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Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of Project Certainty Provisions

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SUMMARY

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Bipartisan American Affordability and Jobs Act of 2026 (BAAJA): Analysis of Project Certainty Provisions

The Bipartisan American Affordability and Jobs Act of 2026 (BAAJA; S. 5653) was introduced on September 30, 2026. Negotiated by Members of the Senate Committees on Environment and Public Works and Energy and Natural Resources, the bill as introduced contains seven titles within two divisions, which aim to reform certain federal environmental review and permitting processes to expedite a wide range of project types, with an emphasis on energy-related projects.

Members have shown sustained interest over several Congresses in amending the nation's permitting laws to increase energy production and expedite a variety of projects (e.g., transportation infrastructure, energy, data center development, ecological restoration, stormwater infrastructure). Some previously proposed permitting reform bills have focused on specific environmental statutes with review and/or permitting provisions. Others have focused on specific project types, and some have included broader reforms to permitting and reviews across project types. Areas of debate on previous legislative proposals have included whether reforms should target conventional or renewable forms of energy, whether amending bedrock environmental laws to shorten reviews may weaken environmental protections, and whether certain proposals may narrow the role of states in the review process and/or reduce opportunities for public input and judicial review.

This report discusses the three sections in BAAJA Title IV, titled "Project Certainty." In brief, BAJAA Section 1401 would generally bar federal agency actions that modify, suspend, or revoke existing permits or authorizations, or that interfere with construction or "operation at full capacity" of fully permitted projects. Such actions would be permissible only when necessary to comply with a court order or address certain emergent threats, or when a permittee violates the terms of its permit or other applicable law, obtains its permit by misrepresentation, or requests the action in question. Section 1401 would authorize suit to enforce its terms and would entitle prevailing plaintiffs to injunctive relief and damages, including 25% to 50% of total project costs, to be paid from the Judgment Fund, a permanent, indefinite appropriation codified at 31 U.S.C. § 1304. Section 1402 would authorize developers of certain types of energy projects to challenge permit delays or denials that were allegedly "due to a pattern of disparate treatment," defined, in part, to mean a "substantial" increase in rates of permit delay or denial for projects of the same type, as compared to a five-year baseline. Like Section 1401, Section 1402 would entitle prevailing plaintiffs to injunctive relief and damages, including 50%-100% of anticipated construction costs, again payable from the Judgment Fund. Section 1403 would authorize suits to enforce a one-year deadline for agencies to approve or disapprove "complete applications" for permits or authorizations that do not require an environmental assessment or environmental impact statement under the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.). Section 1403 would entitle prevailing plaintiffs to injunctive relief but not damages.

By authorizing damage awards of between 25% and 50% of total project costs, or 50% to 100% of reasonably anticipated construction costs, Sections 1401 and 1402 could substantially increase payments from the Judgment Fund relative to historical baseline averages. Such payments would be available to satisfy both court-ordered judgments and out-of-court settlements. Thus, claimants seeking relief under Section 1401 could obtain payment without prevailing in court by resolving their claims through agreements with the Department of Justice.

Section 1401's impact on other statutes is uncertain but could be significant if courts were to construe that provision to bar agencies from taking actions authorized by other laws. Under such a reading, Section 1401 could prevent agencies from fulfilling statutory duties to revisit and revise prior permitting and regulatory decisions upon certain triggering conditions.

The scope of potential liability under Section 1402 is uncertain, in part because it is not clear if any empirically demonstrated "substantial" increase in relevant rates of permit delay or denial could support a claim, or if a plaintiff would instead need to establish a statistical patten of disparate treatment and show that the government intended to create such a pattern. Both readings find support in Section 1402's text. If Section 1402 contains no specific intent requirement, then a series of legal, good-faith permit denials could give rise to liability. Conversely, if plaintiffs must establish the government's subjective motivation to secure relief under Section 1402, then agencies might more easily evade liability by using facially neutral policies that have disproportionate impacts on disfavored project types.

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Introduction

The chairs and ranking members of the Senate Environment and Public Works and Energy and Natural Resources Committees introduced S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), on September 30, 2026. BAAJA is organized into seven titles across two divisions. This report provides an overview of the as-introduced version of BAAJA Division A, Title IV, which is titled "Project Certainty."

