation responsibilities.[48] According to one study, informal consultations greatly outnumber formal consultations under Section 7.[49] If states are unable to conduct informal consultations in an efficient manner, license and permit applicants might opt to conduct consultations with FWS, particularly if FWS has an established process for conducting informal consultations. This option would not be given to federal agencies consulting with participating states under BAAJA.

Judicial Review

The ESA does not specify a particular venue for legal challenges to BiOps issued by the Services under Section 7; instead, 16 U.S.C. §1540(c) assigns federal district courts jurisdiction over "any actions arising" under the ESA. BAAJA Section 1305 would assign challenges to BiOps issued by the Services to the U.S. Court of Appeals for the District of Columbia Circuit. Challenges to federally issued BiOps would have to be brought within 150 days after the publication of the BiOp.

[47] Section 1304 of BAAJA, S. 5653.

[48] Informal consultation is an optional process that can help action agencies determine whether formal consultation is required. During informal consultation, the action agency or designated nonfederal representative may correspond and meet with the Services about a proposed action. Informal consultation may be initiated before or after the biological evaluation is complete. Informal consultation gives the Services an opportunity to suggest ways the action agency or designated nonfederal representative could modify the proposed action to avoid any anticipated adverse effects on listed species or critical habitat.

[49] A 2015 study analyzed consultations from 2008 through 2015 and found that 81,461 informal consultations were completed, compared with 6,829 formal consultations. This study also reported that informal consultations took an average of 13 days and formal consultations took an average of 62 days. J. W. Malcom and Ya-Wei Li, "Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act," *Proceedings of the National Academy of Sciences*, vol. 112, no. 52 (December 29, 2015).

With respect to challenges to BiOps issued by state authorities, the bill would assign jurisdiction to the U.S. federal district courts where projects are located. Under BAAJA Section 1304(e)(2), claims challenging state compliance with the ESA would "be governed by the same legal standards and requirements that would apply" in an action against the Secretary of the Interior had the Secretary issued the BiOp. BAAJA Section 1304 includes no explicit statute of limitations for claims brought against states, unlike BAAJA Section 1305, which would require claims against the Secretary to be brought within 150 days of the BiOp being made public. It is possible this means actions challenging state BiOps could be subject to the standard six-year statute of limitations under 28 U.S.C. §2401(a). However, it is also possible that the provision in BAAJA Section 1304 imposing the same "legal standards and requirements" on suits against states as would apply in a suit against the Secretary could effectively import the 150-day filing limit for federal BiOps from BAAJA Section 1305, if a court determined that such time limit were a "legal standard or requirement." Because that determination would likely be made by federal district courts considering challenges to state actions, it is possible that courts in different circuits could draw different conclusions.

Project Certainty

Title IV of BAAJA, titled "Project Certainty," contains provisions that could affect ESA implementation. Among other things, BAAJA Section 1401 would prohibit a federal agency from revoking, rescinding, withdrawing, terminating, suspending, amending, or altering a BiOp or ITS, or other applicable federal authorization or permit in effect on or after September 16, 2026. This prohibition would be subject to five statutory exceptions.[50] Further, BAAJA Sections 1402 and 1403 would generally require federal agencies to render a decision on certain complete applications for federal authorizations or permits within one year after the date on which the latest of the covered applications is deemed to be complete. This requirement would apply to federal authorizations or permits for which an environmental impact statement (EIS) or environmental assessment (EA) is not required.[51] It would apply to actions that require a BiOp but not an EIS or EA. This may include projects or actions where the scope or magnitude of the action's impact may be considered minor, or projects or actions that are granted categorical exclusions under the National Environmental Policy Act.[52] Environmental analysis under Section 7 consultation typically is still required for determining any potential impacts of the activity on ESA-listed species.[53] Sections 1401-1403 of BAAJA would provide for judicial review of the application of any exception, of any "improperly denied" authorization, or of an agency's failure to comply with a one-year decision deadline. Under particular circumstances, the bill would provide remedies to the permit holder or applicant, including injunctive relief and monetary damages up to the full project costs in certain situations.

[50] As stipulated in Section 1401(b)(1)(A)-(D) of BAAJA, S. 5653, these exemptions include that the federal agency is required to take such action under court order; because of breach of terms, violation of law, or obtainment of the authorization or permit through fraud, concealment, or misrepresentation by the permittee; and/or a necessity to prevent harm or damage under particular circumstances based on new information not considered in the environmental review process or final agency action for the authorization or permit.

