One of the more contentious provisions of BAAJA relates to remedies. Tribes are frustrated that they will not be able to obtain judicial vacatur of violations of the NHPA – and some Democratic Senators have proposed giving tribes an exemption from the provision that prohibits courts from vacating agency decisions for NHPA violations. That request raises real challenges. First, with over 500 federally recognized tribes, that change would dramatically increase the scope for vacatur of agency decisions. In addition, while there are strong arguments based on tribal sovereignty that support BAAJA's restrictions on NEPA litigation within tribal reservations, those arguments are more complicated when they extend beyond the borders of reservations. And finally, giving exemptions from the remedy limitations for tribes for NHPA claims raises difficult normative and political questions about why those exemptions should not extend to tribal NEPA claims, or indeed NEPA claims by others. In any case, more generally, the limitations on judicial remedies are probably among the most controversial politically.

But those limitations are also probably among the most valuable in terms of the bipartisan deal that was struck. And more broadly, as I have noted, reducing or eliminating the use of vacatur for a wide range of NEPA violations, some of which may be of more significance than others, is an important goal of the bill.

Is there a way to strike the balance that accomplishes the policy (and political goals) of BAAJA that may also reduce some of the political opposition to the remedies restrictions? One possibility is to look at how courts address agency responses to remands for NEPA violations. The bill currently provides that courts treat challenges to the agency responses to remands for NEPA violations like original challenges to agency NEPA compliance, with similar limitations on remedy.

But there are good arguments to treat challenges to agency responses to remands for NEPA violations differently. After all, the agency already has violated NEPA in way that has been specifically identified by the court, been given 180 days to fix the problem, and been able to initiate work on the project (absent a preliminary injunction because of another legal violation and irreparable harm). If the NEPA violation cannot be fixed within 180 days, it is perhaps more serious – and therefore more plausible that judicial intervention is justified, including the possibility of stopping the agency decision until the NEPA violation is fixed. Thus, we might give courts the power to vacate agency decisions if the NEPA violation is not fixed on remand. Such a judicial power might be particularly important if the original NEPA violation by the agency was a complete failure to conduct NEPA analysis. As I've noted before, under the current version of the bill, in that situation, the agency

could simply repeatedly promise to complete the NEPA review, fail to do so, and the only remedy the court would be able to impose is another remand, while the agency finished the project. (Perhaps contempt and sanctions are available to the court to address such a situation. I am skeptical that such an approach will be sufficient for this Administration – see the DC golf course case…)

But there are costs to broadly allowing vacatur for violations after remand – if agencies believe vacatur is likely for a challenge to the agency's compliance on remand, then allowing the agency to initiate the project for 180 days may have less effect. Agencies (or project sponsors) may not wish to commit significant resources to starting projects if uncertainty hangs over a future remand challenge.

A narrower approach would be to allow vacatur (or a preliminary injunction) for an agency failure to comply with a remand order only if the action would produce irreparable harm. That would focus the uncertainty on situations where we are most concerned about NEPA violations.

Finally, an even narrower approach would be to allow vacatur only if agency failure to comply with a remand order reflected bad faith. That approach would target the hypothetical I identify above of blatant agency failure to comply with NEPA.

Any of these approaches might make the restrictions on remedies in the bill more focused, and therefore more palatable to opponents, while still achieving many of the policy goals the sponsors seek.