Title IV contains three sections. Section 1401 would restrict agencies' authority to alter or repeal existing permits or interfere with operation or construction of fully permitted projects. Section 1401 would also authorize suits to enforce those restrictions and would entitle prevailing plaintiffs to injunctive relief and damages, including 25% to 50% of total project costs. Section 1402 would allow developers of certain projects to challenge permitting delays or denials that were allegedly "due to a pattern of disparate treatment" against projects of the same type. As with Section 1401, Section 1402 would entitle prevailing plaintiffs to injunctive relief and damages, including 50% to 100% of total anticipated construction costs. Finally, Section 1403 would allow developers to sue to enforce agencies' compliance with a one-year deadline to approve or deny complete applications for authorizations or permits that do not require an environmental assessment (EA) or environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).[1] Under Section 1403, prevailing plaintiffs would be entitled to certain injunctive relief, but not to damages.

This report summarizes Sections 1401, 1402, and 1403. It then identifies considerations for Congress, including the potential implications of damage awards under Sections 1401 and 1402, and uncertainties about the scope and potential impact of those sections.

BAAJA's "Project Certainty" Provisions

BAAJA Sections 1401, 1402, and 1403 concern "Federal authorization[s] or permit[s]," a term defined to include "an authorization, permit, record of decision, right-of-way," other specified agency actions, and "any other approval or order that is necessary" to construct a project or operate a project at full capacity.[2] Each of those sections is discussed in turn below.

Section 1401

BAAJA Section 1401 would prohibit agencies from taking "any new action" that would (1) "revoke, rescind, withdraw, terminate, suspend, amend, or alter" a federal authorization or permit effective on or after September 16, 2026, or (2) "interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits."[3]

These prohibitions would be subject to five exceptions. Under Section 1401, an agency would be able to take an otherwise prohibited action only if

1. a court orders it to do so;

[1] 42 U.S.C. §§ 4321 et seq.

[2] *See* BAAJA, S. 5653, §§ 1401(a), 1402(b)(1), 1403(a)(2) (defining "Federal authorization or permit" for purposes of each section in BAAJA Title IV).

[3] *Id.* § 1401(b)(1). Section 1401 does not define the terms "action," "project," or "operation at full capacity."

2. the holder of a federal authorization or permit materially breached the terms of its authorization or permit "or otherwise violated applicable law";
3. the authorization or permit was obtained "through fraud, intentional concealment, or material misrepresentation";
4. the action is "necessary to prevent specific, urgent, substantial, and proximate harm or damage to life, property, national security, or defense that is based on new," previously unavailable information; or
5. the permit or authorization holder requests the action.[4]

Agencies invoking the fourth of those exceptions would be authorized to take only "reasonably limited" action "necessary to remedy the specific issue" giving rise to the asserted threat.[5]

Before acting under any of Section 1401's five exceptions, agencies would need to give written notification to the "project sponsor or holder of" the authorization or permit.[6] That notice would need to provide "a detailed explanation of the action," identify "the statutory authority relied on for the action," and include "the evidence supporting the action."[7]

Section 1401 would authorize a project sponsor or holder of a permit or authorization to sue to enforce its terms. This cause of action would alter the status quo in several respects. First, under existing law, the party challenging agency action bears the burden of persuasion. By contrast, Section 1401 would "place the burden" on the government. Second, in suits challenging permitting actions, judicial review is currently governed by the statutes underlying the challenged actions or by the Administrative Procedure Act (APA), and reviewing courts typically defer to agencies' factual findings and policy judgments.[8] Section 1401 would supersede these existing statutes and replace their deferential standards of review with a requirement that agencies establish "by clear and convincing evidence" that permit modifications, rescissions, or suspensions fell within one of Section 1401's five enumerated exceptions.[9] Third, at present there exists no cross-statute authorization to challenge "any" agency "action" that interferes with construction or operation at full capacity of full permitted facilities.[10] By creating such a cause of action,[11] Section 1401 would potentially expand the scope of challengeable agency conduct.