[51] Under Section 1402(b)(4) of BAAJA, S. 5653, *specific types of covered projects* are defined to include projects associated with specific electricity- and energy-related sectors, resources, and technologies.

[52] U.S. Department of Transportation, Federal Highway Administration (FHA), *Information: Management of the Endangered Species Act (ESA) Environmental Analysis and Consultation Process*, February 20, 2002, https://www.environment.fhwa.dot.gov/legislation/other_legislation/natural/laws_esaguide.aspx. Hereinafter cited as FHA, *Management of the Endangered Species Act*. For more information about the National Environmental Policy Act, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite and Heather McPherron.

[53] FHA, *Management of the Endangered Species Act*.

Under regulations promulgated pursuant to the ESA, the Services must reinitiate formal consultation or reissue a BiOp under certain circumstances.[54] Reinitiation of consultation is triggered by any one of four possibilities: (1) when the amount or extent of take specified in an incidental take statement is exceeded; (2) new information on the species or the action shows an effect on the species or its critical habitat that was not considered in the BiOp; (3) the action was sufficiently modified that it would cause an effect on species or critical habitat not considered in the BiOp; or (4) the listing of a new species or designation of critical habitat that may be affected by the action.[55] In addition to the Services reinitiating consultation, legal challenges to BiOps may result in court orders requiring changes to or reissuance of a BiOp.

Although BAAJA Section 1401 would generally prohibit an agency from amending a federal authorization, several exceptions contained in the provision may apply to the reinitiation of consultation or to court orders requiring amendments to a BiOp. BAAJA Section 1401 likely would not limit agency action pursuant to a court order, nor would its prohibitions likely apply where a permit holder (in this case, the holder of an ITS) violates the terms of the permit or otherwise violated federal law. BAAJA Section 1401 also would allow for otherwise prohibited action by the agency if it is needed to prevent "specific, urgent, substantial, and proximate harm or damage to life, property, national security or defense" in light of new information not considered in the environmental review process or final agency action. These exceptions likely would permit the Services to amend and reissue a BiOp pursuant to a court order or where the take of listed species has exceeded (i.e., violated) the limits set out in the ITS. It is unclear, however, whether the other triggers for reinitiation of formal consultation could fall within the exception for urgent harm.

Regarding reinitiation and the urgent harm exception, some stakeholders suggest that BAAJA might prevent the reinitiation of consultation for a BiOp addressing a project or action that meets the conditions under Section 1401.[56] If damage to life and property is considered to include damage to the species and critical habitat, reconsultation could occur. However, some stakeholders have raised concerns that these circumstances may not specifically include environmental harm;[57] others collectively summarize these exemptions under the classification of "significant newly discovered risks" or "urgent harm."[58] Some stakeholders with mixed views of the provision note that it is intended to provide more durability and predictability for projects that have received federal approvals (e.g., wind and renewable energy projects; pipelines) and to prevent politicized revocation of approved projects.[59] Others have expressed concerns about

[54] 50 C.F.R. §402.16.

[55] 50 C.F.R. §402.16.

[56] Earthjustice, "The Impacts of BAAJA."

[57] National Resources Defense Council (NRDC), "NRDC Assessment of BAAJA, the 2026 Permitting and Transmission Bill," October 19, 2026, https://www.nrdc.org/media/nrdc-assessment-baaja-2026-permitting-transmission-bill; and Save the Manatee, "Opposition Statement: S. 5653, Bipartisan American Affordability and Jobs Act of 2026 ("Permitting Bill")," October 14, 2026, https://savethemanatee.org/opposition-statement-s-5653/.

[58] Ike Emehelu et al., "Senate Unveils Bipartisan Comprehensive Permitting Reform Bill," *Akin*, October 6, 2026, https://www.akingump.com/en/insights/alerts/senate-unveils-bipartisan-comprehensive-permitting-reform-bill (hereinafter cited as Emehelu et al., "Senate Unveils Bipartisan Comprehensive Permitting Reform Bill"); and Molly Ross et al., "Bipartisan Senate Committee Leaders Release Permitting Reform Text," Holland and Knight, October 1, 2026, https://www.hklaw.com/en/insights/publications/2026/10/bipartisan-senate-committee-leaders-release-permitting-reform-text (hereinafter cited as Ross et al., "Bipartisan Senate Committee Leaders Release Permitting Reform Text").

