To amend the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to clarify the scope of a major Federal action under the National Environmental Policy Act of 1969 with respect to certain projects relating to the production of semiconductors, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. KELLY (for himself, Mr. HAGERTY, Mr. BROWN, and Mr. YOUNG) introduced the following bill; which was read twice and referred to the Committee on ________________

A BILL

To amend the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to clarify the scope of a major Federal action under the National Environmental Policy Act of 1969 with respect to certain projects relating to the production of semiconductors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Building Chips in America Act of 2023”.
SEC. 2. SEMICONDUCTOR PROGRAM.

Section 9909 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (15 U.S.C. 4659) is amended by adding at the end the following:

“(c) Authority relating to Environmental Review.—

“(1) In general.—Notwithstanding any other provision of law, none of the following shall be considered to be a major Federal action under NEPA or an undertaking for the purposes of division A of subtitle III of title 54, United States Code:

“(A) The provision by the Secretary of any Federal financial assistance for a project described in section 9902, if—

“(i) the covered activity described in the application for that project has commenced before the date on which the Secretary provides that assistance;

“(ii) the facility that is the subject of the project is on or adjacent to a site—

“(I) that is owned or leased by the covered entity to which Federal financial assistance is provided for that project; and
“(II) on which substantially similar construction, expansion, or modernization has been carried out such that the facility would not more than double existing developed acreage or supporting infrastructure;

“(iii) the Secretary determines, in the sole discretion of the Secretary, that the laws and regulations governing environmental reviews in the State in which the facility that is the subject of the project is or will be located are functionally equivalent to the requirements under NEPA;

“(iv) the Federal financial assistance provided is in the form of a loan or loan guarantee; or

“(v) the Federal financial assistance provided, excluding any loan or loan guarantee, comprises less than 15 percent of the total estimated cost of the project.

“(B) The provision by the Secretary of Defense of any Federal financial assistance relating to—

“(i) the creation, expansion, or modernization of one or more facilities de-
scribed in the second sentence of section 9903(a)(1); or

“(ii) carrying out section 9903(b).

“(C) Any activity relating to carrying out section 9906.

“(2) SAVINGS CLAUSE.—Nothing in this subsection may be construed as altering whether an activity described in subparagraph (A), (B), or (C) of paragraph (1) is considered to be a major Federal action under NEPA, or an undertaking under division A of subtitle III of title 54, United States Code, for a reason other than that the activity is eligible for funding provided under this title.

“(d) LEAD FEDERAL AGENCY AND Cooperating AGENCIES.—

“(1) DEFINITION.—In this subsection, the term ‘lead agency’ has the meaning given the term in section 111 of NEPA.

“(2) OPTION TO SERVE AS LEAD AGENCY.— With respect to a covered activity that is a major Federal action under NEPA, the Department of Commerce shall have the first right to serve as the lead agency with respect to that covered activity under NEPA.
“(3) Cooperating Agency.—The Secretary may designate any Federal, State, Tribal, or local agency as a cooperating agency with respect to a covered activity for which the Department of Commerce serves as the lead agency under paragraph (1), if the applicable agency has—

“(A) the jurisdiction to issue an authorization or take action for or relating to that covered activity; or

“(B) special expertise with respect to that covered activity.

“(4) Environmental Documents.—

“(A) Single Document.—All authorizations relating to a covered activity shall rely on a single environmental document and joint record of decision prepared by the lead agency with respect to that covered activity for the purposes of NEPA.

“(B) Inclusion.—An environmental document and joint record of decision described in subparagraph (A) shall—

“(i) rely on any comments, analysis, proposals, or documentation developed by cooperating agencies designated under paragraph (3); and
“(ii) provide all authorizations necessary for the applicable covered activity as if any cooperating agency designated under paragraph (3) had issued an environmental document and joint record of decision.

“(e) Adoption of Categorical Exclusions.—

“(1) Establishment of Categorical Exclusions.—Each of the following categorical exclusions is established for the National Institute of Standards and Technology and, beginning on the date of enactment of this subsection, is available for use by the Secretary:

“(A) Categorical exclusion 17.04.d (relating to the acquisition of machinery and equipment) in the document entitled ‘EDA Program to Implement the National Environmental Policy Act of 1969 and Other Federal Environmental Mandates As Required’ (Directive No. 17.02-2; effective date October 14, 1992).


