

I want to write separately to emphasize how sweeping the permit certainty provisions of Section 1401 of [the permitting reform bill](#) likely are. Again, these are provisions that apply if an agency takes an “action” (which is undefined) against a “project” (also undefined) that “would revoke, rescind, withdraw, terminate, suspend, amend, or alter a Federal authorization or permit in effect on or after September 16, 2026, or take any other action to interfere with or prevent the construction or operation at full capacity of a project that has secured all necessary Federal authorizations and permits.” And “authorization or permit” is broadly defined to include “any . . . approval or order that is necessary . . . for the construction or operation at full capacity of a project.” There are limited exceptions for agency actions to interfere with permits or “full capacity” operation of a project – including violation of “any . . . applicable law” or “material breach” of permit conditions. But the agency must show that this standard is met by “clear and convincing evidence” and faces very large potential damages if it loses.

To emphasize the scope of this bill, I want to spin out some possible hypothetical situations.

First, imagine an agency identifies a “material breach” of a permit condition or a violation of federal law by a permit holder. It establishes that violation by a preponderance of evidence in a judicial proceeding for injunctive relief, civil penalties or enforcement of an administrative order. But the permit holder counter claims, using its cause of action newly established under Section 1401, and the court concludes that the agency has not met the higher “clear and convincing evidence” standard. The result? Agency loses, action is enjoined, and the permit holder receives large damages.

This is why I say that the provision, as written, effectively converts the standard for civil enforcement of all federal regulatory standards against all permit holders from preponderance of the evidence to clear and convincing evidence. And that is a massive change. It goes far beyond protecting renewable energy from the depredations of the Trump Administration. It is, in essence, a substantial deregulatory action that will benefit all sorts of permitted actions, and will likely lead to much more substantial violations of a wide range of federal laws, not just environmental ones.

Second, imagine that pursuant to the Clean Air Act, EPA determines that protection of public health requires more rigorous air quality standards (the NAAQS). That in turn requires federal and state agencies to issue more rigorous permitting

standards for new and existing sources (for instance, this would probably trigger an update of the federal interstate air pollution standards that apply to a wide range of existing sources). That in turn would mean that there would be federal “action” that would “interfere with . . . operation at full capacity of a project that has secured all necessary Federal authorizations and permits.” Perhaps the agency can establish – with clear and convincing evidence, of course – that the permit holder is not in compliance with “applicable law.” The permit holder might argue, however, that applicable law is the law in place before the agency action. (That would be consistent with the goals of this provision to provide certainty for permit holders!) And thus violations of the new NAAQS cannot support ratcheting down the permit standards for the facility. And thus, we have perpetually locked in the air quality standards for a wide range of facilities, even if that harms public health. In other words, there has been a stealth amendment of the Clean Air Act to prevent more rigorous regulatory standards in a wide range of circumstances. (As I mention below, it is plausible the bill applies to federal actions that interfere with projects that do not have any current federal permits, so this could also implicate all state permits issued under the Clean Air Act too.)

Third, imagine that pursuant to the Clean Water Act, EPA or a state determine that a water body is severely polluted, in violation of the state’s relevant water quality standards. Then EPA concludes (as authorized/required by the Clean Water Act) that it must ratchet down the standards for state-issued water discharge permits to ensure those water quality standards are met. Even though these are state permits, the result is a “federal” action that has “interfere[d] with. . . operation at full capacity of a project” that has all its necessary federal permits (which might be none!). We’re back to the same scenario as before. The best case is that EPA must show by “clear and convincing evidence” that the ratcheting down of the permit is required to meet water quality standards. Worst case, EPA has no power to do this at all. Again, we have at best made it much more difficult to increase regulatory standards, and at worst, frozen in place all regulatory standards for water quality under the Clean Water Act – another stealth deregulatory amendment of the Clean Water Act.

Fourth, imagine a new species is listed for protection under the Endangered Species Act. Further imagine that operation of a federally permitted project would either “take” members of that listed species, potentially “jeopardize” the existence of that listed species, or potentially “adversely modify” that listed species. Can federal agencies require changes in the operation of that project to avoid these results?

Again, we have federal “action” that would modify a permit and/or “interfere with . . . operation at full capacity of a project” that has all its necessary federal permits. Perhaps the permit requires compliance with the ESA in general – so failure to adjust operations is a material breach of the permit. Likewise, perhaps it is the case that the “applicable law” has changed and so the agencies can force compliance. Even in these scenarios, there must be proof by “clear and convincing evidence,” which is a significant increase in the burden on the agency to win. And again, it is possible that the provision can be interpreted to exclude new legal obligations or changes in the effective terms of the permit (even through lease provisions that generally require compliance with federal law), such that none of this can take place. If that latter interpretation takes hold, the provision has effectively immunized existing projects from the ESA, at least for the listing of new species.

Indeed, it is plausible that this kind of legal protection would apply even to activities that do not have any federal permits – after all, those have “all necessary Federal permits,” which are none – and the federal government cannot impose new permitting requirements on those activities, again without “clear and convincing evidence” of a “violation of applicable law,” which may or may not include new changes to regulatory standards.

My examples above are all environmental ones. But it is easy to see how the provision applies to any regulatory provision, of any type, in any federal law, that might affect a permit or “interfere with . . . full operation” of a permitted activity.

Finally, there is one more way the bill might have sweeping effect. The bill does not define “project.” Does that mean only construction projects count? The dictionary definition is [much broader](#) than that. So does this mean, for instance, that a federally licensed bank can argue that its operations are a “project”? And thus, Federal Reserve changes to interest rates, or regulatory changes for reserve requirements, which interfere with “full operation” of the bank’s lending and investment activities, are therefore covered by the provision? Or perhaps all banks in the US, federally licensed or not, could make that argument?

I hope these examples make clear exactly how sweeping, and dangerous, Section 1401 is. To me, this is a poison pill for this legislation – it sweeps far more broadly than it seems on the surface (and likely more than at least some drafters intended). It is a tool for massive deconstruction of federal regulation, far beyond protection of renewable energy projects. Either it must be fundamentally changed (at the very least by clarifying its scope and reducing the evidentiary burden and

damages imposed on federal agencies), or the bill should not proceed.