Reversing illegal permits in court under BAAJA

A response to John Podesta and Sam Sankar
Ben Schifman | Updated November 8, 2026 to reflect the managers' amendment

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, as amended, lets agencies act "in response to an order by a court." The managers' amendment also adds a savings clause: nothing in Section 1401 "limits or modifies any authority under any applicable law." 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, property, human health, the environment, or national security. Sankar argues that 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.

The managers' amendment narrows that scenario further. A new exception covers agency action "taken pursuant to any applicable law or regulation," and Section 1401 now protects only projects that have secured all necessary federal permits.

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.[1]

The very first exception in 1401(b)(1)(A) makes this clear. Under this exception, an agency may act "in response to an order by a court of competent jurisdiction." When a court vacates an unlawful permit, the agency must comply, and § 1401 in no way stops this. The managers' amendment broadened this exception. As introduced, it covered only action that a court order required; it now covers any action taken in response to one.

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)).

[1] The managers' amendment adds "vacate," "remand," and "reopen" to the list of barred actions. Those words describe what courts do, but here they appear in a prohibition addressed only to agencies.

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).[2] 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, human health, the environment, national security, or defense).

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. The managers'

[2] (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)).

amendment narrows this scenario in two ways. New exception (F) permits action "taken pursuant to any applicable law or regulation," so where a statute or regulation gives the agency power to revoke or reopen a permit, a later administration can use it. How broadly courts read that exception will decide how much of Sankar's scenario remains. And Section 1401 now protects only projects that have "secured all necessary Federal authorizations or permits," so a permit for a project still awaiting others is not protected.

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.[3] There's a long history of the government bringing this kind of claim to cancel land grants issued without lawful authority.[4] It has also sued to remove occupants who lacked valid authority to use federal land.[5] 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.[6]

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. 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)(i)(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. The amendment's new special rule works the same way. For a project whose stop-work order a court has enjoined or stayed, agency action against it has "no force or effect until the Federal department or agency has first obtained a court order to that effect" (§ 1401(b)(4)(E)). Courts read a statute as "a symmetrical and coherent regulatory scheme" and avoid readings that set one provision

[3] See 28 U.S.C. § 1345.
[4] See Moffat v. United States, 112 U.S. 24 (1884); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).
[5] See Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).
[6] 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).

against another.[7] 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.

New exception (F) offers an even clearer answer. The Attorney General's authority to conduct litigation for the United States is itself conferred by statute (28 U.S.C. § 516), so a suit against the holder is an action "taken pursuant to any applicable law."

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. The amendment's new exception (F) and savings clause make that reading less likely still.

[7] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).