Suits challenging agency action under Section 1401 could be brought in the federal courts of appeals, or, if no existing statute provides for direct circuit-court review of the challenged action, then in the district court where the affected project is located.[12] Review in the U.S. Court of Federal Claims would be expressly precluded.[13] Section 1401 also contains a "special rule" for

[4] *Id.* § 1401(b)(1)(A)–(E).

[5] *Id.* § 1401(b)(2).

[6] *Id.* § 1401(b)(3).

[7] *Id.* § 1401(b)(3).

[8] *See* 5 U.S.C. § 706 (directing courts reviewing agency action under the Administrative Procedure Act (APA) to "set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency."); CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

[9] BAAJA, S. 5653, § 1401(b)(4)(B).

[10] *Id.* § 1401(b)(1).

[11] *Id.* § 1401(b)(4)(A).

[12] *Id.* Section 1401(b)(4)(C) would specify procedures for marking relevant information as "classified or otherwise protected from public disclosure under Federal law" and for making that information available to reviewing courts.

[13] *Id.* § 1401(b)(4)(G).

projects that were recently subject to a "stop-work order." If that prior stop-work order was enjoined (barred) by a federal court in the year before BAAJA's enactment, then Section 1401 would grant jurisdiction to "the same judge" that enjoined the stop-work order to "hear a complaint or motion under this section," "assuming that judge continues to sit in the same district."[14]

Existing statutes generally authorize reviewing courts to vacate agency actions found to be unlawful.[15] In some cases these laws also grant prevailing plaintiffs attorney fees and costs of litigation,[16] but they do not provide for damage awards.

Section 1401 would expand the scope of available remedies by entitling prevailing plaintiffs to each of these five forms of relief:

1. reinstatement of its permit or authorization "and the termination of any action by the Federal agency preventing the construction or operation of the project";
2. "injunctive relief preventing a Federal agency from taking any new action that would revoke, rescind, withdraw, terminate, suspend, amend, or alter a previously granted Federal authorization or permit or take any other action to interfere with or prevent the construction or operation at full capacity of a project without first obtaining a court order to that effect from the same judge";
3. reasonable attorney fees and costs of litigation;
4. "any costs" associated with delay attributable to the challenged agency action; and
5. "not less than 25 percent and not more than 50 percent of the total of all costs incurred by" the plaintiff "in connection with the project as of the date of the action and not otherwise recovered."[17]

Courts would determine the recoverable amount of "total costs . . . incurred" by considering "the degree to which" the defendant agency acted in bad faith, the degree to which "there exists a pattern of similar Federal interference in other projects," and the "actual degree" of economic harm to the project sponsor or operator.[18]

Section 1401 would authorize the payment of awards from the appropriation codified at 31 U.S.C. § 1304, which is commonly known as the "Judgment Fund."[19] Administered by the U.S. Department of the Treasury (Treasury), the Judgment Fund is a permanent and indefinite appropriation that provides unlimited funds to pay monetary settlements and court-ordered judgments, subject to certain requirements.[20]

Section 1402

BAAJA Section 1402 would state a sense of the Congress that federal agencies should "treat all applications for Federal authorizations or permits fairly and efficiently."[21] To that end, the section

[14] *Id.* § 1401(b)(4)(E).

[15] *E.g.*, 5 U.S.C. § 706(2), 15 U.S.C. § 2618(c)(1)(B), 42 U.S.C. § 7607(d)(9).

[16] *E.g.*, 15 U.S.C. § 2618(d), 28 U.S.C. § 2412(d)(1)(A), 33 U.S.C. § 1369(b)(3), 42 U.S.C. § 7607(f).

[17] BAAJA, S. 5653, § 1401(b)(4)(D)(i)–(v).

[18] *Id.* § 1401(b)(4)(v)(I)–(III).

[19] *Id.* § 1401(b)(4)(F).

[20] 31 U.S.C. § 1304(a).

