Project Certainty Fixes in the Manager's Amendment

November 8, 2026 (updated after the Manager's Amendment)

Title IV of the Bipartisan American Affordability and Jobs Act (BAAJA) was written to protect energy permitting from political interference, exemplified by the Trump administration's actions directed at renewable energy. **Section 1401** bars agencies from revoking the permits of or otherwise interfering with fully permitted projects, except in listed circumstances. **Section 1402** allows permit applicants to sue if an administration targets an entire industry through bad-faith denials or unreasonable delays.

Critics identified ambiguities and concerns in the text as introduced. This memo explains how the Manager's Amendment addresses each of the main concerns. For a more detailed look at Title IV covering 27 criticisms of the title and responses, see our in-depth report.

Concern	How the Manager's Amendment addresses it
Section 1401 bars generally applicable regulations (such as pollution controls) from applying to permitted projects	New exception (F) allows all actions "taken pursuant to any applicable law or regulation," a savings clause preserves existing authority, and amended language protects "normal" rather than "full" capacity
Courts and future administrations could not reverse illegal permits	Agencies are allowed to reverse a permit "in response to" any court order, and can sue to get one; under Title IV courts keep their full power to set aside illegal permits
Agencies could owe punitive damages for good-faith mistakes	The 25–50% damages award now requires proof of an agency's bad faith, and the amendment removes the "clear and convincing" burden of proof on agencies
A corrupt administration could pay favored developers off-budget	Payments require a final federal court judgment and court findings that payments are fair and serve the public interest; pre-suit settlements are prohibited
Section 1402 would lock in Trump-era approvals	Baseline doubles to 10 years; good-faith denials create no liability; there was never a ratio across project types
Section 1402 would punish lawful denials	Denials must be in bad faith, and if there is a lawful basis for a pattern of denials then they are not punished

1. "BAAJA would freeze future regulation"

Concern: Some worried that barring "any other action to interfere" with a project blocks new Clean Air Act rules, permit reopenings, Endangered Species Act reconsultation, etc.

Fixes:

- The Manager's Amendment's new exception (F) allows any agency action "taken pursuant to any applicable law or regulation." That covers new regulations of general applicability and lawful changes to permits.
- The amendment's new savings clause, § 1401(c), provides that nothing in the section "limits or modifies any authority under any applicable law, compact, or treaty."
- The amendment changes "full capacity" to "normal capacity," so a project cannot claim a right to run at high output.

2. "BAAJA would stop a court from reversing illegal permits"

Concern: An administration could issue illegal permits that neither courts nor a future administration could reverse.

Fixes:

- Exception (A) is expanded to cover any agency action taken "in response to" a court order, not only actions a court specifically requires.
- Under Title IV, courts retain power to set aside illegally issued permits as under current law; Section 1401 limits agencies only.
- If no one sues, the United States can sue the holder to cancel an unlawfully issued grant, a long-standing practice that exception (F) also covers.
- While BAAJA §§ 1110 and 2301 limit courts to remand without vacatur where the *only* violation is of NEPA or the National Historic Preservation Act, violations of the substantive statutes that authorize permits can still be set aside as illegal by courts.

3. "BAAJA imposes punitive damages for good-faith mistakes"

Concern: As introduced, an agency that interfered with a permit and could not prove an exception applies could owe 25–50% of project costs even for an honest legal error.

Fixes:

- The 25–50% award now requires a showing that the agency acted "in bad faith," a demanding standard. A good-faith agency mistake can result in only smaller reinstatement, fees, and delay costs.
- The award is limited to development and construction costs incurred as of the date of the action.
- The agency can now prove an exception applies using the ordinary "preponderance of the evidence" standard, rather than the more difficult-to-prove "clear and convincing evidence" standard.

4. “BAAJA lets a corrupt administration subsidize favored projects”

Concern: Section 1401 lets a permit holder recover from the U.S. government’s Judgment Fund when an agency interferes with its permit. Critics worried a corrupt administration could use that award as a subsidy by taking an unlawful action against a developer’s permit, settling before any lawsuit occurs, and then paying out from the Judgment Fund, possibly on the condition that the money go to a different (such as a fossil fuel) project.

Fixes:

- The amendment bars payments from the Judgment Fund, or from any other source, without a final federal court judgment. Pre-suit settlements are no longer possible.
- A settlement counts only if the court finds that it:
    - resolves a real dispute within the court’s jurisdiction;
    - is “fair, reasonable, and consistent with the public interest”; and
    - furthers the section’s objectives, “including that the interfered-with project be built and operated.”
- A court would have difficulty finding a payment redirected to another project fair or consistent with the section’s objectives.
- A litigated award now also requires a court finding that the agency acted in bad faith.
- As an added benefit, these changes close the pre-suit “imminent litigation” route that the Trump administration used to buy out roughly $4 billion in offshore wind leases since March 2026, at least for disputes over permits and federal interference.

5. “BAAJA locks in Trump-era approvals”

Background: Section 1402 lets permit applicants sue over a “pattern of disparate treatment” against their project type (wind, solar, oil, etc.). They can prove a pattern by showing a substantial increase in that type’s rate of denials or delays compared with a historical baseline. As introduced, the baseline was the five most recent calendar years.

Concern: Critics raised two related concerns, one mistaken and one fair:

- *Mistaken:* Section 1402 would lock in a Trump-era quota or ratio of fossil to clean approvals.
    - Section 1402 never compared project types to each other. Each type is measured only against its own history, so there is no ratio to lock in.
- *Fair*: A five-year window could mostly include permit decisions by the current administration. Its slowdown of wind and solar would become the “normal” rate, making early suits by clean energy developers hard to win. Its fast fossil approvals would set a high bar that a successor’s denials could appear to depart from.

Fixes to concerns about Trump-era lock-in:

- The baseline is now the 10 most recent calendar years, longer than two full presidential terms. So a wind developer suing in late 2027 over a pattern that began in January 2025 would have two to three years of the pattern inside a 10-year window.
- An agency's permit denials now create liability only if made "in bad faith." A future administration that lawfully denies more fossil applications on the merits faces no liability at all, even if its denial rate rises well above the Trump-era rate.
- Delays count only when they run more than 60 days past a statutory deadline. An administration that decides permits on time, with either a yes or a no, cannot be liable for being slower than its predecessor.
- Unchanged from BAAJA as originally introduced but important: the pattern must result from "an intentional course of action … to create such a pattern."

6. "Section 1402 punishes lawful denials"

Concern: The introduced bill's "improperly denied" standard was undefined, and critics worried that statistics alone could establish the government's liability, without the government being able to explain its decisions.

Fixes:

- The amendment changes "improperly denied" to "denied in bad faith." As a result, an agency's lawful denials made in good faith do not create any liability.
- The government may now provide rebuttal evidence of the "lawful basis for the pattern" of permit behavior, e.g., a new public health rule that incidentally falls harder on one industry, and the court must consider the government's evidence in evaluating whether there was a pattern of bad-faith denials or unreasonable delays.
- Unchanged from BAAJA as originally introduced: the applicant must prove "an intentional course of action … to create such a pattern" across an entire project type, and that its own application "satisfies all applicable Federal law."

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