Reversing illegal permits in court under BAAJA

A response to John Podesta and Sam Sankar

Executive Summary

Two prominent critics have recently argued that the project certainty title of the Bipartisan American Affordability and Jobs Act (BAAJA), Title IV, would let the Trump administration issue illegal permits that can never be undone by courts or by future administrations.

- **John Podesta**, quoted in Heatmap, says the bill hands the administration "a loaded Howitzer" to permit projects on public lands that, "even if it's illegal, can't be reversed by the courts."
- **Sam Sankar**, writing in his substack, Watershed, has a different and narrower claim, namely that under BAAJA a future administration could not undo a predecessor's permit, even if issued illegally.

Podesta's claim cannot be reconciled with BAAJA's text, which does nothing to stop courts from reversing permits issued illegally under the substantive laws that authorize the permitted conduct. Section 1401 restricts federal agencies, not courts; and its first exception requires agencies to carry out court orders. Under BAAJA, any litigant with standing can still sue to set aside a permit that violates the law authorizing the permitted activity, and courts can still vacate that permit. BAAJA restricts the remedies available for violations of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), but this is not a blanket ban on court reversals.

Sankar has identified an edge case scenario where an administration issued a permit illegally, no one else sues to challenge its legality, the illegal permit holder committed no fraud and broke no law, and a later administration seeks to reverse the permit and cannot cite a threat to life or property or national security basis. Sankar's argument is this case leaves a future administration with no options to overturn the illegal permit. To Sankar's credit, that is one possible, though implausible, read of 1401. However, a better reading would leave the government with long-established ways to ask a court to cancel an unlawful permit, and the bill's own text assumes it can. Minor technical edits (offered in an appendix below) would settle the question without weakening Title IV's protection against deliberate obstruction.

Response to Podesta: his reading is foreclosed by BAAJA's text

Podesta is quoted in a recent Heatmap article saying the Bipartisan American Affordability and Jobs Act (BAAJA) gives the Trump administration "a Loaded Howitzer," by which he

means the administration could undertake a "permit gorge," issuing illegal permits that "can't be reversed by the courts." BAAJA, including the relevant project certainty title, doesn't do that.

BAAJA's project certainty title, Title IV, does nothing to stop courts from reversing permits issued illegally under the substantive laws that authorize the permitted conduct. Section 1401(b)(1) provides that "a Federal department or agency shall not take any new action" to revoke, rescind, or alter a permit, or otherwise interfere with a permitted project. The prohibition is addressed to agencies. This is not a limit on a court's power to review a permit or the remedies it can order.

The very first exception in 1401(b)(1)(A) makes this clear. Under this exception, an agency may act when it "is required to take such action by order of a court of competent jurisdiction." When a court vacates an unlawful permit, the agency must comply, and § 1401 in no way stops this.

That leaves every ordinary route to challenge an unlawful permit in place. A state, Tribe, or conservation group with standing can sue under the Administrative Procedure Act (APA) to set aside any permit issued unlawfully, or can sue under any statute that independently limits the activity. Examples include:

- **Rights-of-way on Bureau of Land Management (BLM) land.** Title V of the Federal Land Policy and Management Act (FLPMA) authorizes them (43 U.S.C. § 1761). A right-of-way that conflicts with the governing resource management plan (§ 1732(a)) or causes "unnecessary or undue degradation" (§ 1732(b)) can be vacated.
- **Hardrock mining plans of operations on BLM land.** BLM approves them under FLPMA's unnecessary-or-undue-degradation standard and its rules at 43 C.F.R. subpart 3809.
- **Mineral leases and mining approvals on national forest land.** These require Forest Service consent and must be consistent with the forest plan under the National Forest Management Act (16 U.S.C. § 1604(i)).

Podesta named three places he fears the administration would open up: Chaco, the Boundary Waters, and Bears Ears. Conservationists are right to fear development in these public lands. However, the threats to conservation in each case are not from illegally permitted activity, and BAAJA would not change their status.

There is one place where Podesta's argument has a grain of truth. BAAJA limits the relief courts can grant for violations of the National Environmental Policy Act (NEPA) and the

National Historic Preservation Act (NHPA).[1] If the *only* problem with the "permit gorge" envisioned by Podesta was insufficient review under those statutes, then courts would be limited from setting aside the underlying substantive permits (e.g., BLM right-of-way, other authorization) on that basis. A court could order the agency to redo the NEPA or NHPA analysis, but construction or other permitted activity would continue while it did. If the subsequent environmental review revealed a problem with the substantive permit, that could ultimately become a basis to invalidate the authorization, as well.