[21] BAAJA, S. 5653, §1402(a)(1)–(2).

would authorize those seeking permits for "specific type[s] of covered project[s]"—generally, projects related to energy production[22]—to sue in the federal district court in which their project is located and challenge an agency's allegedly unreasonable delay or improper denial of federal permits or authorizations.[23]

Section 1402 defines "delay" as "more than 60 days beyond" specified deadlines, which for completed environmental documents range from roughly one year for agency actions that do not require an EIS under NEPA, to two years for those that do, plus an additional 90–120 days to approve "all outstanding authorizations" after completing the review.[24]

To establish a claim of "unreasonabl[e]" delay or "improper[]" denial under Section 1402, a plaintiff would need to show that

1. its application for the delayed or denied government action "satisfies all applicable Federal law";
2. if granted, the requested permit or authorization would not be canceled for violating federal law, or for having been obtained through fraud, intentional concealment, or material misrepresentation; and
3. the government's delay or inaction reflected a "pattern of disparate treatment" against projects of the same type that "occurred after" BAAJA's enactment.[25]

Section 1402 would define a "pattern of disparate treatment" as a "substantial" increase in the rate of "unreasonably delayed" or "improperly denied" government action for energy projects of the same type, as compared with the rates of delayed or denied actions for projects of that type over the previous five calendar years.[26] This "empirically demonstrated statistical pattern" would also need to be "the result of an intentional course" of government action "to create such a pattern."[27]

Section 1402 does not specify what would constitute a "substantial" increase in the relevant rates of permit denial or delay, but to support a claim, such an increase would need to persist for at least 180 days after BAAJA's enactment for actions that do not require an EIS and for at least 280 days after BAAJA's enactment for those that do.[28]

A plaintiff suing under Section 1402 would have to produce "prima facie evidence" of disparate treatment using "empirical evidence."[29] Section 1402 does not define that term, but treats

[22] *See id.* § 1402(b)(4)(A)–(UU) (listing "covered project" types).

[23] *Id.* § 1402(b)(4), (d)(1)(A).

[24] *Id.* §§ 1402(d)(1)(A)(ii)(I)–(III), 1106. BAAJA §1106 would provide a separate cause of action for a project sponsor to enforce a deadline, as well as administrative procedures for an agency failing to meet a deadline including the ability of a project sponsor to administratively request assistance from the Chairman of Council on Environmental Quality in resolving disputes and, if the delay persists, reallocation of personnel and a subsequent prohibition on travel by an agency head of a "key" permitting agency until that agency "has published or made public the applicable environmental document and issued all outstanding authorizations related to the proposed agency action." For more on § 1106 and on other NEPA-related provisions in BAAJA, see CRS Report R49510, *Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of Division A, Title I, Including National Environmental Policy Act Provisions*, by Heather McPherron et al. (2026).

[25] *Id.* § 1402(d)(1)(B)(i)(I)–(III).

[26] *Id.* § 1402(b)(3)(A).

[27] *Id.* § 1402(b)(3)(A), (C).

[28] *Id.* § 1402(b)(3)(B)(i)–(ii). If an authorization or permit was delayed beyond a listed deadline, the applicant or project sponsor could potentially sue to enforce the deadline under BAAJA Sections 1106 or 1403. Neither of those provisions provide for damage awards but neither requires the plaintiff to establish a "pattern of disparate treatment."

[29] *Id.* § 1402(d)(1)(B)(i)–(ii).

"empirical evidence" as something other than evidence "that demonstrates a bias in the permitting regime," such as executive branch statements or policies.[30] Plaintiffs "may" provide such evidence of "bias" to "support" their "empirical evidence" but would not be required to do so.[31]

If a plaintiff produced prima facie evidence of disparate treatment, Section 1402 would shift the burden of evidence production to the government, which would have to "provide to the applicant and the court raw statistical data for the calendar year in which the action is brought and the preceding 5 calendar years showing, with respect to the specific type of covered project at issue," the number and percentage of federal permits or authorizations granted, delayed, and denied.[32] The reviewing court would then need to base its decision only on the plaintiff's evidence, the government's "raw statistical data," and "the administrative record before the agency."[33]

Section 1402 would entitle prevailing plaintiffs to four forms of relief:

1. injunctive relief, "as provided by applicable Federal law";
2. "reasonable" attorney fees and costs of litigation;
3. "economic damages, including any costs associated with the applicable denial or delay, as the court determines appropriate"; and
4. "damages in an amount equal to not less than 50 percent and not more than 100 percent of the total reasonably expected cost of construction of the project."[34]

