Immigration Detention Is Not a Reason to Oppose the Bipartisan American Affordability and Jobs Act

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The Bipartisan American Affordability and Jobs Act (BAAJA) is not an immigration bill and has little direct impact on immigration policy or on detention center construction or operation.

BAAJA does change what relief is available in court when a judge finds a flawed environmental or historic preservation review for federal projects, including federal detention facilities. But environmental review lawsuits have done little to stop detention centers thus far, and there's little reason to expect them to play a big role going forward; the vast majority of such facilities are already operational, and lawsuits under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) typically delay but do not stop a project.

BAAJA's proposed changes matter far more for the transmission lines, wind farms, and solar projects that lower power bills and contribute to decarbonization goals. Opponents of current detention policy have other, stronger tools, and BAAJA leaves all of them intact.

The detention center concern

Some advocacy organizations have argued BAAJA would give Immigration and Customs Enforcement (ICE) "a faster, cheaper path" to expand detention facilities.[1] The basis of this argument is that opponents have used NEPA to sue ICE over plans to convert a small number of warehouses into detention centers, and BAAJA limits what courts can do about NEPA violations.

The facts on BAAJA and immigration policy

- **BAAJA never mentions immigration, ICE, or detention.** It provides no funding, exemptions, or project-specific streamlining for detention facilities.[2]
- **ICE facilities would still need environmental review under BAAJA.** BAAJA keeps the existing test for when NEPA applies: an action under "substantial Federal control and responsibility."[3] A warehouse ICE buys and converts easily meets this test.
- Senator Whitehouse's office has correctly said there is "no plausible reading" of the bill's NEPA provisions that would exempt detention centers.[4]
- **BAAJA changes the remedy in NEPA and NHPA cases, no matter the type of project,**

[1] Kelsey Brugger et al., *ACLU Warns Permitting Bill Could Give Way to ICE Detention Centers*, POLITICO (Nov. 5, 2026).
[2] Bipartisan American Affordability and Jobs Act of 2026, S. 5653, 119th Cong. (2026), as amended by the managers' amendment in the nature of a substitute [hereinafter BAAJA].
[3] BAAJA § 1102 (amending NEPA § 111(10), redesignated as § 3(18)).
[4] Statement of a spokesperson for Sen. Sheldon Whitehouse, quoted in Brugger et al., *supra* note 1.

not only for ICE facilities. BAAJA's rules are the same for a detention center, a transmission line, and a wind farm. If a court finds a NEPA or historic preservation violation, it sends the review back to the agency to fix within 180 days. The project can proceed; a NEPA or NHPA suit alone no longer supports an injunction.[5]

- **BAAJA's permit certainty protections do not cover ICE's own projects.** Section 1401, which limits an agency's power to revoke a permit it has already granted, applies only to projects with a non-federal sponsor.[6] A future administration could cancel an ICE facility's construction just as it could without BAAJA.

NEPA lawsuits alone are not an effective check on detention centers

- **NEPA requires process, not outcomes.** NEPA has long been held not to "mandate particular results."[7] An agency that loses a NEPA case does more analysis and can then approve the same project. A Maryland case demonstrates this: a federal court halted ICE's Williamsport warehouse conversion in April 2026. The Department of Homeland Security (DHS) responded by doing more environmental review, not by abandoning the project.[8]
- **The "Alligator Alcatraz" case shows NEPA's limits.** An injunction against the Everglades detention facility lasted two weeks before the Eleventh Circuit stayed it. The court later vacated it, holding that NEPA did not apply and 8 U.S.C. § 1252(f)(1) bars lower courts from enjoining detention operations.[9] BAAJA does not change that statute.
- **Other non-NEPA legal claims can stop projects.** Lawsuits challenging detention center construction typically include other claims beyond NEPA, such as Administrative Procedure Act (APA) claims that the government's decision was arbitrary. For instance, Maryland's lawsuit includes an APA claim that DHS's decision was arbitrary because it ignored infrastructure constraints. That type of non-NEPA claim can halt the project and even reverse it. New Jersey's suit brought four claims that could have supported an injunction; only one was a NEPA claim.
- **Congress retains oversight and funding power over ICE.** The strongest levers are those Congress has via the Constitution and would not change with BAAJA.
- **Courts can still block illegal ICE decisions on substance.** Claims that an agency acted arbitrarily, exceeded its authority, or violated the Constitution, immigration law, or other substantive federal laws keep their full force and scope of remedies under BAAJA, including preliminary injunctions.[10]

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[5] BAAJA § 1110 (adding NEPA § 111(c)(5)); *id.* § 2301 (adding the parallel remedy for historic preservation review). Preliminary injunctions remain available for likely violations of other federal laws.