Regardless, the NEPA and NHPA are two laws out of many — not the entire universe of federal law. And the NEPA/NHPA limit on remedies doesn't stop courts from vacating a permit that violates a substantive protection such as the Wilderness Act, FLPMA, or a monument proclamation. Finally, Sec. 1110 still allows preliminary injunctions for likely violations of federal laws other than NEPA and NHPA, like those discussed above.

Response to Sankar's narrower case: a later administration would have options to reverse an illegal permit

Sankar makes a different though related argument. He later conceded that Podesta's statements discussed above were wrong, but imagines a different scenario in which illegally issued permits could not be reversed. That scenario requires:

1. One administration issues an allegedly illegal permit.
2. No state, Tribe, nonprofit, or other party challenges it in time.
3. A later administration concludes the permit was illegal.
4. None of § 1401's other exceptions apply. (That is, no fraud, no breach or violation of law by the holder, and no urgent threat to life, property, or national security).

In that case, the later administration could not simply revoke the permit itself, which it can do under current law; indeed, the Trump Administration's pretextual allegations of permit illegality and attempted revocations motivated the creation of this Title.

But what Sankar is incorrect about is whether just because an administration could not act alone, it lacks any means of withdrawing an illegally issued permit at all. Under Title IV, the new administration would still have ways to bring the question before a court.

One option: The United States could sue the permit holder. Sankar asks whether the government would "sue itself." It would not need to. It would sue the holder, and federal courts generally have jurisdiction over such suits brought by the United States.[2] There's a

[1] (new NEPA § 111(c)(5)(A), added by BAAJA § 1110). And BAAJA § 2301 sets the same rule for the NHPA. During remand, the permit stays in effect and construction can continue (new NEPA § 111(c)(6)).
[2] See 28 U.S.C. § 1345.

long history of the government bringing this kind of claim to cancel land grants issued without lawful authority.[3] It has also sued to remove occupants who lacked valid authority to use federal land.[4] And in the (in)famous Teapot Dome scandal cases, the United States sued lessees, and the Supreme Court canceled oil leases obtained by bribing corrupt Interior Secretary Albert Fall.[5]

Depending on the permit, then, the claim might also be trespass against a right-of-way holder that, in the government's view, has no lawful right to be there, or a suit to cancel a lease issued in violation of the authorizing statute. If the court agrees, it cancels the permit and, pursuant to Exception (A), the agency complies with that court's order.

Would seeking a court order be "interference?" Sankar argues that were the United States to seek a court order, that would violate § 1401's bar on "any other action to interfere with" a project. To Sankar's credit, that is a possible reading, and with a minor amendment that option could be foreclosed. But even were a manager's amendment not to clarify, this is not the best reading, because the bill itself assumes the opposite.

1401's relief provision lets a court bar an agency from acting against a protected project "without first obtaining a court order to that effect from the same judge" (§ 1401(b)(4)(D)(ii)). That clause *expects* agencies to go to court before acting against a protected project. If asking for a court order were itself forbidden interference, the clause would describe a path the statute closes off. Courts read a statute as "a symmetrical and coherent regulatory scheme" and avoid readings that set one provision against another.[6] The clause appears in a remedy provision, and this is further evidence of how the bill expects the system to work. And the action to set aside an illegal permit would not be one to "interfere" with a permit in the way the other actions in the list seem to contemplate, such as a stop-work order; rather, it would be an action to establish the illegality of the permit.

In sum, Sankar has identified an edge case and a possible but unlikely reading that would create an unintended consequence, limiting review of some permits. A technical edit, offered below in the appendix, could easily resolve the issue — making clear that this unusual reading is foreclosed, and an administration that thought a permit was issued illegally could raise that claim in federal court. That federal court would then serve as a "check and balance" on the executive branch's current largely unfettered and occasionally ill-used ability to reverse previously-issued permits as the drafters of Title IV appear to have intended.

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[3] See Moffat v. United States, 112 U.S. 24 (1884); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).
[4] See Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).
[5] See Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 (1927).
[6] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

For more information, contact:

- Ben Schifman, ben@ifp.org
- Will Poff-Webster, will@ifp.org
- Aidan Mackenzie, aidan@ifp.org

Appendix: Proposed Technical Edit

Fix A:

In § 1401(b)(1)(A), after "jurisdiction" insert ", including an order entered in an action brought by the United States or in which the United States is a party".

Fix B:

At the end of § 1401(b), add:

> "(5) RULE OF CONSTRUCTION.—Nothing in this section—
>
> "(A) limits the authority of a court, under any other provision of law, to review, vacate, set aside, or enjoin a Federal authorization or permit; or
>
> "(B) shall be construed to treat as an action described in paragraph (1) the filing of, participation in, or request for relief in a civil action by a Federal department or agency, or by the Attorney General on its behalf."