As in Section 1401, Section 1402 would direct courts to determine the recoverable amount of reasonably expected construction costs by considering "the degree to which" the defendant agency acted in bad faith, the degree to which "there exists a pattern of similar Federal interference" in other projects, and the "actual degree" of economic harm to the project sponsor or operator.[35]

To be eligible for a remedy under Section 1402, a plaintiff would need to "demonstrate" that it possesses the "technical and financial ability" to construct the type of project at issue.[36] A plaintiff that received a remedy under Section 1402 would then need to "complete the applicable specific type of covered project," or, barring certain extenuating circumstances, would need to repay any money it received. Section 1402 does not provide a deadline for project completion.[37]

As with Section 1401, funds awarded under Section 1402 would be payable from the Judgment Fund.[38]

Section 1402 would prohibit the use of class actions by barring any "party with a claim under this section or any other person" from suing "as a representative party on behalf of any member of a specific type of covered project."[39]

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[30] *Id.* § 1402(d)(1)(B)(ii)(I)(aa)–(bb).

[31] *Id.* § 1402(d)(1)(B)(ii)(I)(bb).

[32] *Id.* § 1402(d)(1)(B)(iii)(I)(aa)–(cc).

[33] *Id.* § 1402(d)(1)(C)(i)–(iii). Under existing law, judicial review of agency action is generally limited to an agency's administrative record. 5 U.S.C. § 706; *see also* Camp v. Pitts, 411 U.S. 138, 142 (1973) (holding that "the focal point for judicial review [under the APA] should be the administrative record").

[34] *Id.* § 1402(d)(2)(A)(i)–(iv).

[35] *Id.* § 1402(d)(2)(A)(iv)(I)–(III).

[36] *Id.* § 1402(d)(2)(B).

[37] *Id.* § 1402(d)(3)(A)–(B).

[38] *Id.* § 1402(d)(4).

[39] *Id.* § 1402(d)(5).

For *covered projects* requiring one or more federal authorizations or permits that do not require an EA or EIS, Section 1402(c) would also establish a timeline for agencies to "render decisions on all applicable covered applications." Specifically, agencies would have one year to render decisions from the date on which "the latest of the covered applications is determined to be complete."[40]

Section 1403

BAAJA Section 1403 would provide applicants for federal authorizations or permits that do not require an EA or an EIS a "right to petition" for "judicial review of . . . compliance" with "the deadline established under section 1402(c) with respect to the covered application."[41]

Section 1403 would not require compliance with the deadline in 1402(c) if a federal agency could establish by clear and convincing evidence that its delay was caused by

1. "a natural disaster, act of God, or act of war that reasonably impaired" an agency's ability to comply;
2. "a national emergency" that necessitated delay;
3. "the covered application being based on fraud or material misrepresentations of fact";
4. the applicant withholding necessary information after the agency has made "a reasonable and timely" request for that information; or
5. a lapse in appropriations lasting more than 14 days that precluded compliance.[42]

Section 1403 would authorize suits in the federal district court in which the project is located and would direct reviewing courts to "establish an expedited schedule for briefing and disposition," and to issue a decision within 120 days of a suit's commencement, barring "extraordinary circumstances."[43]

A prevailing plaintiff would be entitled to a court "order requiring a decision on" its application within 60 days, and to other "injunctive relief, as appropriate, to give effect to this section."[44] Courts would be authorized "to retain jurisdiction to ensure compliance" with terms of their orders.[45]

Considerations for Congress

Payments from the Judgment Fund

As noted above, Sections 1401 and 1402 would authorize payments from the Judgment Fund to satisfy awards of economic damages and project costs. Those sections refer only to court-ordered judgments, but unless "otherwise provided by law," if a given action could result in a court-

[40] *Id.* § 1402(c).

[41] *Id.* § 1403(b). For more on judicial review of compliance with deadlines for authorizations or permits that require an EA or EIS, *see* CRS Report R49510, *Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of Division A, Title I, Including National Environmental Policy Act Provisions*, by Heather McPherron et al. (2026).

[42] *Id.* § 1403(c)(1)–(5).