“(C) Categorical exclusions B1.24, B1.31, B2.5, and B5.1 in Appendix B to subpart D of

“(D) The categorical exclusions described in paragraphs (4) and (13) of section 50.19(b) of title 24, Code of Federal Regulations, or any successor regulation.

“(E) Categorical exclusion (c)(1) in Appendix B to part 651 of title 32, Code of Federal Regulations, or any successor regulation.

“(F) Categorical exclusions A2.3.8 and A2.3.14 in Appendix B to part 989 of title 32, Code of Federal Regulations, or any successor regulation.

“(G) Any other categorical exclusion adopted by another Federal agency that the Secretary determines would accelerate the completion of a covered activity if the categorical exclusion were available to the Secretary.

“(2) Subsequent changes.—In any NEPA process that is ongoing (as of the date of enactment of this subsection), or that occurs on or after the date of enactment of this subsection, the Secretary may update, amend, revise, or remove any categorical exclusion established under paragraph (1).
“(3) Scope of review.—The application of any categorical exclusion established under paragraph (1), as the categorical exclusion may be updated, amended, or revised under paragraph (2), shall not be subject to evaluation for extraordinary circumstances under section 1501.4(b) of title 40, Code of Federal Regulations, or any successor regulation.

“(f) Incorporation of Prior Planning Decisions.—

“(1) Definition.—In this subsection, the term ‘prior studies and decisions’ means baseline data, planning documents, studies, analyses, decisions, and documentation that a Federal agency has completed for a project (or that have been completed under the laws and procedures of a State or Indian Tribe), including for determining the reasonable range of alternatives for that project.

“(2) Reliance on prior studies and decisions.—In completing an environmental review under NEPA for a covered activity, the Secretary may consider and, as appropriate, rely on or adopt prior studies and decisions, if the Secretary determines that—
“(A) those prior studies and decisions meet the standards for an adequate statement, assessment, or determination under applicable procedures of the Department of Commerce implementing the requirements of NEPA;

“(B) in the case of prior studies and decisions completed under the laws and procedures of a State or Indian Tribe, those laws and procedures are of equal or greater rigor than those of each applicable Federal law, including NEPA, implementing procedures of the Department of Commerce; or

“(C) if applicable, the prior studies and decisions are informed by other analysis or documentation that would have been prepared if the prior studies and decisions were prepared by the Secretary under NEPA.

“(g) NEPA ASSIGNMENT.—

“(1) ASSUMPTION OF RESPONSIBILITY.—

“(A) WRITTEN AGREEMENT.—

“(i) IN GENERAL.—Subject to the other provisions of this section, with the written agreement of the Secretary and a State, which may be in the form of a memorandum of understanding, the Sec-
retary may assign, and the State may assume, the responsibilities of the Secretary with respect to 1 or more covered activities within the State under NEPA.

“(ii) REQUIREMENTS.—A written agreement between the Secretary and a State under clause (i) shall—

“(I) be executed by the governor of the State;

“(II) provide that the State—

“(aa) agrees to assume all or part of the responsibilities of the Secretary described in that clause;

“(bb) expressly consents, on behalf of the State, to accept the jurisdiction of the courts of the United States with respect to compliance with, the discharge of, and the enforcement of any responsibility of the Secretary assumed by the State;

“(cc) certifies that there are laws of the State, including regulations, in effect that—
“(AA) authorize the State to take the actions necessary to carry out the responsibilities being assumed by the State; and

“(BB) are comparable to section 552 of title 5, United States Code, including by providing that any decision regarding the public availability of a document under those laws of the State may be reviewed by a court of competent jurisdiction; and

“(dd) agrees to make available the financial resources necessary to carry out the responsibilities being assumed by the State;

“(III) require the State to provide to the Secretary any information that the Secretary reasonably considers necessary to ensure that the State is adequately carrying out the
responsibilities being assumed by the State; and

“(IV) be renewable.

“(B) ADDITIONAL RESPONSIBILITY.—If a State assumes responsibility under subparagraph (A), the Secretary may assign to the State, and the State may assume, all or part of the responsibilities of the Secretary for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a covered activity.

“(C) PROCEDURAL AND SUBSTANTIVE REQUIREMENTS.—A State shall assume responsibility under this subsection subject to the same procedural and substantive requirements as would apply if that responsibility were carried out by the Secretary.