[6] BAAJA § 1401(a)(1), (b)(1) (defining "covered project or action" as one "with a non-Federal project sponsor").

[7] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025).

[8] *Judge Halts Construction of ICE Facility in Maryland over Environmental Concerns*, WYPR (Apr. 15, 2026); *ICE Changes Environmental Review Plan for Detention Centers*, Bloomberg Law (May 20, 2026).

[9] *Friends of the Everglades, Inc. v. Sec'y, U.S. Dep't of Homeland Sec.*, No. 25-12873 (11th Cir. Apr. 21, 2026).

[10] BAAJA § 1110 (adding NEPA § 111(c)(5)(B)) (preliminary injunctions available for likely violations of federal laws other than NEPA and the National Historic Preservation Act).

Most facilities used for ICE detention are categorically excluded from NEPA

- **ICE relies overwhelmingly on existing state, local, and private facilities whose use typically falls within NEPA categorical exclusions.**[11] In July 2026, ICE held people in 469 facilities (not counting medical facilities).[12] Almost all are existing county jails, private prisons, and other contract facilities that need no new environmental review to keep operating.
- **New construction is a small and shrinking part of ICE's plans.** ICE bought 11 warehouses in early 2026, then told the Government Accountability Office it plans to keep only four as of September 2026.[13]
- **Out of 469 facilities ICE uses, only about nine sites have been sued.** We identified nine detention sites challenged under NEPA, all warehouse conversions or new construction except for one challenge to a plan to reopen a closed prison. We are not aware of any NEPA suit against a facility ICE was already using.[14]
- **At most, NEPA suits have pushed ICE toward using existing facilities.** There is no evidence that NEPA suits have changed ICE's overall detention strategy, number of detainees, or larger immigration detention policy. At best, the seven lawsuits have temporarily changed where ICE houses certain detainees.[15]

NEPA and NHPA structurally disadvantage clean energy projects, not detention projects

- **Clean energy projects are sued more often.** A Stanford study of major projects found nearly two-thirds of solar projects, 38% of wind projects, and 31% of transmission lines were sued.[16] For renewable projects that completed an environmental impact statement, more than a third of solar projects and half of wind projects were sued.[17]
- **Clean energy and transmission face far larger historic preservation review areas.** In 96 recent federal energy reviews, the median zone for visual effects reached 7.5 miles for wind and solar and 3 miles for transmission, compared with half a mile for

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[11] Depending on the facility, several could apply: B3 (activities "in an existing structure that would be compatible with and similar in scope to its ongoing functional uses"); A5 (awarding contracts for "ongoing management and operation of government facilities"); and C2 (lease renewals with "no change in the facility's use").
[12] Vera Institute of Justice, *ICE Detention Trends* (data through July 2026); note that ICE's website gives a smaller number.
[13] U.S. Gov't Accountability Office, GAO-26-108663 (Sept. 2026).
[14] We've identified the Everglades facility in Florida and proposed sites in Williamsport, Md.; Roxbury, N.J.; Romulus, Mich.; Surprise, Ariz.; Salt Lake City, Utah; San Antonio, Tex.; Hudson, Colo.; and Gilroy, Calif.
[15] TRAC, *Immigration Detention Quick Facts* (data as of July 11, 2026).
[16] Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, 53 Env't L. Rep. 10836 (2023).
[17] Arthur G. Fraas et al., *Taking Green Energy Projects to Court: NEPA Review and Court Challenges to Renewable Energy*, Resources for the Future (Aug. 2025).

gas pipelines and LNG terminals. Offshore wind review zones reach 38 to 45 miles.[18]

- **Clean energy and transmission get far more adverse findings.** Nearly half of clean energy and transmission projects in our empirical analysis (22 of 45) were found to adversely affect historic properties, sometimes based on visual effects alone, compared with 6% of gas projects (3 of 51).
- **Clean energy and transmission are largely unbuilt and larger.** Most fossil fuel (and ICE) infrastructure is already built. New clean energy projects are tall, wide, or long: turbines are visible for miles, solar farms cover large areas, and transmission lines cross hundreds of miles of private land. More land to study means more opportunities for lawsuits.

[18] Institute for Progress, *APE Explorer*, nhpa-ape-stats.org.