[43] *Id.* §§ 1403(b), 1403(e)(1)–(2).

[44] *Id.* § 1403(d)(1), (f).

[45] *Id.* § 1403(d)(2).

ordered judgment payable from the Judgment Fund, then a settlement of that action will be payable from the Judgment Fund as well.[46] This general rule extends to settlements entered by the Attorney General or his designee to resolve "imminent" litigation.[47] Thus, a claimant seeking relief under Section 1401 or 1402 would not need to prevail in court (or even file suit) to recoup payment, and could instead resolve its claims by entering an out-of-court agreement with the Department of Justice (DOJ).[48]

Execution of those agreements would be difficult to prevent. Parties can generally resolve their disputes through out-of-court settlements without any court action.[49] The Judgment Fund then provides for unlimited automatic payment—without further congressional intervention—of settlements (and judgments) that Treasury certifies as meeting statutory criteria.[50]

In the past, concerns about such payments have prompted some Members to propose bills that would have prohibited use of the Judgment Fund to satisfy certain settlements or judgments.[51] If Congress wanted to restrict Judgment Fund payments under Sections 1401 and 1402 to court-ordered awards, it could consider adding similar limitations in those provisions.

Whether obtained through settlement or judgment, monetary awards under Sections 1401 or 1402 could increase Judgment Fund expenditures relative to historical baselines. Recent events may suggest the scale of that potential increase. Over the 17 fiscal years beginning in FY2009 and running through FY2025, the Judgment Fund paid an average of roughly $3.5 billion per year to resolve more than 6,000 claims annually.[52] In fewer than seven months, between late April and mid-October 2026, DOJ and the Department of the Interior (DOI) drew roughly $3.8 billion from the Judgment Fund[53] to pay 10 out-of-court settlements with developers of offshore wind projects.[54] Those payments, which ranged from $3.6 million to $1.1 billion, corresponded to

[46] 31 U.S.C. § 1304(a)(3)(A); 28 U.S.C. § 2414.

[47] 31 U.S.C. § 1304(a)(3)(A); 28 U.S.C. § 2414.

[48] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, vol. 3 at 14-35 (3d ed. 2008).

[49] *See generally* Fed. R. Civ. P. 41(a)(1)(A) (providing for voluntary dismissal of actions without court order).

[50] 31 U.S.C. §§ 1304(a)(2), 3738; 31 C.F.R. pt. 256. For historical background on the payment of litigation awards and on the origins of the Judgment Fund, *see* CRS In Focus IF13139, *Congress's Authority to Restrict Monetary Civil Settlements*, by Andrew S. Coghlan (2025).

[51] *E.g.*, No Taxpayer-Funded Settlement Slush Funds Act of 2026, H.R. 8914, 119th Cong. (as introduced by House, May 20, 2026); Protect American Taxpayer Dollars from Illegal Immigration Act, S. 3453, 117th Cong. (as introduced by Senate Jan. 18, 2022); Judgment Fund Transparency and Terrorism Financing Prevention Act of 2017, S. 386, 115th Cong. (as introduced by Senate, Feb. 15, 2017).

[52] CRS calculated payments from the Judgment Fund by using Treasury's Annual Report to Congress website (https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress) to download a dataset for "All" date ranges and summing the "Confirmed Payment Amount" field for all entries for each fiscal year (based on the entries' "Payment Sent Date"). The "Confirmed Payment Amount" field is described as being inclusive of principal awards, attorney fees, costs, and interest paid to a claimant.

[53] Payment data is available on Treasury's "Judgment Fund Payment Search" web page, https://fiscalcrm.my.site.com/jfpaymentsearch/s/, and can be obtained by filtering for payments between April 1 and October 31, 2026, and selecting "Bureau of Ocean Energy Management" as the defendant agency.

