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WHEN IS WHENEVER? EPA'S RETROACTIVE WITHDRAWAL AUTHORITY IN *MINGO LOGAN*

HALE MELNICK*

Abstract: In 2007, the United States Army Corps of Engineers granted Mingo Logan Coal Co. a permit to discharge dredge and fill material into four West Virginia streams and their tributaries. The U.S. Environmental Protection Agency (EPA) did not file an objection despite concerns about the discharge's environmental impacts. Two years later, EPA moved to withdraw the permit in light of new information and circumstances regarding the discharge's impact on wildlife. EPA claimed that it was authorized to withdraw the permit under Section 404(c) of the Clean Water Act, which provides the Administrator of EPA with the authority to veto specification sites "*whenever* he determines" a discharge will have an "unacceptable adverse effect" on identified environmental resources. Mingo Logan appealed EPA's permit withdrawal on the grounds that EPA exceeded its authority under the Clean Water Act. The U.S. Court of Appeals for the District of Columbia upheld EPA's authority to retroactively withdraw the permit. Although the court's decision has sweeping implications for the reach of EPA, this Comment argues that such broad administrative authority is justified by the plain text of the Clean Water Act and the need for the federal government to take immediate action during environmental crises.

INTRODUCTION

Mingo Logan Coal Co. ("Mingo Logan") was incorporated in 1981 and is based in Wharncliffe, West Virginia.¹ In 2007, Mingo Logan acquired a mountaintop coal mine in West Virginia from Hobet Mining, Inc., a fellow subsidiary corporation of Arch Coal, Inc., after Hobet Mining experienced opposition to its operations.² Mountaintop mining involves removing the top of a mountain to extract coal, which produces excess rock, topsoil, and

*Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

¹ *Company Overview of Mingo Logan Coal Company*, BLOOMBERG BUS., <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=90039810> [<http://perma.cc/4EE6-FD9D>].

² *Spruce 1 Mine*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Spruce_1_Mine [<http://perma.cc/SB72-VQFM>].

debris (“spoil”) that “cannot be returned to the mined area.”³ In 1998, Hobet Mining began applying for the necessary permits to discharge those materials, including an application for a permit under Section 404(a) of the Clean Water Act (CWA).⁴ That permit, which was eventually granted to Mingo Logan in 2007 despite concerns from the U.S. Environmental Protection Agency (EPA), authorized Mingo Logan to discharge dredged or fill material into stream segments, including the Pigeonroost and Oldhouse Branches.⁵

In 2009, the Administrator of EPA (the “Administrator”) moved to withdraw the Section 404(a) permit—only two years after the U.S. Army Corps of Engineers (the “Corps”) granted it to Mingo Logan.⁶ EPA took this action based on “new information and circumstances . . . which justif[ied] reconsideration of the permit,” particularly its “concern[] about the project’s potential to degrade downstream water quality.”⁷ EPA claimed that it was authorized to take this action under Section 404(c) of the CWA, which gives the Administrator veto authority for specification of a site “*whenever* he determines” the discharge will have an “unacceptable adverse effect” on identified environmental resources.⁸ No provisions in the CWA or other statute expressly grant EPA the power to revoke *permits* retroactively; it only allows them to revoke the specified disposal site areas.⁹ Mingo Logan filed suit alleging that EPA lacked the authority to revoke its permit after the permit was granted, and even if EPA did have authority to do so, its decision was arbitrary and capricious and therefore invalid.¹⁰ The U.S. Court of Appeals for the District of Columbia’s decision in the resulting case, *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, has sweeping implications for the expanding reach of EPA, but such broad administrative

³ *Mingo Logan Coal Co. v. U.S. Env'tl. Prot. Agency (Mingo Logan I)*, 850 F. Supp. 2d 133, 134 (D.D.C. 2012).

⁴ *Spruce 1 Mine*, *supra* note 2.

