



Veto Power: Pressure Builds to Fix EPA's CWA Authority

August 20, 2026 | ENERGY

There is pressure building for guardrails on the EPA's open-ended authority to overturn Clean Water Act (CWA) 404 dredge and fill permits underpinning major energy and infrastructure projects. Industry is pushing for a legislative fix – or, in the meantime, regulatory limits on EPA's authority. Either would be a net positive for developers, if Washington's timeclock cooperates.

Key Points

- Regulatory and/or legislative fixes may be most constructive for mining, traditional oil and gas and LNG infrastructure, oil and gas well pads, and data centers depending on location, as those could become future CWA 404 political targets for a Democratic EPA.
- We think this could be taken up by the Trump EPA, given its demonstrated willingness to pursue executive action to streamline permitting and ensure more certainty for energy infrastructure projects.

Project certainty has become a real catchphrase around Capitol Hill in recent years. President Donald Trump's December 2025 stop work orders to five already approved offshore wind projects (Revolution Wind in Rhode Island, Vineyard Wind in Massachusetts, Coastal Virginia Offshore Wind, Sunrise Wind in New York, and Empire Wind in New York) served as a catalyst behind project certainty language in the Speed Act passed in the House 221-196 late last year.

The language would limit when federal agencies may reverse environmental reviews or authorizations. A provision was added to appease the Freedom Caucus that grandfathered in Trump's offshore wind decisions, later vacated by the courts anyway. Project certainty language is one of the potential sticking points for the Senate in their own permitting reform negotiations, though both parties generally think it's a good idea. Republicans, remembering the Keystone XL fiasco, have as much incentive to shield traditional fossil fuel projects against reversal by a future administration as Democrats do to protect wind and solar permits.

But one area that has arguably not gotten as much attention in awhile: EPA's CWA veto authority. Under section 404 of the CWA, the agency along with the U.S. Army Corps of Engineers issues so-called dredge-and-fill permits authorizing discharge of sediment material from construction projects into federally regulated "Waters of the U.S." Section 404(c), colloquially referred to as EPA's "veto" power, allows the agency to prohibit or withdraw any defined area as an authorized site for such

discharges “whenever” it determines unacceptable adverse effects could occur to water supply, shellfish beds and fisheries, wildlife, or recreational areas.

It’s the word “whenever” that causes the hangup for developers that rely on final permits being, well, final. Though EPA has been quite judicious in using its veto authority, [invoking](#) it only 14 times in its 54-year history, it remains a kind of sword of Damocles of which industrial developers should remain wary, in our view. It is a vulnerability that potentially impacts a wide range of industrial projects: pipelines, LNG terminals, oil and gas production sites, roads, bridges, mining, and even potentially data centers.

Mingo Logan and Pebble Mine

Perhaps the two most famous instances of the EPA wielding its 404(c) authority: Mingo Logan’s Spruce No. 1 surface mine in Logan County, West Virginia, and Alaska’s planned Pebble copper and gold mine. In the former, EPA in 2011 moved to revoke authorization for two sites underpinning a final permit for the mountaintop coal mine – four years after issuing the permit. The DC Circuit eventually upheld the revocation in a 2016 2-1 opinion authored by Circuit Judge Karen LeCraft Henderson. The majority [opinion](#) found, essentially, that “whenever” means exactly that, and the “EPA’s ex post withdrawal is a product of its broad veto authority” rather than a “defect.” In a strongly worded dissent, now Supreme Court Justice Brett Kavanaugh argued that EPA’s “cost-blind” approach was arbitrary and capricious.

In the Pebble example, the Biden administration acted on years of requests from environmental groups to issue the Jan. 30 2023 [determination](#) blocking the proposed copper and gold mine site from development. The agency cited “unacceptable adverse effects” on salmon fisheries in Alaska’s Bristol Bay watershed should the project have gone forward.

Why Now?

We think this could be an important space to watch now because permitting reform talks and the project certainty dialogue on the hill give industry advocates some impetus for advancing regulatory and legislative fixes. House bill language, originally introduced by Rep. Pete Stauber (R-MN), passed the House last year as part of the PERMIT Act in a 221-205 vote.

The language, which has since been added to Sen. Alan Armstrong’s (R-OK) permitting reform [bill](#), would shrink EPA’s 404(c) authority to allow it to act only after a permit application has been filed and before a final permit has been issued. But it is not clear that would make it into a final permitting reform bill, given likely Democratic objections. We could envision a scenario where it could become a trade-off in exchange for Republicans accepting stronger protections for clean energy projects, but again, even then it might not pass muster with Senate Dems.

Oil and gas and mining interests have long been wary of the open-ended nature of EPA’s 404(c) authority. With a presidential election looming in 2028, those concerns have been reaching a higher pitch this year, especially with the Trump administration looking to fast track mining and other types of projects. Industry advocates fear that a future Democratic administration could use 404(c) to target projects approved during Trump’s term. One lobby group, a newly formed cadre of mining and energy groups known as the Fix the EPA Veto coalition, in a June 6 [letter](#) to Trump, which has

achieved wide attention in the [trade press](#), urged the administration to direct the EPA to take regulatory action. “Although the EPA's retroactive 404(c) veto authority was only used once each by the Obama and Biden Administrations, there are good reasons to think that it could be used to pull the plug on many more projects in the future by an even more environmentally extreme Democratic Administration,” the letter said. Specifically, the group wants an EPA rulemaking to more clearly define “unacceptable adverse effects,” i.e. raising the bar for when it could employ its 404(c) veto authority. That would give industry a finite set of guardrails in the absence of a durable legislative fix. It could always be overturned by a future administration, unlike legislation, but it would offer some regulatory certainty for infrastructure projects in the meantime.

Ticking Clock

In our view, the administration has already proven more than willing to enact regulatory and executive fixes to offer permitting relief, a consolation prize of sorts if Congress does not manage to pass comprehensive bipartisan permitting reform. We could see EPA doing the same here, though the regulatory relief would be more limited assurance for developers than the Stauber language.

The overarching question is time. Congress returns Sept. 14 with just over a month left in total time on the legislative calendar. Even with the lame duck the new target for Senate negotiators to move a permitting reform bill, it is far from a certainty. There is even less certainty that the Stauber language makes it into a final reform package.

EPA has ample time to complete a rulemaking on the issue. But the agency would have to move quickly – within the next three months at least for a proposed rule – in order to be able to defend a legal challenge in at least the D.C. Circuit before Trump exits office.