[54] *Settlement Agreement Between the United States and Attentive Energy, LLC* (Mar. 23, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/4.%20Attentive%20Agreement.pdf?VersionId=uFdQf7xB5VyxvzYkY5K_HN4WtQ.Xqvan; *Settlement Agreement Between the United States and TotalEnergies Carolina Log Bay, LLC* (Mar. 23, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Carolina%20Bay%20Agreement.pdf?VersionId=HopJl_XAKE1BrLqv9SAPk5bR.RVf4Es6; *Settlement Agreement Between the United States and Bluepoint Wind, LLC* (Apr. 27, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-
(continued...)

amounts that the developers had paid to secure offshore wind leases that DOI later decided to cancel.[55] By providing for awards of 25% to 50% of "total" project costs,[56] or 5% to 100% of "total reasonably expected" construction costs,[57] Section 1401 could result in significantly larger awards.

Section 1401's Impacts on Other Statutory Provisions

Section 1401 would restrict federal agencies' ability to revise, rescind, or suspend "any . . . approval or order that is necessary" to construct or operate a project at full capacity.[58] It would also prohibit, with certain exceptions, "any . . . action" by the federal government that "interfere[s] with . . . construction or operation at full capacity" of fully permitted projects.[59] Given the breadth of these proscriptions, Section 1401 could potentially impact agencies' ability to exercise their authority under existing statutes.

To illustrate, some statutes direct the Environmental Protection Agency (EPA) to periodically review and, if necessary, revise pollution-control standards and guidelines for new and existing facilities.[60] Other statutes and regulations authorize or require agencies to modify federal authorizations or permits upon certain triggering events, including the discovery of new information about the environmental impacts of permitted activities.[61] Section 1401 could be read to conflict with these legal frameworks. For instance, a court might bar EPA from issuing new, more stringent regulations if those regulations interfered with "operation at full capacity" of projects that had secured all necessary federal authorizations or permits.[62] Similarly, a court might

activities/Bluepoint%20Settlement%20Agreement.pdf?VersionId=SidEk1G2MTW3Jbu90gwXRo0Q2PZpe6tF; *Settlement Agreement Between the United States and Golden State Wind LLC* (Apr. 27, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Golden%20State%20Settlement%20Agreement.pdf?VersionId=Eg8hs6CdhZslEPZVT2PtS9HMpHIRa1b3; *Settlement Agreement Between the United States and Invenergy Wind Offshore LLC* (June 12, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Invenergy%20NY%20Settlement%20Agreement.pdf?VersionId=nmiOxiu_SMWflcIkDgRDPGr4HRgZwsYg; *Settlement Agreement Between the United States and Invenergy NE Offshore LLC*, June 12, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Invenergy%20Maine%201%20Settlement%20Agreement.pdf?VersionId=hjnF2wJYTwd001sMHVnYPrSdrOb70Vpp; *Settlement Agreement Between the United States and Invenergy California Offshore LLC*, (June 12, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Invenergy%20CA%20Settlement%20Agreement.pdf?VersionId=JweIK.RBJKIZw6QSe_4Ur1W49u.75M_W; *Settlement Agreement Between the United States and RWE Offshore US Gulf, LLC*, (Aug. 4, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/Fully%20Executed%20Agreement%20-%20Gulf.pdf?VersionId=CzJKQFQnL6scstx9oCVeurV9Prcf2OuT; *Settlement Agreement Between the United States and Community Offshore Wind, LLC*, (Aug. 4, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/Fully%20Executed%20Agreement%20-%20COSW.pdf?VersionId=Fsk0Eb9qN1WrFxow3tFGewitcAORqejw; *Settlement Agreement Between the United States and Canopy Offshore Wind, LLC*, (Aug. 4, 2026), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Fully%20Executed%20Settlement%20Agreement%20-%20Canopy.pdf?VersionId=7RrmVtJ2DW17nxhSerVvuClME9x3hxua.

[55] See sources cited *supra* note 54.

[56] BAAJA, S. 5653, § 1401(b)(4)(D)(v).

[57] *Id.* § 1402(d)(2)(A)(iv).

[58] *Id.* § 1401(a), (b)(1).

[59] *Id.*

[60] *E.g.*, 33 U.S.C. § 1314(b), (m); 42 U.S.C. §§ 7409(d)(1), 7411(b)(1)(B), 7411(d); 7412(d)(6).

[61] *E.g.*, 33 U.S.C. §§ 1342(b)(1)(C)(iii), 1344(e)(2), 1344(h)(1)(A(iii); 42 U.S.C. § 7661a(b)(9); 50 C.F.R. § 402.16.