⁵ *Mingo Logan I*, 850 F. Supp. 2d at 136–37. Dredge is material that is excavated from a water source. U.S. ENVTL. PROT. AGENCY, EVALUATION OF DREDGED MATERIAL PROPOSED FOR DISCHARGE IN WATERS OF THE U.S.—TESTING MANUAL, at xiv–xv (1998), http://www.epa.gov/sites/production/files/2015-08/documents/inland_testing_manual_0.pdf [<https://perma.cc/5J24-NPZS>]. Fill material means “any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body for any purpose.” *Id.*

⁶ See *Mingo Logan Coal Co. v. U.S. Env'tl. Prot. Agency (Mingo Logan II)*, 714 F.3d 608, 610–11 (D.C. Cir. 2013); *Mingo Logan I*, 850 F. Supp. 2d at 136.

⁷ *Mingo Logan II*, 714 F.3d at 610–11 (quoting Letter from William C. Early, Reg’l Adm’r, Env’tl. Prot. Agency, to Colonel Robert Peterson, Dist. Eng’r, U.S. Army Corps of Eng’rs (Sept. 3, 2009) (available in Joint Appendix on case docket)).

⁸ 33 U.S.C. § 1344(c) (2012) (emphasis added).

⁹ See *Mingo Logan I*, 850 F. Supp. 2d at 140.

¹⁰ See *Mingo Logan II*, 714 F.3d at 609.

authority is justified by the text of the law and the need for the federal government to take immediate action during environmental crises.¹¹

I. FACTS AND PROCEDURAL HISTORY

In June 1999, Mingo Logan's predecessor applied for a permit to discharge material "into four West Virginia streams and their tributaries."¹² Section 404 of the CWA gives the Secretary of the Army (the "Secretary"), acting through the Corps, authority to grant permits to discharge dredged or fill material.¹³ After the Corps prepared a draft Environmental Impact Statement in 2002 that assessed the comprehensive effect of the mining operation, the EPA expressed concern that even the best mountaintop mining practices yield "significant and unavoidable environmental impacts" that the Corps did not adequately address.¹⁴ EPA, however, did not pursue a Section 404(c) objection at the time.¹⁵ That Section authorizes the Administrator, after consultation with the Corps, to veto the Corps' disposal site specification "whenever he determines" that the discharge will have an "unacceptable adverse effect on identified environmental resources."¹⁶

The Corps issued a Section 404 permit to Mingo Logan, effective from January 22, 2007 through December 31, 2031.¹⁷ The permit expressly advised that the Corps could reevaluate its decision at any time, and that it could subsequently suspend, modify, or revoke the permit.¹⁸ The permit, however, made no mention of any future action allowed by EPA.¹⁹

¹¹ See *infra* notes 92–106 and accompanying text (noting that while EPA's authority to essentially revoke permits might have negative implications such as a chilling effect in industry, the need for EPA's expertise to protect our environment outweighs those negative implications).

¹² *Mingo Logan II*, 714 F.3d at 610. Mingo Logan initially applied for a permit to discharge material into the Right Fork of the Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and White Oak Branch. *Mingo Logan I*, 850 F. Supp. 2d at 135.

¹³ *Mingo Logan II*, 714 F.3d at 610 n.1.

¹⁴ *Id.* at 610 (quoting Letter from Donald S. Welsh, Reg'l Adm'r, Env'tl. Prot. Agency, to Ginger Mullins, Chief, U.S. Army Corps of Eng'rs (June 16, 2006) (available in Joint Appendix on case docket)). An Environmental Impact Statement is a document that EPA "requires a federal agency to produce before undertaking a major project or legislative proposal so that better decisions can be made about the positive and negative environmental effects of an undertaking." *Environmental-Impact Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁵ *Mingo Logan II*, 714 F.3d at 610 (quoting Email from William Hoffman, Env'tl. Prot. Agency, to Teresa Spagna, U.S. Army Corps of Eng'rs (Nov. 2, 2006, 03:17 PM) (available in Joint Appendix on case docket)) ("[W]e have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint . . .").

¹⁶ *Id.*; see also 33 U.S.C. § 1344(c) (2012) (describing procedure for withdrawal of specification site).

¹⁷ *Mingo Logan II*, 714 F.3d at 610.

