NO. _____

In the
Supreme Court of the United States

MINGO LOGAN COAL COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 404 of the Clean Water Act ("CWA") gives the Army Corps of Engineers ("Corps") authority to issue permits to discharge dredged or fill material into navigable waters, as well as authority to enforce, modify, and revoke those permits. 33 U.S.C. § 1344. In contrast to the Corps' primary role in the permitting process, section 404(c) gives the Environmental Protection Agency ("EPA") the limited subsidiary ability to "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" for such dredged or fill material *before* the Corps has issued a permit. *Id.* § 1344(c).

In this case, EPA attempted—for the first time ever—to nullify an existing, Corps-issued permit by purporting to "withdraw" the site specifications *years after* the permit had been issued. While the Corps' authority to revoke duly-issued permits is carefully circumscribed to promote compliance with permits and protect reliance interests, EPA's claimed authority to withdraw specifications is essentially uncabined. The District Court concluded that EPA's assertion of a sweeping power to effectively invalidate permits duly-issued by the Corps was inconsistent with the CWA's text, structure, and legislative history. The Court of Appeals reversed only by reading section 404(c) in a vacuum.

The question presented is whether, under section 404(c) of the CWA, EPA has the uncabined authority to withdraw disposal site specifications years after the Corps has issued a permit, thereby effectively nullifying a permit properly issued by the Corps.

PARTIES TO THE PROCEEDING

Mingo Logan Coal Company is Petitioner here and was Plaintiff-Appellee below. United States Environmental Protection Agency is Respondent here and was Defendant-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Mingo Logan Coal Company is a wholly-owned subsidiary of Arch Coal, Inc. No other publicly held company owns 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

The authority asserted by the Environmental Protection Agency ("EPA") in this case is as dangerous as it is unprecedented. EPA claims nothing less than a unilateral power to nullify, at any time and without considering weighty reliance interests, a Clean Water Act ("CWA") permit issued years earlier by a different agency, even though the permitting agency which possesses a carefully circumscribed authority to revoke or modify the permit has found no reason to do so.

EPA's assertion of a sweeping authority to nullify permits duly-issued by the Corps is not just breathtaking. It is also—as the District Court correctly concluded—wrong. Congress gave the Army Corps of Engineers ("Corps") the principal permitting authority for discharges of dredged or fill material under section 404; EPA's role is limited and secondary. As one would expect, the Corps has authority not only to issue permits, but to revoke or modify those permits in certain circumstances. And as one would expect in light of the enormous reliance interests generated by a duly-issued Corps permit, the circumstances in which a permit may be modified or revoked are carefully circumscribed. Yet the D.C. Circuit granted an agency with a subsidiary role the power to eviscerate the Corps' permit by withdrawing the specification *ex post facto*. That result makes no sense. It ignores basic assumptions about how the administrative state and a unitary executive function. The court reached this result through a narrow focus on section 404(c) in isolation. But read in the context of the overall regime, that provision

clearly grants EPA a modest subsidiary role in the process that culminates in a permit decision by the Corps. It does not remotely grant EPA a retroactive trump card that trivializes the Corps' authority and destroys the regulated community's ability to rely on the permit. Congress does not generally "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and did not do so here.

EPA's claimed authority to nullify existing permits is a question of paramount importance. By holding that EPA may withdraw site specifications years after the Corps has issued a permit, the decision below destroys regulatory certainty and overturns the settled expectations of the regulated community. EPA has an important seat at the table during the permitting process, but the ultimate decision of the Executive Branch is reflected in the Corps' decision to issue a permit. The decision below allows EPA—the subsidiary regulator—to render years of development and millions of dollars in investments for naught based on nothing more than a reassertion of concerns that did not carry the day in the inter-agency process. Granting EPA this unprecedented power will chill private investment in critical sectors of the economy, where some $220 billion each year is contingent upon section 404 permits. EPA's self-aggrandizement also undermines the CWA's carefully crafted scheme of cooperative federalism. And the D.C. Circuit's decision is in substantial tension with this Court's caselaw recognizing the Corps' primacy in the section 404 permitting process and the need for clear lines of authority when it comes to these critical permits.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 714 F.3d 608 and reproduced at App.1-17. The opinion of the District Court is reported at 850 F. Supp. 2d 133 and reproduced at App.20-65.

JURISDICTION

The Court of Appeals issued its opinion on April 23, 2013, App.1, and denied rehearing en banc on July 25, 2013, App.18. On September 20, 2013, the Chief Justice extended the time for filing a petition for certiorari until November 13, 2013. *See* No. 13A286. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the CWA, 33 U.S.C. § 1344, is reproduced in its entirety at App.66. Section 404(c) provides in pertinent part:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, 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.…

STATEMENT OF THE CASE

A. Section 404 of the Clean Water Act.

The CWA generally makes it unlawful to discharge a pollutant into "navigable waters" without a permit. Most pollutants are governed by the National Pollutant Discharge Elimination System ("NPDES") under section 402 of the Act, in which States and EPA play a significant role. Section 404, however, makes the Corps the sole federal agency responsible for "issu[ing] permits … for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). It was eminently reasonable for Congress to assign this function to the Corps, which had nearly a century of experience regulating dredge and fill activities pursuant to the Rivers and Harbors Acts of 1890, 1899, and 1905. *See* 33 U.S.C. §§ 401, 403, 419.

The Corps also has sole authority to modify, suspend, or revoke the permits it issues in certain narrow and carefully defined circumstances. 33 C.F.R. § 325.7. When deciding whether to alter an existing permit, the Corps considers a range of factors, including permittee compliance, whether any "circumstances … have changed since the permit was issued," "any significant objections to the authorized activity which were not earlier considered," and whether modification would "adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit." *Id.* § 325.7(a).

In contrast to the Corps' lead role in the permitting process, Congress gave EPA a subsidiary and carefully circumscribed role. For example, EPA

promulgates guidelines regarding the selection of disposal sites (which are ultimately applied by the Corps), 33 U.S.C. § 1344(b)(1), and may provide comments to the Corps during the permitting process, 33 C.F.R. pt. 325. EPA may also "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" if it determines that "the discharge of such materials into such area will have an unacceptable adverse effect" on the environment. 33 U.S.C. § 1344(c). Although EPA has limited authority over the specification of disposal sites *during the permitting process*, nothing in the statute grants EPA authority to withdraw, revoke, or modify permits after they have been issued by the Corps. EPA on several occasions has withdrawn site specifications *before* a permit was issued, but—until this case—it had never attempted to nullify an existing permit. App.59 n.14.

B. The Corps Issues, and EPA Purports To Revoke, Mingo Logan's Permit.

Surface coal mining involves the removal of soil and rock—called "spoil" or "overburden"—to expose coal deposits. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 186, 189-90 (4th Cir. 2009). When coal extraction ends, some overburden is used to recontour the terrain. But in most instances excess overburden must be placed in adjacent hollows. *See id.* at 189-90. These hollows may contain streams that qualify as "navigable waters" under the CWA. As a result, surface mining often requires a section 404 permit.

