Project Certainty In BAAJA

One of the reasons it is difficult and expensive to build in America is that an infrastructure project can spend years seeking federal permits and arranging financing, only to have a new administration seek to **improperly revoke those permits — or never respond to its request for a permit**.

The project sponsor bears the cost of delay or improper denial, even if a court eventually overturns it. The executive branch has increasingly interfered in permitting over time, and the resulting uncertainty makes it harder for projects to attract financing, raising costs for consumers and reducing the number of projects that can be built at all. **Title IV of the Bipartisan American Affordability and Jobs Act (BAAJA) seeks to address this problem**.

Summary

- **Title IV limits any administration's ability to use permitting to target a type of energy project.** Today the targets are wind and solar, but the text is technology-neutral.
- **It does not lock in Trump's energy policy.** Title IV has no approval quotas and does not require a ratio of fossil-to-clean projects, or any comparison between energy types.
- A future administration that meets the law's new permit deadlines, and decides permits on proper grounds — or revokes or modifies them for legal reasons such as violation of substantive environmental laws — **would not be liable** under the most reasonable reading of the law**.**
- **The most alarming claimed consequences of Title IV rest on misreadings of the text,** or on judges adopting the broadest possible reading of a few ambiguous phrases.
- **A handful of technical clarifications would close off potential misinterpretations** without weakening Title IV's application against deliberate obstruction, mostly by defining additional terms.

What Title IV does

Administrations of both parties have used the permitting process to disfavor certain categories of energy projects. The Trump Administration's actions have gone beyond anything before. Title IV provides greater certainty against this interference in permitting by giving project sponsors three new ways to sue to challenge these actions.

Section 1401 of BAAJA protects permits already issued

- **Under 1401, an agency may not revoke, suspend, or alter a permit already granted**, or otherwise interfere with a fully permitted project, unless an exception applies.
    - **The government must prove an exception** applies in court by clear and convincing evidence.
    - Exceptions include: (1) a court ordered the action; (2) the project sponsor broke the law or the permit terms; (3) the permit was obtained by fraud; (4) the action is needed to prevent urgent harm, based on new information; or (5) the project sponsor asked for the change.
- **If the agency loses:**
    - **the permit is reinstated;** and
    - the sponsor gets fees, delay costs, and **25 to 50 percent of everything it has spent on the project.**
- **Example:** a stop-work order against a mostly constructed offshore wind farm. Under current law the developer can get the order set aside, but has no recourse for delays that can raise the cost of the project or derail its financing. Under 1401, it could also recover hundreds of millions of dollars.

Section 1402 penalizes "disparate treatment" of a project type

- For 46 listed types of energy projects, agencies **must act on permit applications within one year** (or longer for permits that require more environmental review).
- A developer can sue if its permits were improperly denied or delayed as part of an **intentional pattern of disparate treatment** against its project type.
    - "Disparate treatment" is a term borrowed from civil rights law, where it means **intentional discrimination** in that context.
- **In a 1402 claim, an applicant must prove:**
    - a **substantial increase** in delays or improper denials for its project type, compared with that same type's five-year history of approvals, denials and delays;
    - the **pattern lasted** at least 180 days (280 if environmental review applies);
    - the pattern **was the result of an intentional course of government action**; and
    - its own application satisfied all applicable law.
- **Winning plaintiffs get 50 to 100 percent of the project's expected construction cost.** They must repay this if it later gets its permits and does not build the project.
- **Example:** a future administration announces a year-long freeze on all solar approvals due to animus towards the solar industry. A solar project sponsor proves

that the government intentionally created a pattern by delaying permits for all solar projects.

Sections 1402, 1403 and 1106 make deadlines binding

- Section 1106 (in the NEPA title, not Title IV) sets the deadlines that § 1402 uses to measure "unreasonable delay" in cases where an Environmental Impact Statement (EIS) or Environmental Assessment (EA) are required. Once there is such a delay, a developer can sue to compel the agency to act.
- Section 1403 does the same for the one-year deadline that applies when no NEPA document is required for a given decision.
- Under these provisions, a developer can petition a court for an order requiring an agency to decide when it misses the following deadlines:
    - **Decisions where an EA is prepared:** (NEPA § 107(g)(1)(A), as amended by § 1106): one year to complete the EA, then 90-120 days for the remaining permit decisions.
    - **Decisions where an EIS is prepared:** (§ 107(g)(1)(B)): two years to publish the EIS, then 45 days for the record of decision and 90-120 days for the remaining permit decisions.
- **Decisions where neither are prepared:** (§ 1402(c), enforced by § 1403): one year after the application is complete, for the 46 covered project types.**The only remedy is an order to decide.** No damages are available for delay, and there is no intent or pattern requirement.
- There are narrow exceptions for natural disasters, emergencies, war, project sponsor fraud or withholding information, or a government shutdown.