¹⁸ *Id.*

¹⁹ *Id.*

On September 3, 2009, EPA requested that the Corps “use its discretionary authority . . . to suspend, revoke or modify” Mingo Logan’s permit to discharge dredged and/or fill material, citing “new information and circumstances . . . which justifi[ed] reconsideration of the permit.”²⁰ EPA was particularly concerned “about the project’s potential to degrade downstream water quality.”²¹ Despite the Corp’s dismissal of the request, EPA stated that it intended to use its veto power under Section 404(c) of the CWA and regulations in Part 213 of Title 40 of the Code of Federal Regulations.²² EPA proceeded to issue a public notice of a “Proposed Determination” on April 2, 2010, to withdraw or restrict the use of certain rivers and tributaries for the discharge of dredged and/or fill material from the project site.²³ EPA then issued a “Recommended Determination” on September 24, 2010, to withdraw two rivers and their tributaries from the specification.²⁴ On January 13, 2011, EPA adopted the Recommended Determination as its “Final Determination.”²⁵

Mingo Logan filed a claim in the U.S. District Court for the District of Columbia challenging EPA’s authority to revoke the three-year-old permit and asserting that the Final Determination was *ultra vires* and arbitrary and capricious.²⁶ The district court granted judgment to Mingo Logan on cross-

²⁰ *Id.* at 610–11 (quoting Letter from William C. Early to Colonel Robert Peterson, *supra* note 7).

²¹ *Id.* at 611 (quoting Letter from William C. Early to Colonel Robert Peterson, *supra* note 7).

²² *Id.* (citing Letter from William C. Early, Reg’l Adm’r, Env’tl. Prot. Agency, to Colonel Robert Peterson, Dist. Eng’r, U.S. Army Corps of Eng’rs (Oct. 16, 2009) (available in Joint Appendix on case docket)). 40 C.F.R. § 231 states that “the procedures to be followed by the Environmental Protection agency in prohibiting or withdrawing the specification, or denying, restricting, or withdrawing the use for specification, of any defined area as a disposal site for dredged or fill material pursuant to section 404(c) of the Clean Water Act . . .” 40 C.F.R. § 231.1 (2015).

²³ *Mingo Logan II*, 714 F.3d at 610–11.

²⁴ *Id.* at 611. A recommended determination is a document prepared by EPA’s Regional Administrator or his designee that demonstrates EPA’s intention to restrict or prohibit a site based on unacceptable adverse effects that are likely to occur. *Spruce No. 1 Mine 404(c) Frequent Questions*, U.S. ENVTL. PROT. AGENCY, <http://www3.epa.gov/region03/mnttop/spruce1qa.html> [<http://perma.cc/PC9H-P989>]. Prior to issuing a recommended determination, the EPA Regional Administrator must issue a proposed recommendation notifying the public that it is considering restricting or prohibiting a site, and it must allow for public comments on the subject. *Id.*

²⁵ *Mingo Logan II*, 714 F.3d at 611. A final determination “represents the last step of EPA’s Section 404(c) process,” and involves “affirming, modifying, or rescinding the recommended determination.” *Spruce No. 1 Mine 404(c) Frequent Questions*, *supra* note 24.

²⁶ *Mingo Logan II*, 714 F.3d at 611. Black’s Law Dictionary defines “*ultra vires*” as “[u]nauthorized; beyond the scope of power allowed or granted by . . . law.” *Ultra Vires*, BLACK’S LAW DICTIONARY (10th ed. 2014). An “arbitrary and capricious” challenge is brought under the Administrative Procedure Act (“APA” or the “Act”). 5 U.S.C. § 706(2)(A) (2012). The Act prescribes the procedures for federal agency action. *Id.* § 706. Section 706(2)(A) of the APA states: “The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious.” *Id.* § 706(2)(A). An agency taking action without providing

motions for summary judgment.²⁷ The court held that EPA “exceeded its authority under section 404(c) of the CWA when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by the Corps under section 404(a).”²⁸ EPA appealed, and the Corps joined EPA’s brief.²⁹ The U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that EPA did possess post-permit withdrawal authority, and remanded the case for consideration of Mingo Logan’s remaining challenges.³⁰ On remand, the district court denied Mingo Logan’s remaining motions for summary judgment.³¹

