Principal Objections to the Historic Preservation Title of the BAAJA, S.5653

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The Bipartisan American Affordability and Jobs Act ("BAAJA") contains several provisions that would negate the core protections and purpose of the National Historic Preservation Act ("NHPA") of 1966 by empowering federal agencies to make unilateral decisions without consulting state or local governments, Tribes, or the American public. The proposed legislation also contains multiple ambiguous provisions that would generate confusion and litigation, and lead to the loss of historic resources. This analysis focuses on provisions of greatest concern and is not an exhaustive review of all issues raised by the bill.

Key Issues

Federal Agency Override of Preservation.

The proposed bill would allow Federal agencies to unilaterally declare that the purpose and goal of federal undertakings "outweigh the consideration of historic preservation" at the outset of consultation. This is functionally an exemption from Section 106 that would render all other provisions of the proposed bill and the NHPA moot. Federal agencies could simply declare that every undertaking under their jurisdiction "outweigh(s) the consideration of historic preservation." Pg. 390-391, (II)(ff).

For example: The head of BLM could declare that any development of land under the agency's jurisdiction outweighs the consideration of historic preservation and could submit a form letter to SHPOs and THPOs for every undertaking in lieu of initiating consultation.

Unilateral "No Adverse Effect" Determinations.

The proposed bill would allow Federal agencies to unilaterally determine whether an undertaking will have adverse effects. If a federal agency determines that an undertaking will not have adverse effects, or that no historic properties are present, no further consultation nor review of that finding will occur, even if those determinations are erroneous. This is particularly concerning because State and Tribal Historic Preservation Officers (SHPOs and THPOs), Tribes, local governments and the public often possess the specialized expertise and local knowledge needed to identify historic resources that federal agencies may otherwise overlook. Pg. 388-389, (D)(ii).

For example: Suppose the Department of Veterans Affairs ("VA") proposes to demolish several older buildings it owns that are not listed on the National Register. The VA determines there will be no adverse effects and demolition begins. In fact, the buildings were designed by a famous architect and are eligible for the National Register and were extremely valuable due to being well-suited for adaptive reuse as housing. The VA would never know any of that because their initial finding of no adverse effect would foreclose all consultation with SHPO and the local community.

Tribal Consultation Becomes Optional.

The proposed legislation would make Tribal consultation optional for Federal agencies. The Department of the Interior would also be empowered to assume the roles and responsibilities of Tribal Historic Preservation Offices if the Department unilaterally deems them to be out of compliance. Both provisions raise issues of Tribal sovereignty in addition to concerns about a lack of Tribal involvement in the stewardship of their own cultural resources.

Ignores Visual, Atmospheric & Audible Impacts.

The proposed bill would exclude from consideration "any visual, atmospheric, or audible element," unless it "would have a direct impact on a historic property that would significantly diminish the eligible characteristics of the historic property." This provision is likely to cause conflict and litigation because there is no definition of "significantly diminish," and that threshold could be interpreted in multiple ways. From a preservation perspective, any diminishment could be argued to be significant, while a federal agency might argue that this proposed language allows for substantial adverse effects. Pg. 379-380, (a)(1)(B)(i).

For example: if a large vegetable oil deodorizer and packaging plant is proposed on the Mississippi River in the heart of New Orleans' French Quarter, the smell, noise, overwhelming visual presence, and traffic impacts from the facility would not be considered by the Army Corps of Engineers when deciding whether to issue the facility a permit.

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Eliminates Review for Projects Receiving Federal Financial Assistance.

The proposed bill would eliminate Section 106 review altogether for projects that receive federal financial assistance, such as a "loan, loan guarantee, grant (including a capitalization grant), cost-share award, or other form of financial assistance." This would eliminate compliance requirements for many categories of projects, including most transportation projects and HUD projects. Pg. 383-384, (7)(B)(ii).

Reliance on Incomplete Documentation.

The proposed bill would exclude from consideration "any effect on a portion of the historic property other than an adverse effect to the character-defining features, such as contributing elements, cultural-use locations, or access points, that significantly contribute to the qualification of the property for inclusion on the National Register." This provision is unworkable given how character-defining features are recorded on National Register inventory forms. Many historic buildings have extremely limited information on character-defining features, especially on older National Register nominations; sometimes only one architectural feature like a roof is listed. Under this proposal, demolition of the remainder of the building would not be considered an adverse effect. Pg. 379-381, (a)(1)(B)(iii).

For example: if a historic 1880s post office has a notable clock on its facade that is identified on the National Register nomination as a character-defining feature, and no other elements of the building are specifically mentioned, even though the post office is otherwise a classic example of Victorian civic architecture, the entire post office could be demolished under the proposed bill, without being considered an "adverse effect," so long as the clock itself was preserved.

Consultation on Area of Potential Effects Becomes Optional.

The proposed bill would make optional the current requirement that Federal agencies consult with SHPOs and Tribes regarding areas of potential effects and the identification of historic properties. This is extremely problematic, especially regarding identification. Federal agencies often do not have access to state historic properties databases and generally lack the ability to evaluate locally significant historic resources. Federal agencies other than NPS also have no legal role in the National Register evaluation process, whereas SHPOs have a legal responsibility to administer that process in conjunction with state review boards. Pg. 386-387, (c)(2)(B)(iii).

Ignores Historic Resources Discovered After Consultation Begins.

The proposed bill states that federal agencies may ignore historic resources identified after consultation has been initiated. This is problematic since, under the proposed bill, consultation would not be initiated until after federal agencies have completed their identification efforts. If a federal agency fails to identify a historic resource and SHPO then notifies them that they've made an error, this provision would allow the federal agency to exclude that resource from consideration, even if it is a clear error that results in destruction of the resource. Pg. 413, (d).

Creates Ambiguous "Substantial Control" Standard.

The proposed bill would exclude undertakings from consideration if "a federal agency does not exercise substantial control or responsibility over the outcome." The threshold for "substantial control or responsibility" is undefined and would likely lead to conflict and litigation. From a preservation advocate's perspective this could be argued to be a "but for" standard, where without federal action the harms would not occur, while Federal agencies will likely argue that a more direct level of federal involvement is required. Pg. 383, (7)(B)(i).

Eliminates Accountability for Agency Leaders.

The proposed bill would eliminate the requirement that the head of the federal agency must respond to formal comments from the Advisory Council on Historic Preservation, and it instead would allow that responsibility to be delegated to lower-level staff. Direct involvement by the head of the agency in the event of termination is an important incentive to reach agreement through consultation, and that incentive would be eliminated. Pg. 393-394, (B)(ii)(III).

Restricts Judicial Review.

The proposed bill would prohibit courts from issuing preliminary injunctions under Section 106 and NEPA, and it would prohibit courts from vacating federal agency decisions that the court finds are in violation of Section 106. Thus, unlawful demolition or construction activity could continue while the case is remanded back to the agency. Pg. 406-407, (9)(C)(i), (C)(ii)(I)(aa).