[62] BAAJA, S. 5653, § 1401(b)(1).

construe Section 1401's prohibition on permit modifications to bar even those permit modifications that are expressly required under other laws.

While possible, such outcomes are not certain. When interpreting statutes, courts apply a presumption against implied repeals,[63] and when specific statutory provisions appear to conflict with more general provisions, courts often presume that the specific controls the general.[64] Thus, as commentators have noted,[65] courts construing Section 1401 may conclude, in the absence of explicit statutory language to the contrary, that Congress did not mean for Section 1401's broad prohibitions to sweep away more particularized statutory directives.

It is also possible that courts would disagree about the proper interpretation of Section 1401, with some courts reading that provision to override provisions in existing statutes, such as the Clean Water Act or Clean Air Act,[66] and other courts reaching the opposite conclusion. Such divergent interpretations could lead to inconsistent application of federal law.

If desired, Congress could provide express direction on whether Section 1401 would supersede or leave intact existing statutory provisions. For instance, Congress could disclaim intent to modify existing laws, or, conversely, provide that Section 1401 governs notwithstanding any other provision of law. Alternatively, Congress could define "federal authorization or permit" or agency "action" to exclude activities under certain statutes.

Section 1402's Intent Requirement of Lack Thereof

Section 1402 would create a cause of action to challenge certain permit delays or denials that are "due to a pattern of disparate treatment,"[67] defined, in part, to mean an "empirically demonstrated" "substantial" statistical increase in rates of "unreasonably delayed" or "improperly denied" permits as compared to a five-year baseline.[68] It is unclear, however, if the government could be held liable under Section 1402 whenever its actions create such a pattern, or, alternatively, only when it both creates a pattern of disparate treatment *and* intends to do so. Parts of Section 1402 could be read to support either interpretation.

Section 1402 defines "pattern of disparate treatment" to mean not just a "statistical pattern," but one that is "the result of an intentional course of action undertaken by the Federal Government to create such a pattern."[69] The latter definitional phrase suggests that plaintiffs suing under Section 1402 would need to establish the government's subjective motivation to obtain relief.

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[63] *See, e.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (noting the "'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute'") (quoting United States v. Fausto, 484 U.S. 439, 452 (1988)).

[64] *See* United States v. Wesley, 60 F.4th 1277, 1284 (10th Cir. 2023) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quoting Morton v. Mancari, 417 U.S. 535, 550–51 (1974)); *see also* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

[65] Eric Biber, *Unpacking the Senate Permitting Reform Bill: Permit Certainty*, LEGAL PLANET (Oct. 13, 2026), https://legal-planet.org/2026/10/13/unpacking-the-senate-permitting-reform-bill-permit-certainty/.

[66] 33 U.S.C. §§ 1251–1389; 42 U.S.C. §§ 7401–7671q.

[67] BAAJA, S. 5653, § 1402(d)(1)(A).

[68] *Id.* § 1402(b)(3)(A)(i)–(ii).

[69] *Id.* § 1402(b)(3)(C).

Different provisions in Section 1402 suggest otherwise. For example, Section 1402(d)(1)(B)(i)–(ii) would allow plaintiffs to make a prima facie showing of disparate treatment based only on "empirical evidence," which plaintiffs could, but would not be required to, supplement with additional evidence "that demonstrates a bias." Section 1402(d)(1)(C) would then direct the reviewing court to consider the alleged pattern of disparate treatment based only on the plaintiffs' evidence, the "raw statistical data" submitted by the government, and an agency's administrative record. Given these evidentiary constraints, Section 1402 appears to contemplate a finding of liability without any direct evidence that the government intended to create a pattern of disparate treatment.

The presence or absence of a specific intent requirement in Section 1402 has implications for the scope of potential liability under that section. On the one hand, if a "pattern of disparate treatment" means nothing more than a statistical increase in rates of permit delay or denial for a given project type, then even lawful, good-faith permit denials could give rise to liability. On the other hand, if the government can be held liable only when it acts with specific intent, then agencies might evade liability by employing facially neutral policies that disproportionately impact disfavored project types.

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