Concerns over 1401 are overblown and depend on judges giving the broadest possible reading to the text

There are risks of misinterpretation of 1401, but each requires a court to pick essentially the **broadest available reading** over the better one.

- **Claim:** (BAAJA) gives the Trump administration "a Loaded Howitzer," allowing the administration to undertake a "permit gorge," issuing illegal permits that "can't be reversed by the courts." (John Podesta)
    - **Reality: Section 1401 does not stop courts from setting aside permits issued illegally under their authorizing statutes.** Nor does it stop agencies from reconsidering permits courts have found to be illegal; this is one of 1401's express exceptions. A permit that violates a substantive law like the Wilderness Act, FLPMA, a land withdrawal, a monument proclamation or

substantive environmental laws like the Clean Air or Clean Water Act would still be able to be vacated under BAAJA, as it can today.

- **"1401 would protect every existing coal and gas plant from future regulation"** (Symons).
    - The fear rests on a catchall phrase that bars "any other action to interfere with or prevent" a project's operation.
        - **Better reading:** "to interfere with" implies an action aimed at a project. A pollution rule that happens to raise a plant's costs is not that. Courts also refuse to infer sweeping repeals of the Clean Air and Clean Water Acts from vague language.
- **"Improperly denied" could cover lawful denials.**
    - The bill does not define "improperly," so absent further clarification, a court could in theory read it more broadly than "unlawfully."
    - **Even then, the intent requirement is an important check.** An agency that applies a pollution standard to every project and finds that fossil projects fare worse has not acted *because of project type* but rather because of pollution concerns.
- **A rolling baseline would bake in today's wind and solar slowdown.**
    - This assumes the five-year comparison window moves with the filing date, so it would include the very slowdown being challenged.
    - **Better reading:** the bill's own evidence clause compares against the period "prior to the commencement of the alleged pattern." The rolling reading means the longer a slowdown lasts, the harder it is to challenge, which is an absurd result. The better reading reads both five-year periods to apply to the time before the alleged discriminatory activity began.

The fossil fuel "lock-in" fears over 1402 are overblown

Some have argued that 1402 would require a future administration to continue the Trump administration's energy policy by, for instance, permitting the same absolute number of fossil fuel projects as are currently permitted, or by maintaining the ratio of fossil fuel to renewable projects approved, and an administration that deviated from the current norm would be liable under this section.

In fact, BAAJA requires no absolute number of permits and no ratio of any one project type to another. And **only an administration that acts improperly towards an entire class of projects would be liable.** For a targeted project sponsor to win in court, Section 1402 requires:

- missed deadlines (by more than 60 days) or improper denials;

- aimed **intentionally** at one project type as such; and
- at a scale large enough to be a **pattern of disparate treatment.**

A new administration that meets deadlines and decides permits properly would not be liable under 1402 whatever it does on energy policy. **Even denying every fossil fuel permit application creates no liability if each denial is proper, lawful on its merits, and not taken with the intent to target fossil fuel projects specifically.**

Many alarming claims about Title IV don't hold up

- **Claim:** agencies must keep the same "percentage of fossil fuel projects vs clean projects," so clean projects "will be stuck until they are buddied up with enough fossil fuel projects" (Jeremy Symons).
    - **Reality: 1402 never compares one technology with another.** A pattern is measured "with respect to 1 specific type of covered project." Approving more solar facilities has no relationship to proving disparate treatment of natural gas plants.
- **Claim:** the five-year baseline "will really operate as a ceiling" and "cement a high level of fossil fuel projects" (Rep. Jared Huffman).
    - **Reality: 1402 does not count or cap approvals of anything.** It measures the share of one type's permits that are delayed or improperly denied, once a claim is brought. An agency is not locked into approving the same absolute number of permits for any type of project.
- **Claim:** a president "can't put out a goal like 'more clean energy' or 'less carbon pollution.'" (Symons).
    - **Reality: the bill expressly excludes these statements as evidence to prove intent, or anything else.** Statements of energy preference "unrelated to the permitting" of projects cannot be introduced. Speeches about climate policy, pollution control, etc are not covered. Statements about the permits themselves — such as the recent Presidential Memorandum that froze all wind permits and accompanying statements — are included.
- **Claim:** 1402 will produce billions of dollars in subsidies for new fossil projects.
    - **Reality:** Payments of that magnitude would require an administration that had an intentional pattern of delaying or improperly denying permits for these projects. Every suit must prove intent, one project at a time. Class actions are barred.

A handful of technical edits would close off potential misinterpretations without weakening Title IV's application against deliberate obstruction. Most of these edits simply define a term that the bill leaves undefined. For more information, contact:

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