In 1999, Mingo Logan's predecessor applied for such a permit for the Spruce No. 1 coal mine in West

Virginia. Over the next several years, the company worked closely with the Corps, EPA, and State of West Virginia throughout an exhaustive environmental review process. Mingo Logan spent millions of dollars preparing the necessary studies and agreed to a number of mitigation measures, including drastically reducing the proposed scale of the operation, reducing the acreage of affected hollows, and committing to stream creation, restoration, and enhancement. C.A.App.17.[1]

In March 2006, the Corps issued a 1600-page draft Environmental Impact Statement concluding that the Spruce mine "would only contribute minimally to cumulative impacts on surface water quality." C.A.App.963-64. EPA offered a number of comments, which the Corps addressed at length. Apparently satisfied with the Corps' resolution, EPA announced that "we have no intention of taking our Spruce Mine concerns any further." C.A.App.982.

After nearly a decade of study, the Corps in January 2007 issued a permit for the discharge of fill material into several streams at the Spruce site. The permit recited the Corps' authority to modify or revoke the permit under 33 C.F.R. § 325.7, *see* C.A.App.986, but did not suggest that EPA could alter the permit under section 404(c).

Nearly three years (and a presidential election) later, in September 2009 EPA asked the Corps to revoke the permit in light of purportedly new

[1] "C.A.App." refers to the Joint Appendix filed in the Court of Appeals.

information. C.A.App.941. The Corps refused. Applying its longstanding criteria for permit modification or revocation, *see* 33 C.F.R. § 325.7, the Corps concluded that Mingo Logan had fully complied with its permit and that no new information justified the extraordinary step of revocation. C.A.App.949-52.

EPA then attempted to take matters into its own hands. In March 2010, EPA announced that it intended to "veto" the permit under section 404(c). C.A.App.288-310. EPA's Proposed Determination expressed concern that Mingo Logan's permit-compliant operations might degrade "on-site and downstream water quality." C.A.App.288. In response, the Corps reiterated that EPA had "no basis to take any corrective action regarding the 404 permit [it] issued." C.A.App.937. Moreover, under section 402 of the CWA, States have primary responsibility for regulating water quality within their borders. West Virginia emphasized that "[n]one of the information" EPA cited "would cause [the State] to change the water quality certification that it issued for this project." C.A.App.946. Despite these objections, EPA issued a Final Determination in January 2011 purporting to "withdraw" two disposal sites. C.A.App.775. EPA's action, if valid, would curtail authorized operations at Spruce by 88%. App.28-29.

C. Proceedings Below.

On February 28, 2011, Mingo Logan filed a complaint in federal District Court in Washington, D.C., arguing that EPA's actions exceeded its statutory authority and were arbitrary and

capricious. On March 23, 2012, the District Court ruled that EPA "exceeded its authority under section 404(c) of the [CWA] when it attempted to invalidate an existing permit." App.21.

The District Court held at *Chevron* step one that the "stunning power" claimed by EPA "is not conferred by section 404(c)" and is "contrary to the language, structure, and legislative history of section 404 as a whole." App.32. The court stressed that EPA's actions "had the legal effect of invalidating Mingo Logan's permit for the streams that are no longer specified," and nothing in the statute "confer[s] the express authority to undermine an existing permit." App.36-38. It also found that the CWA's legislative history reinforced its textual analysis, and that "EPA's position is inconsistent with what Congress had in mind" when it enacted section 404. App.45.

The court further concluded that EPA's interpretation would be impermissible at *Chevron* step two because it "sow[s] a lack of certainty into a system that was expressly intended to provide finality." App.62. EPA's claimed veto power would "leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit." App.62. The District Court also found it telling that, in the "thirty-plus years" since the CWA was enacted, EPA had "never before invoked its 404(c) powers to review a permit that had been previously duly issued by the Corps." App.58-59 & n.14.

The Court of Appeals reversed. The court limited its focus to section 404(c) and held that this provision grants EPA "a broad veto power extending beyond the permit issuance." App.10. The court concluded that section 404 "grant[s] [EPA] authority to prohibit/deny/restrict/withdraw a specification at *any* time." App.10. The court also rejected Mingo Logan's arguments based on the broader statutory structure and legislative history because the court concluded that the statutory text "unambiguously" supported EPA's interpretation. App.13-14.

Although it rejected Mingo Logan's challenges to EPA's statutory authority, the court remanded for consideration of the claim that EPA's revocation of the Spruce permit was arbitrary and capricious. App.17. Proceedings in the District Court have been held in abeyance pending the Court's resolution of this Petition.

REASONS FOR GRANTING CERTIORARI

By granting EPA a "broad veto power" over permits issued by the Corps, the decision below upends Congress' careful scheme, which gives the Corps primary authority over the section 404 permitting process, and unsettles the expectations of the regulated community, which invests hundreds of billions of dollars in reliance on Corps-issued permits. While EPA has a seat at the table during the permitting process, the decision below grants it an extraordinary ability to render the permit worthless based on the same concerns that failed to carry the day in the inter-agency discussions. Congress could not have intended the section 404 permitting process to work this way. To the

contrary, it gave the Corps the primary role in the permitting process, including the authority to issue permits, which reflect the considered judgment of the unitary executive, and the corresponding power to revoke or modify the permits in limited circumstances. The limited modification or revocation authority requires the Corps to consider factors—such as newly discovered evidence and reliance interests—that reflect the finality presumptively accorded a duly-issued permit. The notion that EPA enjoys an uncabined authority to pull the rug out from under the permitting process *ex post facto* cannot be squared with basic principles of the administrative state and the unitary executive, not to mention the enormous reliance interests generated by the section 404 permitting process. The decision below is important, consequential, and incorrect. It clearly merits this Court's review.

I. The Decision Below Disregards Congress' Explicit Policy Choice To Give The Corps Primary Authority Over The Section 404 Permitting Process.

The D.C. Circuit held that EPA may nullify an existing permit "at *any* time" because section 404(c) authorizes it to withdraw a specification "'whenever'" it finds an "'unacceptable adverse effect.'" App.10. In so doing, the court myopically focused on a single word in isolation from the statutory scheme as a whole. A proper focus on section 404 in its entirety, as well as its legislative history, reveals that Congress clearly intended to give the Corps, not EPA, the lead role in the permitting process. EPA's claimed *post hoc* "veto" power is incompatible with

the statutory text, statutory structure, and Congress' clearly articulated policy goals. Indeed, once the Corps issues a permit, "specifications" cease to exist as separate and distinct legal concepts and are merged into the final permit. Specifications cannot be withdrawn post-permit because they no longer exist post-permit.

A. Section 404's Plain Language Makes Clear That EPA Has No Authority To Revoke an Existing Permit Issued by the Corps.

Section 404 carefully and consistently distinguishes between *specifications*—over which EPA has limited authority—and *permits*, which are the exclusive province of the Corps. Under section 404(a), the Corps "may issue permits" for discharges of fill material "at specified disposal sites." 33 U.S.C. § 1344(a). A permit may be issued only for a "specified" site, and the Corps is responsible for issuing those specifications in the first instance. *Id.* § 1344(b). Section 404(c), in turn, grants EPA limited authority "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site." *Id.* § 1344(c). The D.C. Circuit's holding that EPA has authority to revoke specifications even for *existing* permits, and thereby nullify them, is deeply flawed, for a number of reasons.