II. LEGAL BACKGROUND

The Clean Water Act (CWA) “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.”³² The U.S. Environmental Protection Agency (EPA) is the agency delegated to administer the CWA.³³ Under the CWA, EPA has implemented various pollution control programs, such as setting wastewater standards for industries and water quality standards for all contaminants in surface waters.³⁴ CWA prohibits the discharge of any pollutant from a point source into navigable waters without a permit.³⁵ Industrial and municipal facilities must also obtain permits if they discharge pollutants directly into surface waters.³⁶

sufficient reasoning for taking that action constitutes arbitrary and capricious action pursuant to the APA. *See id.*; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²⁷ *Mingo Logan I*, 850 F. Supp. 2d 133, 134 (D.D.C. 2012).

²⁸ *Id.*; see 33 U.S.C. § 1344(a), (c) (2012).

²⁹ *Mingo Logan II*, 714 F.3d at 611.

³⁰ *Id.* at 609; *Mingo Logan Coal Co. v. U.S. Env'tl. Prot. Agency (Mingo Logan III)*, 70 F. Supp. 3d 151, 154 (D.D.C. 2014).

³¹ *Mingo Logan III*, 70 F. Supp. 3d at 154–55.

³² Clean Water Act, 33 U.S.C. §§ 1251–1387; *Summary of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/laws-regulations/summary-clean-water-act> [<http://perma.cc/A9RN-UP2Y>].

³³ 33 U.S.C. § 1251(d).

³⁴ *Id.* §§ 1251–1274; see *Summary of the Clean Water Act*, *supra* note 32.

³⁵ 33 U.S.C. § 1311(a) (“Except as in compliance with [CWA] the discharge of any pollutant by any person shall be unlawful.”); see *Summary of the Clean Water Act*, *supra* note 32. The regulations define “point source” as:

[A]ny discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.

40 C.F.R. § 122.2 (2015).

³⁶ See *Summary of the Clean Water Act*, *supra* note 32.

The CWA provides that the discharging of pollutants is unlawful except as in compliance with specifically enumerated CWA provisions, including Section 404.³⁷ Under Section 404(a) of the CWA, the Secretary of the Corps (the “Secretary”) is authorized to issue permits allowing permittees to discharge dredged or fill material “at specified material sites.”³⁸ Under Section 404(b), the sites are specified by the Secretary using guidelines developed by the Administrator of EPA (the “Administrator”) and the Secretary.³⁹ Section 404(b) expressly designates the Secretary’s authority in Section(a) subject to 404(c).⁴⁰ Section 404(c) authorizes the Administrator “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site” and to “deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect” on identified environmental resources.⁴¹ Before making such a determination, the Administrator must consult with the Secretary and publicly state his findings and reasons for the determination.⁴²

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. was a landmark United States Supreme Court decision that set forth the standard by which a court must evaluate an agency’s interpretation of its own statute.⁴³ *Chevron* involved an interpretation of the Clean Air Act Amendments of 1977 (the “amendments”), which imposed certain requirements on states that had not achieved national air quality standards established by EPA (“nonattainment states”).⁴⁴ Under the amendments, nonattainment states had to obtain a permit for any new or modified major stationary source of pollution.⁴⁵ In 1980, EPA adopted a rule that required a new permit for a stationary source if any one part of the stationary source was replaced or modified.⁴⁶ In 1981, however, EPA adopted an alternative rule that exempted a stationary source if that source, in the aggregate, was not increasing its emission of pollution.⁴⁷ The question for the Court was whether EPA’s in-

³⁷ 33 U.S.C. § 1311(a); *Mingo Logan II*, 714 F.3d 608, 610 (D.C. Cir. 2013).

³⁸ 33 U.S.C. § 1344(a); *Mingo Logan II*, 714 F.3d at 610.

³⁹ 33 U.S.C. § 1344(b); *Mingo Logan II*, 714 F.3d at 610.