“(D) FEDERAL RESPONSIBILITY.—Any responsibility of the Secretary not explicitly assumed by a State by written agreement under this subsection shall remain the responsibility of the Secretary.

“(E) NO EFFECT ON AUTHORITY.—Nothing in this subsection preempts or interferes
with any power, jurisdiction, responsibility, or authority of an agency, other than the Department of Commerce, under applicable law (including regulations) with respect to a project.

“(2) STATE PARTICIPATION.—The Secretary may develop an application for a State to assume responsibility under paragraph (1), at such a time and containing such information as the Secretary determines appropriate.

“(3) SELECTION CRITERIA.—The Secretary may approve the application of a State to assume responsibility under this subsection only if—

“(A) the Secretary determines that the State has the capability, including financial and with respect to personnel, to assume the responsibility; and

“(B) the governor of the State has entered into the written agreement with the Secretary required under paragraph (1)(A).

“(4) LIMITATIONS ON AGREEMENTS.—Nothing in this subsection permits a State to assume any rulemaking authority of the Secretary under any Federal law.

“(5) AUDITS.—To ensure compliance by a State (including compliance by the State with all
Federal laws for which responsibility is assumed under paragraph (1)(B)), for each State participating in the program under this subsection, the Secretary shall—

“(A) conduct annual audits for each year of State participation;

“(B) not later than 180 days after the date on which the agreement between the Secretary and the State is executed, meet with the State to review implementation of the agreement and discuss plans for the first annual audit required under subparagraph (A); and

“(C) ensure that the time period for completing an audit under subparagraph (A), from initiation to completion, does not exceed 180 days.

“(6) TERMINATION.—

“(A) TERMINATION BY SECRETARY.—The Secretary may terminate the participation of any State in the program under this subsection, if—

“(i) the Secretary determines that the State is not adequately carrying out the responsibilities assigned to the State;
“(ii) the Secretary provides the State with—

“(I) a notification of the determination of noncompliance under clause (i);

“(II) a period of not less than 120 days to take corrective action as the Secretary determines to be necessary to comply with the applicable agreement; and

“(III) on request of the Governor of the State, a detailed description of each responsibility in need of corrective action regarding an inadequacy identified under clause (i); and

“(iii) the State, after the period provided under clause (ii), fails to take satisfactory corrective action, as determined by the Secretary.

“(B) TERMINATION BY THE STATE.—A State, at any time, may terminate the participation of the State in the program under this subsection by providing to the Secretary notice not later than 90 days before the date on which that termination will take effect, subject to such
terms and conditions as the Secretary may pro-
vide.

“(h) JUDICIAL REVIEW.—

“(1) IN GENERAL.—Subject to paragraph (2),

nothing in this section shall affect whether any final

Federal agency action may be reviewed in a court of

the United States or of any State.

“(2) EFFICIENCY OF CLAIMS.—

“(A) STATUTE OF LIMITATIONS.—Not-

withstanding any other provision of law, and ex-

cept as provided in subparagraph (B), a claim

arising under Federal law seeking judicial re-

view of Federal financial assistance provided

under this title, or with respect to any author-

ization issued or denied under NEPA by the

Secretary for a covered activity, shall be barred

unless the claim is filed not later than 150 days

after the date on which the Secretary an-

nounces that, as applicable—

“(i) the Secretary has approved the

application for such Federal financial as-

sistance;

“(ii) the Secretary has issued that au-

torization; or
“(iii) the Secretary has denied that
authorization.

“(B) EXCEPTION.—Subparagraph (A)
shall not apply if a shorter deadline than the
applicable deadline under that subparagraph is
specified in the Federal law under which judi-
cial review is allowed.

“(i) USE OF APPROPRIATED FUNDS.—To carry out
the activities under subsections (e) through (g), the Sec-
etary may use amounts made available to the Secretary
under section 102(a)(2)(B)(ii) of the CHIPS Act of 2022

“(j) DEFINITIONS.—In this section:

“(1) COVERED ACTIVITY.—The term ‘covered
activity’ means any activity relating to the construc-
tion, expansion, or modernization of a facility, the
investment in which is eligible for Federal financial
assistance under section 9902 or 9906.

“(2) NEPA.—The term ‘NEPA’ means the Na-
tional Environmental Policy Act of 1969 (42 U.S.C.
4321 et seq.).”.