1. At the outset, EPA's claimed power to "withdraw" specifications is nothing less than a power to revoke or nullify existing permits issued by the Corps. *See* App.38 (EPA's actions would have "legal effect" of invalidating permit). But section 404

leaves no doubt that Congress intended the Corps, not EPA, to have the lead role in the permitting process. *See Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-77 (2009). Congress gave the Corps, not EPA, the statutory authority to issue permits. 33 U.S.C. § 1344(a). Congress gave the Corps, not EPA, the statutory authority to ensure compliance with those permits. *Id.* § 1344(s). And it is the Corps, not EPA, that has narrow and carefully circumscribed authority to revoke or modify existing section 404 permits. 33 C.F.R. § 325.7.

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Am. Trucking*, 531 U.S. at 468. Here, Congress certainly would have spoken with far greater clarity if it intended to grant EPA the extraordinary power to revoke existing permits issued by the Corps. Discharge permits are central to the entire CWA regulatory regime; indeed, the CWA for the first time made it unlawful to discharge without a permit. That is why permits are addressed extensively throughout the statute. Section 404 uses the word "permit" *eighty-seven* times. But, tellingly, that word does not once appear in section 404(c), which refers only to "specifications." Congress used different terms to refer to different functions to be performed by different agencies at different times, and it must be presumed that it did so deliberately. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006).

Moreover, when Congress assigns primary responsibility to one agency, only a clear

congressional command would allow a court to conclude that Congress has granted another agency the power to nullify the practical effect of the primary agency's action. It is a core principle of the separation of powers—and the *raison d'être* for the structure of the Presidency—that the Executive speaks with one voice. *See Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155 (2010) (criticizing "diffusion of power" among executive officers). To be sure, Congress or the Executive often authorizes an inter-agency process in which the views of different agencies are aired before a final agency action that reflects the considered views of the Executive. But Congress would not have created a counterproductive system in which multiple agencies participate and a lead agency issues a permit, while allowing a subordinate agency to retroactively vitiate the permit by simply reasserting views that did not prevail in the inter-agency process. The resulting permits would be of little value and the inter-agency process designed to produce a single decision of the Executive would be a fruitless exercise. Certainly, a court should not attribute such a strange intent to Congress absent the clearest of statutory commands.

There is nothing remotely resembling such a clear command in the CWA. To the contrary, the CWA clearly provides for inter-agency consultation, *see, e.g.*, 33 U.S.C. § 1344(b) (Corps must apply guidelines developed by EPA); *id.* § 1344(g), (h) (Corps and Fish and Wildlife Service may review EPA's approval of state-administered permit programs); *id.* § 1344(m) (Fish and Wildlife Service entitled to comment on permit applications), but nowhere provides one agency a retroactive trump

card over another agency's final decision. The notion that the same Congress that specifically authorized inter-agency consultation during the permitting process would grant one agency a *sub silentio* veto over another agency's final action strains credulity.

And Congress certainly would not have granted EPA an extraordinary ability to revoke existing permits duly-issued by the Corps without giving the Corps some role or putting some limits on EPA's authority in order to protect reliance interests. It is no accident that the permit-issuing agency is the agency responsible for modifying or revoking its own permits, and that such modification/revocation authority is carefully circumscribed to promote interests in finality and to protect reliance interests. The Corps has promulgated comprehensive regulations outlining the circumstances in which it will modify or revoke an existing permit. *See* 33 C.F.R. § 325.7(a). In making that determination, the Corps will consider whether the permittee has complied with the permit, whether there are changed circumstances, and "any significant objections to the authorized activity which were not earlier considered." *Id.* Critically, the Corps also considers how revocation or modification "would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit." *Id.*

Perhaps the clearest evidence that EPA's claimed collateral veto authority does not exist is the astonishing breadth of the power asserted. According to EPA, it may effectively revoke an existing permit under section 404(c) without regard to the permit

holder's compliance history and legitimate reliance interests, and even if no new information has come to light. EPA can just change its mind. *See* App.60 (EPA's reading of the statute would allow "post permit revocation without limitation"). In short, EPA claims that its power to withdraw specifications under section 404(c) is far *broader* than the Corps' power to modify or revoke an existing permit. In a legal system that values finality, protects reliance interests, and disfavors collateral attack, EPA's claimed authority is a complete outlier.

2. Read in its proper statutory context, section 404(c) does not support, let alone compel, this extraordinary authority. To the contrary, it simply allows EPA to "prohibit" or "withdraw[]" a site specification *before* the Corps has issued a permit. Once the Corps has issued a permit, there are no longer any "specifications" in existence for EPA to withdraw; the specifications are superseded by the issued permit. As the District Court correctly recognized, under section 404 "a permit can only be *issued* for specified areas, but the issued permit does not make reference to 'specification.'" App.42 n.9.

Importantly, section 404 refers to "specifications" exclusively in connection with activities that necessarily take place before the issuance of a permit, and never in connection with post-permit activities. For instance, section 404(a) authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Disposal sites are usually proposed in the public notice that is a key element of the pre-permit process. Needless to say,

one cannot propose sites for the disposal of material after the permit authorizing such disposal has already been issued. Subsection (b) likewise requires "each such disposal site" to "be specified for each such permit" pursuant to guidelines jointly developed by the Corps and EPA. *Id.* § 1344(b). Again, guidelines cannot be applied to proposed disposal sites after the issuance of the permit that allows such disposal.

From the moment the Corps issues a permit, however, there is no further mention of specifications. This is no accident, but reflects a conscious and deliberate congressional choice to limit EPA to pre-permit evaluation. *See Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

For instance, section 404(o) directs that the public shall have ready access to a copy of "each permit issued under this section." 33 U.S.C. § 1344(o). It conspicuously fails to additionally grant access to "a list of specified disposal sites." There is no need to do so, as the issued permit itself indicates where fill material may be disposed. Subsection (p)'s safe harbor likewise provides that "[c]ompliance with a permit" amounts to compliance with the CWA. *Id.* § 1344(p). It does not further require compliance with a freestanding list of specified disposal sites. Nor does that section address the consequences of complying with a permit when the conditions of disposal in the permit itself have been retroactively

and collaterally invalidated by EPA. And section 404(s) authorizes the Corps to issue enforcement orders to those who are "in violation of any condition or limitation set forth in a permit" (not those "in violation of a specification"), *id.* § 1344(s)(1), and imposes civil penalties on those "who violate[] any condition or limitation in a permit" or an enforcement order (not those who "violate a specification"), *id.* § 1344(s)(4). And again, nothing in the statutory regime addresses the consequences of complying with a permit term that has been collaterally attacked by EPA. That omission would be astonishing if the claimed authority existed, but perfectly natural if the conditions of a duly-issued permit govern unless and until modified or revoked by the issuing agency.

The D.C. Circuit concluded that, because section 404 allows EPA to withdraw a specification "'whenever'" it determines that there will be an "'unacceptable adverse effect,'" EPA must have authority "to prohibit/deny/restrict/withdraw a specification at *any* time," even if a permit has already been issued. App.10. But, as the District Court recognized, the word "whenever"—when properly read in context—simply "convey[s] the meaning that the EPA may act 'at such time as' it makes the necessary determination." App.36. In other words, in a statutory regime that did not grant primary authority to a different agency and in a legal regime that did not value finality, "whenever" might mean "whenever, including even after a permit issued." But in the context of section 404 and our legal system, "whenever" means at any time a specification remains a relevant concept, which is to say any time before the permit issues. That is not

just the more logical reading, it is the only permissible reading given that the word "whenever" only relates to EPA's authority over *specifications*. As explained above, specifications only exist during the permitting process. In the context of this statutory scheme a post-permit specification is an oxymoron. And once a permit issues, only the Corps has the authority to modify or revoke it, as even EPA implicitly recognized in approaching the Corps before asserting its own extraordinary unilateral, collateral, and retroactive revocation authority.