⁴⁰ 33 U.S.C. § 1344(b); *Mingo Logan II*, 714 F.3d at 610.

⁴¹ 33 U.S.C. § 1344(c).

⁴² *Id.*

⁴³ 467 U.S. 837 (1984); see *Chevron, U.S.A. v. Natural Res. Def. Council*, U.S. DEP’T OF JUSTICE [hereinafter *Chevron, U.S.A.*], <http://www.justice.gov/enrd/chevron-usa-v-natural-res-def-council> [<http://perma.cc/8ZB5-TRWY>].

⁴⁴ *Chevron*, 467 U.S. at 839–40; see Clean Air Act Amendments of 1977, 42 U.S.C. § 7491(a)(1) (2012).

⁴⁵ *Chevron*, 467 U.S. at 839–40.

⁴⁶ *Id.* at 857.

⁴⁷ See *id.* at 857–58.

interpretation of the amendments was a permissible construction of the statutory language.⁴⁸ The Supreme Court, applying a two-part test, ruled in favor of EPA.⁴⁹

The *Chevron* two-part test has become the benchmark standard for determining whether an agency's interpretation of its enabling statute is permissible.⁵⁰ First, the court must determine whether "Congress has directly spoken to the precise question at issue."⁵¹ "If the intent of Congress is clear, that is the end of the matter."⁵² If the statute is "silent or ambiguous" with respect to the specific issue, however, the court must then consider whether the agency's interpretation is reasonable.⁵³

In almost every major case since the *Chevron* decision, courts have affirmed agencies' interpretations of their organic statutes if the court reaches the second step.⁵⁴ Therefore, whether the language of the statute is clear or not will almost certainly determine the case.⁵⁵ Courts differ as to how to determine whether Congress's intent was in fact clear.⁵⁶ Courts may determine the intent of Congress by analyzing "the statute's text, structure, purpose, and legislative history."⁵⁷ Courts may also only look at the plain statutory text.⁵⁸

The results of many legal questions ultimately depend on how judges apply the various tools of statutory interpretation, for which there are many.⁵⁹ The Supreme Court has not provided lower courts with a clear path

⁴⁸ *Id.* at 859.

⁴⁹ *Id.* at 842–43, 866.

⁵⁰ *Chevron*, U.S.A., *supra* note 43; *see Chevron*, 467 U.S. at 842–43.

⁵¹ *Chevron*, 467 U.S. at 842.

⁵² *Id.*

⁵³ *See id.* at 843.

⁵⁴ *See* Marianne Kunz Shanor, Note, *Administrative Law—The Supreme Court's Impingement of Chevron's Two-Step*; *Energy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009), 10 WYO. L. REV. 537, 552–53 (2010) ("[T]he Supreme Court only twice invalidated an agency's construction of a statute relying solely on step two of the [*Chevron*] doctrine."). *But see* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484–85 (2001) (finding EPA's interpretation of an ambiguous statute unreasonable because EPA's interpretation would have rendered a subpart of the statute nugatory).

⁵⁵ Shanor, *supra* note 54, at 553.

⁵⁶ *Compare* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (considering tobacco legislation as a whole to determine whether or not Congress directly spoke to the issue of whether or not FDA had authority to regulate tobacco under the Food and Drug Administration Act), *with* *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) (finding regulatory language complex but not ambiguous), *and* *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 43 (1990) (White, J., dissenting) (finding fault with the majority opinion's conclusion that the Paperwork Reduction Act was clear and unambiguous because its reasoning required more than ten pages to explain why it was clear and unambiguous).

⁵⁷ *Mingo Logan I*, 850 F. Supp. 2d 133, 140 (D.D.C. 2012).

⁵⁸ *See* *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 108 (2007).

