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If EPA is afraid of the new Congress, you wouldn't know it from today's news. Assistant Administrator Peter Silva issued the Obama administration's first [veto of a Clean Water Act section 404 permit](#). This veto, which has been working its way through the cumbersome process for more than a year (see [here](#), [here](#), [here](#), and [here](#)), is [only the 13th in agency history](#), the second since 1989, and the first to be issued after a permit had been issued. It blocks "valley fills" — the use of streams and tributaries for disposal of the rock and dirt removed in surface coal mining — at Mingo Logan's Spruce No. 1 Mine in Logan County West Virginia.

The proposed Spruce No. 1 project is enormous:

If fully constructed, the project will disturb approximately 2,278 acres (about 3.5 square miles) and bury approximately 7.48 miles of streams beneath 110 million cubic yards of excess spoil. This is among the largest individual surface mines ever authorized in West Virginia.

EPA has allowed a small part of the project, which is already underway, to go ahead. But it decided that the burial of 6.6 stream and tributary miles which "represent some of the last remaining least-disturbed, high quality stream and riparian resources" in the area would have unacceptable impacts on wildlife and ecosystem functions, both directly and downstream. The US Fish and Wildlife Service backed EPA's view. Furthermore, EPA found that the proposal failed to consider less damaging alternatives or include compensatory mitigation, as required by regulations implementing section 404.

Expect litigation, and expect it to focus on the timing of the veto. On the merits, section 404 provides EPA considerable discretion to veto permits whose effects it finds unacceptable. Because there have been only a few vetoes over the years, there has been little litigation construing EPA's veto authority. But what there is supports the agency. The only published appellate decision comes from the 4th Circuit, which is likely to be the site of litigation about the Spruce Mine permit. That decision, *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993), provides no comfort to the fans of Spruce Mine. The court upheld EPA's veto of a water supply project based on unacceptable environmental impacts, giving the usual judicial deference to the agency's view of the evidence in the record. EPA has compiled a very strong scientific record supporting its Spruce Mine veto decision, one that will almost certainly survive judicial review.

The mine's proponents are relying heavily on the timing issue. The Corps issued a permit for Spruce No. 1 in January 2007; they say it's too late to issue a veto now. But the statute does not put a time limit on EPA's veto power. It says simply that the EPA administrator "is authorized to deny or restrict" any 404 discharge "whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Although it does remind us that in the 1970s no one envisioned a female EPA administrator, that language doesn't support the argument that EPA has to act before the Corps actually issues a permit.

Even without a statutory deadline, vetoing a permit four years after its issuance might seem unfair enough to call for judicial intervention. But not without some harm to the permittee, which can't be shown in this case. Environmental groups challenged the permit immediately after it was issued, and most activity at the site has been on hold during that litigation. An agreement between plaintiffs and the coal company allowed operations in one area to go ahead; EPA's veto expressly does not affect those operations.

The mine's backers will also look to Congress; indeed West Virginia Democrats Nick Rahall and Joe Manchin have already [spoken out against the decision](#). Openly amending the Clean Water Act to limit EPA's veto authority seems highly unlikely and would surely draw a presidential veto. The most likely strategy, therefore, is an appropriations rider. I'm cautiously optimistic, though, that the politics of this one favor EPA. The agency has made it clear throughout this process that it's not looking to completely block mountaintop mining, just to reduce the practice's most drastic environmental impacts. It has tried to negotiate changes in the Spruce Mine proposal, and it [approved the Hobet 45 proposal](#) (to the dismay of environmental groups) after the company agreed to some reductions. Furthermore, because the veto is so rare it's unlikely that a lot of other delegations are worried about its impact on their state. Finally, this issue does not have a high enough political profile to make a lot of hay. I don't see who, other than the West Virginia legislators, is going to get a political boost out of arguing that coal companies should be able to take down mountains and bury streams without any outside review.