3. Longstanding Corps practice in implementing section 404 confirms this straightforward reading of the statutory text. *See United States v. Alaska*, 503 U.S. 569, 583 (1992) (consulting Corps' "practice since the late 1960's" when interpreting Corps' permit power under Rivers and Harbors Act). Corps-issued permits do not refer to disposal site specifications or otherwise suggest that specifications continue to exist once the permit issues. The permits do all the necessary work on their own, laying out in precise detail the permittee's rights and obligations.

This is certainly true of Mingo Logan's permit. The permit nowhere incorporates by reference or otherwise refers to freestanding "specifications." That omission is telling given that the permit does reference two other external documents—a "conditioned water quality certification" and a set of "special conditions," a nine-page document attached to the permit. C.A.App.985, 990-98. The Corps knows how to acknowledge separate instruments that survive permit issuance. It has not done so with respect to specifications.

Instead, the permit directly and in exacting detail identifies the particular waterways into which material is authorized to be discharged, including:

> ephemeral stream segments of the 1st unnamed right tributary of the Right Fork of Seng Camp Creek; Pigeonroost Branch and its 2nd unnamed left tributary, 4th unnamed right tributary, 1st unnamed left tributary of the 4th unnamed right tributary, 3rd unnamed right tributary, 1st unnamed left and right tributaries of the 3rd unnamed right tributary; [and] Oldhouse Branch and its 1st unnamed left and right forks.

C.A.App.984. The permit also includes a comprehensive set of tables that detail the volume of fill that may be deposited, identify the authorized waterways, and measure the impacts in linear feet and acres. C.A.App.987-98. In short, the Corps—like Congress—does not treat site specifications as continuing to exist after a permit is issued, but regards that permit as the complete and entire legal authorization for the holder's activities.

The reason Mingo Logan's permit includes detailed descriptions of the authorized disposal sites is not, as the D.C. Circuit erroneously concluded, because specifications are made "in the permit itself." App.11. Section 404 contemplates that specifications are to be made before, not upon, permit issuance. That is why it provides that "each such disposal site shall be specified *for* each such permit" (not "*in* such permit"), 33 U.S.C. § 1344(b) (emphasis added), and why it directs the Corps to issue permits "after notice

and opportunity for public hearings," *id.* § 1344(a). The public cannot meaningfully comment on a proposed "discharge of dredged or fill material into the navigable waters at specified disposal sites," *id.*, unless it knows what those sites are before permit issuance.

* * *

Properly interpreted in light of the overall statutory scheme, section 404(c) gives EPA the subsidiary but important responsibility to prohibit or withdraw a disposal site "specification" during the pre-issuance deliberative process. But once the inter-agency process results in a permit issued by the Corps, the concept of a "specification" is no longer relevant. The duly-issued permit is what is relevant, and the revocation authority is limited to the issuing agency and to narrow circumstances that acknowledge new information but also protect interests in finality generally, and the reliance interests of the permittee in particular. Nothing in the statutory text remotely grants EPA authority to collaterally attack the duly-issued permit *ex post facto*.

B. Section 404's Legislative History Confirms That EPA Is Limited to Acting Before a Permit Issues.

Section 404(c)'s legislative history confirms what its text plainly indicates: Congress never intended the statute to authorize post-permit EPA vetoes.

When the CWA was being drafted, Congress considered—and explicitly rejected—a proposal that would have granted EPA the primary power over section 404 permits that it now claims. The Senate

version of what would become the CWA proposed to treat dredged and fill material like any other pollutant, and would have given EPA responsibility for issuing permits governing their discharge. S. 2770, 92d Cong. (1971). The House version, in contrast, made EPA generally responsible for regulating most pollutants but established a special regulatory regime for dredged and fill material. H.R. 11896, 92d Cong. (1971). Permits for the discharge of these pollutants were to be issued by the Corps because of its long experience regulating dredge and fill activities. *Id.*

The Conference Committee ultimately opted for the House's approach, emphasizing that "[t]he Conference agreement follows those aspects of the House bill which related to the [Corps'] regulatory authority," including "designat[ing] the [Corps] rather than [EPA] as the permit issuing authority." 118 Cong. Rec. 33692, 33699 (1972) (statement of Sen. Muskie). EPA's assertion of collateral control over a permitting process that Congress expressly granted to the Corps cannot be squared with Congress' intent. *See FDA v. Brown & Williamson*, 529 U.S. 120, 144 (2000) (rejecting FDA authority to regulate tobacco in part because "Congress considered and rejected bills that would have granted the FDA such jurisdiction").

Statements by the CWA's chief congressional proponent likewise reveal Congress' expectation that EPA would have no authority to veto Corps-issued permits after the fact. Senator Edmund S. Muskie emphasized that EPA would assess the environmental impact of a discharge operation "*prior*

to the issuance of any permit to dispose of spoil." 118 Cong. Rec. at 33699 (emphasis added). If EPA determined that the material to be disposed of would "adversely affect municipal water supplies," then "*no permit may issue*." *Id.* Senator Muskie thus explicitly recognized that EPA's power to reject disposal sites could only be exercised *before* the Corps issued a permit. The reason for this temporal restriction was to remove the cloud of uncertainty that would hang over permit holders if EPA could unwind existing permits at any point in the future. As Senator Muskie explained, one of the legislation's "essential elements" was "finality." *Id.* at 33693.

Senator Muskie's explanation of section 404(c) is entitled to special weight, not only because it confirms what is clear in the statutory text, but because Senator Muskie "played the most significant role in the passage of the legislation." App.45. He was the chief sponsor of the 1972 CWA amendments, the leader of the Senate delegation to the Conference Committee, and the Chairman of the Senate Subcommittee on Air and Water Pollution. Presumably for these reasons, the government has long maintained that Senator Muskie's statement is uniquely helpful in illuminating the respective powers of the Corps and EPA under section 404. *See* 43 Op. Att'y Gen. 197, 199-200 (1979) ("EPA responsibilities [under section 404] were perhaps best summarized by Senator Muskie.").

C. EPA's Interpretation Is Not Entitled to *Chevron* Deference.

Because nothing in the text of the CWA remotely grants EPA a perpetual veto over existing Corps-

issued permits, EPA's plea for deference must be rejected at step one of the *Chevron* inquiry. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter."). But even if section 404 were ambiguous, EPA's interpretation would not be entitled to deference, for several reasons.

EPA's interpretation of its withdrawal authority is ineligible for deference because section 404 is jointly administered by two agencies, and EPA plays only a minor role in the permitting scheme. Where multiple agencies are charged with administering a statute, a single agency's interpretation is not entitled to *Chevron* deference. *See Salleh v. Christopher*, 85 F.3d 689, 691-92 (D.C. Cir. 1996). Granting deference to one agency's view of a jointly administered statute "would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies, or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport v. Dep't of the Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995). And it would be particularly odd to defer to the efforts of the agency with the subsidiary role under the scheme to arrogate to itself authority that Congress expressly vested in the dominant agency.