⁵⁹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396–406 (1950).

for applying these tools.⁶⁰ For example, *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates* held that “a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme”⁶¹ *Burlington Northern & Santa Fe Railway Co. v. White* held that “where words differ . . . ‘Congress acts intentionally and purposely in the disparate inclusion or exclusion’” of those words.⁶² *Corley v. United States* applied “one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”⁶³ The result of a case, therefore, depends in large part on which canons of statutory interpretation a court applies, but which canons to apply remains unclear.⁶⁴

III. ANALYSIS

In *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, the U.S. Court of Appeals for the District of Columbia Circuit held that the U.S. Environmental Protection Agency (EPA) did not lack statutory authority under the Clean Water Act (CWA) to withdraw a proposal site specification post-permit.⁶⁵ The court came to this conclusion by looking at the scheme of the permitting process and the express language of Section 404(c) of the CWA.⁶⁶ The court’s decision has far-reaching implications for the expanding authority of EPA, but such expansion is justified given the text of the law and the need for the federal government to take immediate action during environmental crises.⁶⁷

The D.C. Circuit found that the language of the CWA unambiguously expressed Congress’s intent, thus ending the two-step inquiry articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* at step

⁶⁰ Compare *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (presuming that where Congress uses different words, it does so intentionally), and *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (looking to the entire statutory scheme to interpret the meaning of a term or phrase), with *Corley v. United States*, 556 U.S. 303, 304 (2009) (treating every word of a statute as though Congress included it intentionally).

⁶¹ *United Sav. Ass'n of Tex.*, 484 U.S. at 371.

⁶² 548 U.S. at 63.

⁶³ *Mingo Logan II*, 714 F.3d 608, 614 (D.C. Cir. 2013) (quoting *Corley*, 556 U.S. at 314 (internal brackets and quotation marks omitted)).

⁶⁴ See generally *id.* at 612–16; *Mingo Logan I*, 850 F. Supp. 2d 133, 138–53 (D.D.C. 2012); Llewellyn, *supra* note 59, at 396–406.

⁶⁵ *Mingo Logan II*, 714 F.3d at 616; see 33 U.S.C. § 1344(c) (2012).

⁶⁶ *Mingo Logan II*, 714 F.3d at 612–14; see 33 U.S.C. § 1344(c).

⁶⁷ See *infra* notes 92–106 and accompanying text (noting that while EPA’s authority to essentially revoke permits might have negative implications such as a chilling effect in industry, the need for EPA’s expertise to protect our environment outweighs those negative implications, and Congress gave EPA that authority).

one.⁶⁸ This conclusion was based on the following logic: Section 404 of the CWA authorizes the United States Corps of Engineers (the “Corps”)—not EPA—to issue permits to discharge dredged or fill material.⁶⁹ Despite this authority of the Corps, Congress granted EPA “a broad environmental ‘backstop’ authority” over site selection.⁷⁰ Section 404 prescribes no time limit for the Secretary of EPA to withdraw the permit, but rather “expressly empowers him to prohibit, restrict, or withdraw the specification ‘*whenever*’ he makes a determination that the statutory ‘unacceptable adverse effect’ will result.”⁷¹ Citing the Oxford English Dictionary, the court interpreted “whenever” to mean “at *any* time.”⁷² “Thus, the unambiguous language of Section 404(c) manifests the Congress’s intent to confer on EPA a broad veto power extending beyond the permit issuance.”⁷³ The court further underscored Congress’s intent by noting that “withdrawal” is “a term of retrospective application.”⁷⁴ Therefore, EPA withdrawal can “*only* be exercised post-permit,” and it would not make sense for them to exercise their withdrawal authority at any other time.⁷⁵ Using this reasoning, the court determined that Congress had directly spoken to the precise question at issue, and therefore, it did not proceed to the second step of the *Chevron* test.⁷⁶

The district court, however, found that the text of 404(c) was at best ambiguous.⁷⁷ The district court stated that EPA’s purported specification withdrawal authority “does not make a great deal of sense since under the statute, EPA doesn’t ‘specify’ in the first place—it is only empowered to prohibit or decline to prohibit the Corps from doing so.”⁷⁸ Therefore, “it is not clear how . . . EPA could ‘withdraw’ a decision it has not made.”⁷⁹ While the district court found there was some language in section 404(c) that could be considered ambiguous (thus rendering necessary *Chevron* analysis at step two), it also found that neither the statute as a whole, nor the legislative history, supported EPA’s argument that it could withdraw its specification.⁸⁰

⁶⁸ *Mingo Logan II*, 714 F.3d at 612.