[59] Emehelu et al., "Senate Unveils Bipartisan Comprehensive Permitting Reform Bill"; Brownstein Hyatt Farber Schreck, LLP, "Senate Builds Momentum on Permitting Reform with Bipartisan Deal," October 5, 2026, https://www.bhfs.com/insight/senate-builds-momentum-on-permitting-reform-with-bipartisan-deal/; and Aidan (continued...)

potential effects to the use of adaptive management approaches, such as in BiOps.[60] Relatedly, some also note that agencies would be responsible for establishing an exception based on specific evidence, which some may interpret as agencies specifying particular factors requiring reinitiation of consultation.[61]

Members may consider how the project certainty language in BAAJA (as introduced) may affect reinitiation of Section 7 consultation for projects and actions, and other provisions or regulations of the ESA. Congress might consider whether these provisions would prevent or allow reinitiation of consultation if there were a change in a project or action if a newly listed species or newly designated critical habitat were affected by the project or action. Members may also consider if Section 1401(b) of BAAJA would restrict or allow for changes to a BiOp if "such action is necessary to prevent specific, urgent, substantial, and proximate harm or damage to life." The terms "life" and "harm" are undefined in BAAJA.[62] Further, Members may consider if the Services' lack of a definition for harm under the ESA and its regulations may affect implementation of BAAJA's project certainty provisions with respect to any allowable changes to a BiOp.[63] Such considerations may include whether the use of the term "harm" would apply to factors triggering reinitiation of consultation. Congress also may examine how BAAJA's proposed limitations for modifying or revoking a BiOp or ITS may affect ESA provisions allowing for an exemption of Section 7 consultation requirements by the Endangered Species Committee (ESC).[64] For example, in a March 2026 decision, the ESC (composed of multiple federal agency representatives) granted an exemption from the requirements of the ESA for agency actions analyzed in a 2025 NMFS BiOp and in 2018 and 2025 FWS BiOps based on matters related to national security.[65] Members may consider the degree to which national-security-related exemptions under BAAJA might apply to this type of situation.

Members may consider the potential advantages of including project certainty provisions, such as the benefits of formalizing guardrails to limit an Administration's ability to prevent a federally approved project from occurring or to broadly modify the terms of a given permit. Members also may weigh how these project certainty directives might allow for efficiencies in evaluating future proposed projects by constraining recurrent agency attention on previously approved projects.

Mackenzie, "How the Permitting Deal Works," Institute for Progress, October 12, 2026, https://ifp.org/how-the-permitting-deal-works/#3-permitting-certainty.

[60] Earthjustice, "The Impacts of BAAJA." In this context, adaptive management may be summarized as an iterative decisionmaking process informed by ongoing monitoring and scientific understanding to allow for flexible approaches to managing natural resources. Byron K. Williams et al., *Adaptive Management: The U.S. Department of the Interior Technical Guide*, U.S. Department of the Interior, 2009, pp. 1-72, https://www.doi.gov/sites/default/files/uploads/TechGuide-WebOptimized-2.pdf.

[61] Jennifer S. Collins, "The Bipartisan American Affordability and Jobs Act—What You Need to Know," *National Law Review*, October 5, 2026, https://natlawreview.com/article/bipartisan-american-affordability-and-jobs-act-what-you-need-know; and Ross et al., "Bipartisan Senate Committee Leaders Release Permitting Reform Text."

[62] The term "life" is not defined under BAAJA. It is unclear if it would include wildlife and listed species under the ESA.

[63] U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration, "Rescinding the Definition of 'Harm' Under the Endangered Species Act," 91 *Federal Register* 43330-43317, July 14, 2026.

[64] 16 U.S.C. §1536(e)-(o).

[65] Office of the Secretary, Interior; Department of the Army; Environmental Protection Agency; Department of Agriculture; Council of Economic Advisors; Executive Office of the President; Department of Commerce, "Endangered Species Committee," 91 *Federal Register* 16966-16967, April 3, 2026. For more information, see CRS In Focus IF13218, *Endangered Species Committee ("God Squad") Exemption of Oil and Gas Activities in the Gulf of America*, by Anthony R. Marshak, Pervaze A. Sheikh, and Laura B. Comay; and CRS Legal Sidebar LSB11421, *ESA "God Squad" Exemption for Gulf Oil and Gas Activities: Background and Current Litigation*, by Cassandra J. Barnum and Erin H. Ward.

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