Moreover, EPA's current interpretation of section 404(c) was not the product of a "relatively formal administrative procedure" that is needed to trigger *Chevron* deference. *United States v. Mead*, 533 U.S. 218, 230 (2001). The only place EPA has claimed an

authority to withdraw specifications from existing permits is a preamble to regulations issued in 1979. *See* 44 Fed. Reg. 58,076, 58,077 (Oct. 9, 1979). But that interpretation is inconsistent with the position EPA advances here. In the 1979 preamble, EPA claimed a relatively modest power to withdraw specifications only if there was "substantial new information … first brought to the Agency's attention after [permit] issuance." *Id.* Here, in contrast, EPA has disavowed any "new information" requirement, and has asserted that it may "veto a specification at any time" and "without limitation." App.59-60. That interpretation of EPA's authority is not only inconsistent with the agency's previous statements, but was advanced for the first time in oral argument before the District Court. Agency litigating positions are entitled to no deference from this Court. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).[2]

II. The D.C. Circuit's Decision Undermines Congress' Efforts To Promote Regulatory Certainty And Cooperative Federalism.

The D.C. Circuit's interpretation of EPA's section 404(c) authority is also at odds with the balance of the statute, which reflects Congress' clear goal of promoting regulatory finality. The finality of an agency decision, like that of a judicial decision,

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[2] EPA has offered no explanation for abandoning its previous view, let alone the "more detailed justification" required given that its prior approach has "engendered serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

promotes "a variety of interests that contribute to the efficiency of the legal system," *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987), as well as weighty reliance interests, *Gonzalez v. Crosby*, 545 U.S. 524, 539-40 (2005) (Breyer, J., concurring). Finality concerns are especially strong when they attach to a government-issued permit, the purpose and effect of which is to induce certain behavior by declaring it lawful. The CWA's permitting regime in particular "serves the purpose of giving permits finality," by "insulat[ing] permit holders from changes in various regulations during the period of a permit" and "reliev[ing] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).[3]

By undermining the finality of Corps-issued permits, the decision below not only disregards Congress' instructions. It also threatens to chill private investment in the energy, construction, and other critical sectors of the economy where billions of dollars of investment are dependent on the finality that comes with a duly-issued Corps permit. The

[3] Courts recognize that the Corps' decision to issue a permit is "final agency action," 5 U.S.C. § 704, because issuance "'mark[s] the consummation of [the Corps'] decisionmaking process'" and because permits "create legal rights and impose binding obligations." *Nat'l Ass'n Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278-79 (D.C. Cir. 2005). A Corps-issued permit would not be truly final if a secondary regulator like EPA remains free to nullify it at any time without the need to point to new information or consider reliance interests.

notion that EPA could effectively revoke such permits based on nothing more than the reassertion of concerns that did not prevail in the inter-agency process would profoundly chill such investments prospectively, and would raise serious retroactivity and Takings Clause problems. Finally, the fact that EPA's self-aggrandizement comes at the expense of Congress' carefully crafted scheme of cooperative federalism, which recognizes the States' primary role in regulating land and water within their borders, heightens the need for review by this Court.

A. The Decision Below Threatens the Regulatory Certainty That Is a Central Goal of the CWA.

Like any statutory provision, section 404(c) "cannot be construed in a vacuum" but rather "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Davis v. Michigan*, 489 U.S. 803, 809 (1989). Congress' intent to promote regulatory finality and stability is evident throughout the CWA.

For example, section 404(p) establishes a safe harbor for regulated entities, assuring them that they will not face liability under the CWA so long as they comply with a Corps-issued permit. 33 U.S.C. § 1344(p). Indeed, once a CWA permit is issued, the recipient is assured that it generally will not be modified even to reflect subsequent regulatory developments. As EPA has emphasized, "[i]n general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the [EPA] during the term

of the permits." 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984). A permit thus insures the holder against the risk of future regulatory change. *Cf. United States v. Winstar*, 518 U.S. 839 (1996).

Section 404(q) reflects a similar commitment to regulatory certainty. That provision requires the Corps and EPA to minimize delays in issuing permits, and to resolve all permit applications within 90 days, "to the maximum extent practicable." 33 U.S.C. § 1344(q). This assures regulated entities that a request for permission to discharge dredged or fill material will not linger in bureaucratic limbo but will be conclusively resolved by a date certain.

A post-permit EPA veto would rob these provisions of their finality-conferring force and fundamentally upend the statutory scheme. App.39-45. There is no point to a safe harbor that applies even against subsequent regulatory changes if EPA has perpetual authority to render the permit a nullity by withdrawing disposal authorization at any time. And Congress' instructions that the Corps and EPA must resolve all permit applications within 90 days would accomplish nothing if EPA could reopen the matter at any point thereafter. The D.C. Circuit erred in reading EPA's section 404(c) authority so broadly as to render these neighboring statutory requirements meaningless. "The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Am. Trucking*, 531 U.S. at 485.

The legislative history of section 404 confirms the emphasis in the statutory text on the need for regulatory certainty. Senator Muskie emphasized

that his legislation had "three essential elements": "uniformity, *finality*, and enforceability." 118 Cong. Rec. at 33693 (emphasis added). Finality thus was a central goal of the CWA from the beginning.

The Corps consistently has respected Congress' call for regulatory certainty. Corps regulations specifically address permit modification or suspension and lay out five factors to be balanced in that inquiry, including whether any "circumstances … have changed since the permit was issued," "any significant objections to the authorized activity which were not earlier considered," and "the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit." 33 C.F.R. § 325.7(a). Those are the classic factors that a system that values finality considers before re-opening decisions. *Cf.* Fed. R. Civ. P. 60(b)(5). Only newly discovered information justifies re-opening past decisions, and only in circumstances that do not unduly interfere with settled expectations. This framework allows the Corps to address any newly discovered environmental information not in a vacuum but in light of permit holders' settled, investment-backed expectations.

Despite the Corps' primary role under section 404 and on-point regulations limiting the Corps' modification authority, EPA now takes the novel litigating position that it has essentially unlimited authority to alter an existing permit. When asked whether it claimed "unlimited authority to withdraw post permit" or the more modest "authority to

withdraw post permit based on new information," EPA's counsel made clear it asserted a withdrawal authority uncabined by any "new information" requirement. Under EPA's view, "the statute and regs do not provide that limitation." App.60.

Of course, the obvious explanation for the statute and regulations' failure to specify any constraint on EPA's claimed revocation power is that such authority does not exist at all, let alone in an unconstrained form that provides no protection for finality interests whatsoever. Given Congress' stated finality concerns, it would be remarkable for Congress to grant EPA the ability to eviscerate issued permits without any need to identify newly discovered information or consider reliance interests. The far more rational explanation is that those constraints on revocation are missing because EPA's subsidiary role is limited to addressing the specifications in the deliberative process *before* a permit issues. Once the permit issues, it is the Corps that determines whether the permit it issued should be modified or revoked, and it does so by applying regulatory standards that fully protect Congress' interest in finality.

B. The Uncertainty Resulting From EPA's Claimed Veto Power Will Chill Private Investment and Raise Grave Retroactivity and Takings Problems.

1. The uncertainty resulting from EPA's reading of section 404(c) will create powerful disincentives to invest in critical job-creating sectors of the economy. "[L]enders and investors would be less willing to extend credit and capital if every construction project

involving waterways could be subject to an open-ended risk of cancellation." App.62. The risk is especially great in light of the massive resources needed to obtain a permit, build a facility, and bring it into operation in the first place. Developers will be far less likely to make those upfront investments if they can be rendered for naught based on a regulatory whim.