⁶⁹ *Id.*; see 33 U.S.C § 1344.

⁷⁰ *Mingo Logan II*, 714 F.3d at 612; see 33 U.S.C § 1344(c).

⁷¹ 33 U.S.C § 1344(c); *Mingo Logan II*, 714 F.3d at 613.

⁷² *Mingo Logan II*, 714 F.3d at 613 (describing the English Oxford Dictionary’s definition of “whenever”).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 612.

⁷⁷ *Mingo Logan I*, 850 F. Supp. 2d 133, 134 (D.D.C. 2012).

⁷⁸ *Id.* at 140.

⁷⁹ *Id.*

⁸⁰ *Id.* at 142–46.

The district court's primary problem with EPA's interpretation of its withdrawal authority was that EPA confused its role with the Corps' role in the permitting process.⁸¹ EPA and the Corps are purported to have separate and distinct roles, but EPA conflates its role with the Corps' by treating EPA's specification authority the same as the Corps' permitting authority.⁸² EPA's specification of the disposal site is based on its expertise concerning environmental impact, and the Corps' permitting authority is based on its engineering expertise.⁸³ By treating its specification authority like the Corps' permitting authority, EPA acted outside of its statutory confines.⁸⁴

At step two of the *Chevron* test, the district court found that EPA's interpretation was unreasonable.⁸⁵ First, it found EPA's interpretation "illogical and impractical" because EPA simultaneously claimed that (1) it did not revoke a permit (it only withdrew a specification), and (2) the withdrawal of the specification effectively revoked the permit.⁸⁶ Second, the district court found that EPA's interpretation was unreasonable because it would create uncertainty for a system "expressly intended to provide finality."⁸⁷ The district court reasoned that industry would be less willing to lend and invest if permits could be revoked retroactively.⁸⁸ This analysis is understandable; an individual could incur substantial costs relying on an issued permit, only to see that permit withdrawn a year later.⁸⁹

The circuit court dismissed the district court's conclusions, relying heavily on the text of Section 404 and finding no inconsistencies between Section 404 and the permitting scheme.⁹⁰ In fact, the circuit court scarcely mentioned the policy implications addressed by Mingo Logan and the district court.⁹¹

⁸¹ *Id.* at 143–47.

⁸² *Id.*

⁸³ See Jennifer L. Dusenberry, Comment, *Undermining the Clean Water Act: One Court's Attack on Another Safeguard for America's Waters*, 80 TENN. L. REV. 585, 595 (2013).

⁸⁴ See 33 U.S.C. § 1344 (2012); *Mingo Logan I*, 850 F. Supp. 2d at 147.

⁸⁵ See *Mingo Logan I*, 850 F. Supp. 2d at 152. The district court accorded EPA less than full *Chevron* deference because EPA and the Corps jointly administered the statute that EPA was interpreting. See 33 U.S.C. § 1344(c) (authorizing EPA to veto specification only after consultation with the Corps); *Mingo Logan I*, 850 F. Supp. 2d at 150. The court suggested that it would apply *Skidmore* deference, which is "'obviously less than *Chevron*,' but a 'non-trivial boost.'" *Id.* (quoting *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253–54 (D.C. Cir. 2003)); see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁸⁶ *Mingo Logan I*, 850 F. Supp. 2d at 152.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Dusenberry, *supra* note 83, at 609.

⁹⁰ See *Mingo Logan II*, 714 F.3d 608, 615 (D.C. Cir. 2013).

⁹¹ See *id.* at 612–16.

