

## **The PERMIT Act is an important step for permitting reform**

*Daren Bakst*

Tomorrow, the House is expected to consider the Promoting Efficient Review for Modern Infrastructure Today Act or PERMIT Act ([H.R. 3898](#)). It contains several useful reforms to the federal government's overly cumbersome permitting process.

Specifically, this legislation introduced by Rep. Mike Collins (R-GA) makes several important changes to the Clean Water Act (CWA). While some provisions could be clarified and strengthened, particularly in the section defining "navigable waters" under the CWA, the PERMIT Act would represent a meaningful step towards modernizing the Clean Water Act and addressing permitting reform.

Too many discussions regarding permitting reform focus solely on the National Environmental Policy Act (NEPA). But permitting reform is much broader than NEPA. It also requires updating laws like the Clean Water Act and the Clean Air Act. To Rep. Collins and the co-sponsors' credit, they apparently recognize this critical point.

There are two especially important reforms in the bill that are worth highlighting: prohibiting retroactive and preemptive vetoes by the Environmental Protection Agency (EPA) of Section 404 dredge and fill permits, and stopping the abuse of the Section 401 certification process.

These reforms are focused on clarifying the law and ensuring that the CWA is implemented as intended.

**Retroactive and preemptive vetoes.** The US Army Corps of Engineers issues Section 404 permits. However, under Section [404\(c\)](#) of the CWA, the EPA is authorized to have the final say on what may be permitted. This "veto" power has been sparingly [used](#), but during the Obama administration, there were two abuses of this power: retroactive and preemptive vetoes.

In 2011, for the first time ever, the EPA used its veto power after the Corps issued a permit. In fact, the veto was exercised [four years](#) after the Corps originally issued a permit to Mingo Logan Coal. Such power can do incredible damage to project development. After all, even when a developer has been given the federal government's green light for a project, the EPA can swoop in years later and put an end to it.

Then there's the EPA's use of a preemptive veto. In 2014, in yet another unprecedented use of Section 404(c), the Obama administration used its veto power to block a project [before](#) the Section 404 permit application had even been filed. The project in question was Pebble Mine, which has been [described](#) as "the world's largest undeveloped copper deposit."

A preemptive veto has a chilling effect on project development and demonstrates the EPA pre-judging a project. For all practical purposes, such preemptive action indicates that the EPA is acting in a political and ideological manner instead of being a thoughtful environmental backstop as was intended through Section 404(c).

The PERMIT Act would prohibit retroactive and preemptive vetoes. It doesn't get rid of the EPA's Section 404(c) veto power, but it details the specific period when the EPA may issue a veto: no earlier than the day in which the permit application has been completed and no later than the day the Corps issues the permit.

**Section 401 reform.** The bill reforms the [Section 401](#) certification [process](#), a process that gives states a voice in whether federal permits or licenses should be issued. This is an important provision that has unfortunately been abused by some states to block projects for reasons that have nothing to do with water quality, such as for [climate change](#) and [train noise](#). In many cases, a state could be inappropriately using Section 401 to block an interstate project, like a natural gas pipeline. This can hurt numerous states that would benefit from such a project and even undermine important national objectives.

The CWA requires federal permits for *discharges* from *point sources* (i.e., discrete sources such as pipes) into *navigable waters*. Yet there have been efforts, such as seen in the Biden administration's final Section 401 [rule](#), which would allow states to block projects even if the reasons have nothing to do with discharges, point sources, or navigable waters.

The PERMIT Act would help to ensure that the Section 401 certification process gets back to its intended purpose by focusing on water quality issues and discharges from point sources into navigable waters.