The chilling effect on investment cannot be overstated. Expert testimony in the record showed that if investors believe there is a 1% annual risk that EPA will revoke a permit, "the expected benefit-cost ratio of projects involving discharge permits decreases by 17.5%." C.A.App.224. A 2% risk of revocation reduces the benefit-cost ratio by 30%. C.A.App.224. Thus, EPA's claimed veto power will have "highly pernicious effects," as even "*small changes in the threat of permit revocation can lead to dramatic reductions in private investment*." C.A.App.223-24.

This uncertainty will render uneconomic a number of investments that otherwise would have been undertaken absent the threat of a *post hoc* EPA veto. It will also make it more difficult to obtain financing for projects. Bond rating services might respond to the risk of EPA nullification by lowering a company's credit rating, which "in turn could make it much more expensive to access capital." C.A.App.225.

These harmful effects will be felt throughout the economy. Companies in countless and diverse industries are required to obtain section 404 permits authorizing the discharge of dredged or fill material,

including those engaged in residential and commercial construction, power generation and transmission, manufacturing, agriculture, and many others. Many municipal public works projects are subject to the same requirement. This is so in part because of the government's sweeping understanding of the "navigable waters" that trigger application of the CWA. 33 U.S.C. § 1362(7). "Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act." *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring); *see also Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

As a result of this expansive reading, there are now "over 100 million acres of land in the contiguous United States that contain wetlands and other waters subject to regulation under the [CWA]," C.A.App.225—a vast area approximately equal in size to the State of California, *Rapanos*, 547 U.S. at 722. And "[m]any more acres are within the drainage waters of the United States and thus potentially come under [Corps] jurisdiction." C.A.App.225. Indeed, "the statutory 'waters of the United States' engulf entire cities and immense arid wastelands." *Rapanos*, 547 U.S. at 722. Given the staggering scope of the CWA's regulatory footprint, EPA's claimed power to veto Corps-issued permits has the potential to touch virtually any sector of the economy.

The Corps issues approximately 60,000 section 404 permits a year, and "over $220 billion of investment annually is conditioned on the issuance of

these discharge permits." C.A.App.216. In addition, every $1 spent on such projects generates roughly $3 of downstream economic activity. C.A.App.218. This is an extraordinarily large sum to subject to EPA's caprice. The potential economic consequences of an uncabined regulatory authority to eviscerate issued permits is precisely why the law frowns upon retroactive decision-making and why the Corps' revocation authority is generally limited to narrow circumstances. The D.C. Circuit's recognition of such a sweeping authority in a provision as off-point as section 404(c) clearly merits further review.

2. EPA's reading of its section 404(c) authority also enables the agency to disrupt—indeed, destroy—current permit holders' settled, investment-backed expectations. That interpretation must be rejected to avoid grave retroactivity and takings problems.

Since the late 1990s, Mingo Logan has invested millions of dollars to obtain the necessary approvals for the Spruce mine. C.A.App.15-17. And, in direct reliance on the 2007 permit issued by the Corps (with EPA's consent), the company spent several more million dollars preparing the site and commencing operations. C.A.App.21. Under longstanding Corps regulations, Mingo Logan reasonably expected that its permit would not be altered absent truly extraordinary circumstances, and only upon due consideration of the "plans, investments and actions [it] has reasonably made or taken in reliance on the permit." 33 C.F.R. § 325.7(a). Yet EPA has now, over the Corps' objections, purported to revoke two of the three disposal sites approved years earlier, forcing the company to curtail its operations at

Spruce by nearly 88%. A massive investment has been rendered uneconomic by an agency that has simply reasserted objections that did not carry the day in the inter-agency deliberations, and has done so without pointing to new evidence or considering Mingo Logan's substantial reliance interests. Only the clearest of congressional commands would justify recognizing such an extreme regulatory authority (and confronting the attendant constitutional issues). Section 404 does not come close.

This nullification of Mingo Logan's permit raises retroactivity concerns of the first order. The presumption against retroactivity "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Retroactive government action is especially harmful in cases, like this one, that concern "contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. That is why courts repeatedly have condemned government actions that, like EPA's attempted veto of existing permits, "alter[] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule." *Bowen*, 488 U.S. at 220 (Scalia, J., concurring).

EPA's claimed post-permit veto power also raises serious concerns under the Takings Clause. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps approved a proposal to dredge a channel, but later revoked its consent after the work was completed. The Court held that this regulatory bait-and-switch was a compensable taking. Government

approvals "can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for." *Id*. at 179. A CWA permit—which offers a shield against liability, as well as the assurance that modifications will be made only in extraordinary circumstances—induces precisely those sorts of expectancies. The D.C. Circuit erred in failing to construe section 404(c) to avoid these serious retroactivity and takings problems.

C. EPA's Claimed Post-Permit Veto Authority Usurps the States' Authority To Regulate Water Quality Within Their Borders.

EPA's claimed authority to veto Corps-issued permits also threatens to upset the delicate federal-state balance that Congress struck in the CWA's scheme of cooperative federalism. "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" *SWANCC*, 531 U.S. at 166-67.

Section 402 recognizes the States' primary responsibility for regulating water quality within their borders by providing for State-administered NPDES permitting programs. 33 U.S.C. § 1342(b). West Virginia's EPA-approved NPDES program has been in effect since 1982. 47 Fed. Reg. 22,363 (May 24, 1982). On January 11, 1999, West Virginia—without objection from EPA—issued Mingo Logan a

section 402 permit, which included a number of restrictions to preserve water quality at and downstream from the Spruce site. C.A.App.1087-1107. The State has modified and reissued the permit several times since, again without EPA objection. C.A.App.638. Yet EPA now seeks to veto disposal sites on the basis of purported concerns about "on-site and downstream water quality." C.A.App.288. EPA's professed concerns thus implicate precisely the issues that Congress intended States to address under section 402—and that West Virginia in fact did address when issuing and renewing Mingo Logan's NPDES permit.

As such, EPA seeks to arrogate not just the Corps' section 404 powers but also the States' powers to regulate water quality under section 402. If EPA believes that a State is improperly administering its approved NPDES program—and the agency has offered no reason whatsoever to believe that this is true of West Virginia—there is a simple and straightforward course of action available. It may, after a "public hearing" and in compliance with other procedural safeguards, withdraw approval of the program. 33 U.S.C. § 1342(c)(3). What EPA may not do is use section 404 as an end run around the elaborate—and publicly visible—processes spelled out in section 402. The fact that Congress created a special statutory mechanism for EPA to resume regulatory responsibility for water quality within a given State is compelling evidence that it did not intend EPA to accomplish the same thing *sub silentio* through section 404(c).

III. The Decision Below Disregards This Court's Emphasis On The Need For Regulatory Certainty.

The D.C. Circuit's recognition of an EPA post-permit veto power also disregards clear guidance from this Court on the need for regulatory clarity under section 404. In *Coeur Alaska*, the Court held that the Corps, not EPA, has authority to approve a permit to discharge a slurry of crushed rock and water. It explained that the alternative approach—in which the Corps' authority would not extend to fill material that EPA regulates elsewhere, 557 U.S. at 276—would lead to confusion from conflicting assertions of regulatory authority. "The regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority," *id.* at 277: If the substance is fill material, then it is a Corps responsibility, full stop.