Although there are negative implications associated with EPA's pseudo-permit revocation authority, it is not the court's role to solve them.⁹² It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."⁹³ Further, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."⁹⁴ It is not the court's responsibility to determine how agencies operate; rather, it is for Congress to decide.⁹⁵

If the courts were to involve themselves in the legislative process and strip EPA of its pseudo-permit revocation authority, it would be bad policy.⁹⁶ The safeguard contained within the 404(c) provision is necessary for the welfare of the public and the environment.⁹⁷ For example, in 1981, EPA was able to use its 404(c) veto authority to restrict part of a permit authorizing the placement of fill into 291 acres in North Miami for the development of a public recreation facility.⁹⁸ EPA exercised its veto power only after learning that North Miami modified its Corps' permit to allow it to use solid waste and garbage as the fill material.⁹⁹ EPA determined that such fill material would have unacceptable adverse effects on wildlife and the environment based on observed increased ammonia levels.¹⁰⁰ Without the authority for EPA to revisit its specification site permit, EPA could not have prevented such adverse effects.¹⁰¹

⁹² See *City of Arlington v. FCC*, 133 S.Ct. 1863, 1858 (2013); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (statutory language should be conclusive unless there is clear legislative history implying otherwise).

⁹³ *GTE Sylvania*, 447 U.S. at 108.

⁹⁴ *Id.*

⁹⁵ See *City of Arlington*, 133 S.Ct. at 1858.

⁹⁶ Shae Blood, *Retroactive Environmental Justice: Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 41 *ECOLOGICAL Q.* 589, 593 (2014); Dusenberry, *supra* note 83, at 609.

⁹⁷ See Blood, *supra* note 96, at 593; Dusenberry, *supra* note 83, at 609.

⁹⁸ Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act, 46 Fed. Reg. 10,203, 10,203 (Feb. 2, 1981); Proposed Determination to Prohibit, or Deny Specification, or Use for Specification, of an Area as a Disposal Site, 45 Fed. Reg. 51,275, 51,276 (Aug. 1, 1980); Amy Oxley, Comment, *No Longer Mine: An Extensive Look at the Environmental Protection Agency's Veto of the Section 404 Permit Held by the Spruce No. 1 Mine*, 36 *S. ILL. U. L.J.* 139, 154 (2011).

⁹⁹ Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act, 46 Fed. Reg. at 10,203; Proposed Determination to Prohibit, or Deny Specification or Use for Specification, of an Area as a Disposal Site, 45 Fed. Reg. at 51,276; Oxley, *supra* note 98, at 154.

¹⁰⁰ Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act, 46 Fed. Reg. at 10,203; Proposed Determination to Prohibit, or Deny Specification or Use for Specification, of an Area as a Disposal Site, 45 Fed. Reg. at 51,276.

¹⁰¹ See Oxley, *supra* note 98, at 154

Although the district court was correct in distinguishing the separate roles of EPA and the Corps, it failed to resolve the resulting problem: the Corps would be responsible for decision-making only suitable for EPA's expertise.¹⁰² It is illogical to relinquish EPA's regulatory powers simply because it had already specified disposal sites.¹⁰³ If new information arises that makes a site unsuitable, EPA should have the authority to make the decision to withdraw a permit, not the Corps, which has no expertise in environmental protection.¹⁰⁴ Congress unambiguously granted EPA that authority, and there was reason for it.¹⁰⁵ The argument that uncertainty will chill industry has merit, but the alternative of leaving industry unregulated is much more risky.¹⁰⁶

CONCLUSION

In *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, the U.S. Court of Appeals for the District of Columbia Circuit upheld the U.S. Environmental Protection Agency's (EPA) interpretation of its authority under Section 404 of the Clean Water Act, which permits it to withdraw the specification of any defined area as a disposal site retroactively whenever it determines that the discharge will have an "unacceptable adverse effect" on identified environmental resources. This decision essentially gives EPA the authority to revoke discharge permits at any time, no matter the circumstances of the permitting process. Despite the unintended consequences of this interpretation—including confusing the roles of various agencies and cooling industry from lending and investing due to uncertainty—congressional intent should not be replaced by a court's judgment. There are strong policy reasons for giving EPA the authority to take quick action when new information is available, and unless Congress changes the language in Section 404, courts should not interfere.

¹⁰² See Dusenberry, *supra* note 83, at 595.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *supra* notes 87–89, 96–104 and accompanying text.

¹⁰⁶ Blood, *supra* note 96, at 589.