Allowing EPA to usurp the Corps' permitting powers, the Court emphasized, "would create numerous difficulties for the regulated industry." *Id.* at 276. A company would have to ask, not just is the material to be discharged "fill" within the meaning of the CWA, but in addition is this particular type of fill "also subject to one of the many hundreds of EPA performance standards." *Id.* at 277. And "[t]he statute gives no indication that Congress intended to burden industry with this confusing division of permitting authority." *Id.*; *see Int'l Paper v. Ouellette*, 479 U.S. 481, 497 (1987) ("It is unlikely—to say the least—that Congress intended to establish … a chaotic regulatory structure" in the CWA.).

The same "burden[s]" and "confusi[on]" would result if EPA is allowed to usurp the Corps' power to modify issued permits. Yet that is exactly what the Court of Appeals has unloosed. Surely this Court did not clarify that the Corps—and not EPA—had authority over fill permits only to allow EPA—and not the Corps—to effectively revoke those permits after the fact. In a regulatory context where this Court has emphasized the need for clear lines of authority, the decision below allows for a retroactive collateral attack by EPA on a Corps-issued permit. That result makes nonsense of the statutory scheme and violates fundamental precepts of the administrative state and basic principles of finality. The need for this Court's review is plain.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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November 13, 2013

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5150

MINGO LOGAN COAL COMPANY,

Appellee,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Appellant.

Appeal from the United States
District Court for the District of Columbia
(No. 1:10-cv-00541)

Argued March 14, 2013
Decided April 23, 2013

OPINION

Before: HENDERSON, GRIFFITH AND KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: The Mingo Logan Coal Company (Mingo Logan) applied to the United States Army Corps of Engineers (Corps) for a permit under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to discharge

dredged or fill material from a mountain-top coal mine in West Virginia into three streams and their tributaries. The Corps—acting on behalf of the Secretary of the Army (Secretary) and without objection from the Administrator of the United States Environmental Protection Agency (Administrator, EPA), who has "veto" authority over discharge site selection under CWA subsection 404(c), 33 U.S.C. § 1344(c)—issued the permit to Mingo Logan, approving the requested disposal sites for the discharged material. Four years later, EPA invoked its subsection 404(c) authority to "withdraw" the specifications of two of the streams as disposal sites, thereby prohibiting Mingo Logan from discharging into them. Mingo Logan filed this action challenging EPA's withdrawal of the specified sites on the grounds that (1) EPA lacks statutory authority to withdraw site specification after a permit has issued and (2) EPA's decision to do so was arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*. The district court granted summary judgment to Mingo Logan on the first ground without reaching the second. We reverse the district court, concluding that EPA has post-permit withdrawal authority, and remand for further proceedings.

I.

The CWA provides that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with specifically enumerated CWA provisions, including section 404.[1] 33 U.S.C.

[1] Under the CWA, "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point

§ 1311(a). Subsection 404(a) authorizes the Secretary to issue permits allowing discharge of dredged or fill material "at specified disposal sites," which are to be "specified for each such permit by the Secretary . . . through the application of guidelines developed by the Administrator, in conjunction with the Secretary." *Id.* § 1344(a), (b). The Secretary's authority to specify a disposal site is expressly made "[s]ubject to subsection (c) of [section 404]." *Id.* § 1344(b). Subsection 404(c) authorizes the Administrator, after consultation with the Corps, to veto the Corps's disposal site specification—that is, the Administrator "is authorized 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" the discharge will have an "unacceptable adverse effect" on identified environmental resources. *Id.* § 1344(c).

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source," 33 U.S.C. § 1362(12); "pollutant," in turn, "means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water," *id.* § 1362(6). CWA section 404 authorizes the Secretary, acting through the Corps, to issue permits for the discharge of dredged and fill material, while section 402 authorizes EPA to issue permits for the discharge of other pollutants. *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 10 (D.C. Cir. 2011) (citing *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 461 n.1 (D.C. Cir. 2006)).

In June 1999, Hobet Mining, Inc., Mingo Logan's predecessor, applied for a section 404 permit to discharge material from the Spruce No. 1 Mine into four West Virginia streams and their tributaries. In 2002, after the Corps prepared a draft Environmental Impact Statement, EPA expressed its concern that "even with the best practices, mountaintop mining yields significant and unavoidable environmental impacts that had not been adequately described in the document." Letter from EPA, Region III to Corps, Huntington Dist., at 1 (June 16, 2006) (JA 617). In the end, however, EPA declined to pursue a subsection 404(c) objection. Email from EPA to Corps (Nov. 2, 2006) (JA 982) ("[W]e have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint . . . ."). On January 22, 2007, the Corps issued Mingo Logan a section 404 permit, effective through December 31, 2031, which authorized Mingo Logan to dispose of material into three streams—Pigeonroost Branch, Oldhouse Branch and Seng Camp Creek—and certain tributaries thereto. Dep't of the Army Permit No. 199800436-3 (JA 984) (Spruce Mine Permit). The permit expressly advised that the Corps "may reevaluate its decision on the permit at any time the circumstances warrant" and that "[s]uch a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7." *Id*. at 3 (JA 986). The permit made no mention of any future EPA action.

On September 3, 2009, EPA wrote the Corps requesting it "use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke or

modify the permit issued authorizing Mingo Logan Coal Company to discharge dredged and/or fill material into waters of the United States in conjunction with the construction, operation, and reclamation of the Spruce Fork No. 1 Surface Mine," based on "new information and circumstances . . . which justif[ied] reconsideration of the permit." Letter from EPA, Region III to Corps, Huntington Dist., at 1 (Sept. 3, 2009) (JA 941). EPA noted in particular its "concern[] about the project's potential to degrade downstream water quality." *Id*. The Corps responded that there were "no factors that currently compell[ed it] to consider permit suspension, modification or revocation." Letter from Corps, Huntington Dist. to EPA, Region III, at 2 (Sept. 30, 2009) (JA 950). EPA wrote back: "We intend to issue a public notice of a proposed determination to restrict or prohibit the discharge of dredged and/or fill material at the Spruce No. 1 Mine project site consistent with our authority under Section 404(c) of the Clean Water Act and our regulations at 40 C.F.R. Part 231." Letter from EPA, Region III to Corps, Huntingdon Dist., at 1 (October 16, 2009) (Supp. JA 1).

EPA's Regional Director published the promised notice of proposed determination on April 2, 2010, requesting public comments "[p]ursuant to Section 404(c) . . . on its proposal to withdraw or restrict use of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and certain tributaries to those waters in Logan County, West Virginia to receive dredged and/or fill material in connection with construction of the Spruce No. 1 Surface Mine." Proposed Determination, 75 Fed. Reg. 16,788, 16,788 (Apr. 2,

2010). The Regional Director followed up with a Recommended Determination on September 24, 2010, limited to withdrawal of the specification of Pigeonroost Branch and Oldhouse Branch and their tributaries. On January 13, 2011, EPA published its Final Determination, which, adopting the Regional Director's recommendation, formally "withdraws the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, as described in [the Spruce Mine Permit] . . . as a disposal site for the discharge of dredged or fill material for the purpose of construction, operation, and reclamation of the Spruce No. 1 Surface Mine" and "prohibits the specification of the defined area . . . for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine." Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV, 76 Fed. Reg. 3126, 3128 (Jan. 19, 2011).

Mingo Logan filed this action in district court immediately following the Proposed Determination, challenging EPA's authority to "revoke" the three-year-old permit, Compl., ¶ 75, *Mingo Logan Coal Co. v. U.S. EPA*, C.A. No. 10-00541 (D.D.C. Apr. 2, 2010), and amended its complaint in February 2011 to challenge the Final Determination, asserting it is both ultra vires and arbitrary and capricious. Am. Compl., *Mingo Logan Coal* (Feb. 28, 2011).

On cross-motions for summary judgment, the district court granted judgment to Mingo Logan on

March 23, 2012. *Mingo Logan Coal Co. v. U.S. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012). The court concluded EPA "exceeded its authority under section 404(c) of the Clean Water Act 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)." *Id.* at 134. The United States filed a timely notice of appeal on behalf of EPA. The Corps joined EPA on brief. *See* Appellant Br. & Reply Br.

II.

In granting summary judgment, the district court agreed with Mingo Logan's interpretation of subsection 404 to preclude EPA from withdrawing a site specification once the Corps has issued a permit. "We review a grant of summary judgment *de novo* applying the same standards as those that govern the district court's determination." *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997). "Moreover, insofar as the agency's determination amounts to or involves its interpretation of . . . a statute entrusted to its administration, we review that interpretation under the deferential standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* Under *Chevron*:

> We first ask "whether Congress has directly spoken to the precise question at issue," in which case we "must give effect to the unambiguously expressed intent of Congress." If the "statute is silent or ambiguous with respect to the specific issue," however, we move to the second step

> and defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."

Natural Res. Def. Council v. EPA, 706 F.3d 428, 431 (D.C. Cir. 2013) (quoting *Chevron*, 467 U.S. at 842–43). We construe subsection 404(c) under *Chevron* step 1 because we believe the language unambiguously expresses the intent of the Congress.

As noted earlier, *see supra* p. 3, section 404 vests the Corps, rather than EPA, with the authority to issue permits to discharge fill and dredged material into navigable waters and to specify the disposal sites therefor. *See* 33 U.S.C. § 1344(a)-(b); *see Senate Consideration of the Report of the Conference Committee*, 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (Legislative History) 161, 177 (Jan. 1973) (Statement of Sen. Edmund Muskie, 118 Cong. Rec. at 33,699 (Oct. 4, 1972)) (Senate Committee "had reported a bill which treated the disposal of dredged spoil like any other pollutant" but Conference Committee adopted provisions of House bill that "designated the Secretary of the Army rather than the Administrator of the Environmental Protection Agency as the permit issuing authority"). Nonetheless, the Congress granted EPA a broad environmental "backstop" authority over the Secretary's discharge site selection in subsection 404(c), which provides in full:

> (c) Denial or restriction of use of defined areas as disposal sites
>
> The Administrator is authorized to prohibit the specification (including the withdrawal

> of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, 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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1344(c); *see* Legislative History at 177 ("[T]he Conferees agreed that the Administrator . . . should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").[2] Section 404

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[2] Thus, subsection 404(c) affords EPA two distinct (if overlapping) powers to veto the Corps's specification: EPA may (1) "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" or (2) "deny or restrict the use of any defined area for specification (including the withdrawal of specification)." In withdrawing the specifications here, EPA did not clearly distinguish between the two powers. *See* Final Determination, 76 Fed. Reg. at 3127 ("EPA Region III published in the Federal Register a Proposed Determination to prohibit, restrict, or deny the specification or the use for specification (including withdrawal of specification) of certain waters at the project site as disposal sites for the

imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification but instead expressly empowers him to prohibit, restrict or withdraw the specification "*whenever*" he makes a determination that the statutory "unacceptable adverse effect" will result. 33 U.S.C. § 1344(c) (emphasis added). Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time. *See* 20 Oxford English Dictionary 210 (2d ed.1989) (defining "whenever," used in "a qualifying (conditional) clause," as: "At whatever time, no matter when."). Thus, the unambiguous language of subsection 404(c) manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance.[3] This construction is further

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discharge of dredged or fill material for the construction of the Spruce No. 1 Surface Mine."). It appears, however, that EPA exercised the first authority—"to prohibit"/"withdraw[]"—given the post-permit timing. *See id*. at 3128 ("EPA's Final Determination withdraws the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, as described in DA Permit No. 199800436-3 (Section 10: Coal River), as a disposal site for the discharge of dredged or fill material for the purpose of construction, operation, and reclamation of the Spruce No. 1 Surface Mine. This Final Determination also prohibits the specification of the defined area constituting Pigeonroost Branch, Oldhouse Branch, and their tributaries for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine.").

[3] Based on the plain meaning of the statutory language, EPA has consistently maintained this interpretation for over thirty years. *See* Section 404(c) Procedures, 44 Fed. Reg. 58,076,

buttressed by subsection 404(c)'s authorization of a "withdrawal" which, as EPA notes, is "a term of retrospective application." Appellant Br. 27. EPA can *withdraw* a specification only after it has been made. *See* 20 Oxford English Dictionary 449 (2d ed.1989) (defining "withdraw" as "[t]o take back or away (something that has been given, granted, allowed, possessed, enjoyed, or experienced)"). Moreover, because the Corps often specifies final disposal sites in the permit itself—at least it did here, *see* Spruce Mine Permit at 1 ("You are authorized to perform work in accordance with the terms and conditions *specified* below . . . .") (emphasis added) (JA 984)—EPA's power to withdraw can *only* be exercised post-permit. Mingo Logan's reading of the statute would eliminate EPA's express statutory right to withdraw a specification and thereby render subsection 404(c)'s parenthetical "withdrawal" language superfluous—a result to be avoided. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (applying "one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions,

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58,077 (Oct. 9, 1979) ("The statute on its face clearly allows EPA to act after the Corps has issued a permit; it refers twice to the 'withdrawal of specification,' which clearly refers to action by EPA after the Corps has specified a site (e.g. issued a permit or authorized its own work)."); Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act at 1-2 (Jan. 26, 1981) (JA 239-40) (exercising 404(c) authority "to restrict the use of [of the North Miami Landfill] for specification (including the withdrawal of specification) as a disposal site" almost five years after Corps issued permit therefor). The Corps has made clear by joining EPA in this litigation that it agrees with EPA's interpretation. *See supra* p. 7.

so that no part will be inoperative or superfluous, void or insignificant") (brackets and quotation marks omitted).

Notwithstanding the unambiguous statutory language, Mingo Logan presses its own view of the language, the statutory structure and section 404's legislative history to maintain that the Congress intended to preclude post-permit withdrawal. We find none of its arguments persuasive.

First, Mingo Logan argues that the statutory language itself contemplates that specification occurs before (rather than when) the permit issues and therefore *can* (and must) be withdrawn pre-permit. We find no such intent in the statutory directive Mingo Logan quotes—that "each such disposal site shall be specified for each such permit by the Secretary . . . through the application of guidelines developed by the Administrator, in conjunction with the Secretary." 33 U.S.C. § 1344(b). This language is at least as consistent with specification by the Corps at the time the permit issues as it is with pre-permit specification. Moreover, as noted earlier, *see supra* p. 10, the Corps expressly "specified" the final sites in the Spruce Mine Permit itself. Nor does the permitting process—including the "extensive coordination process during which EPA can review the Corps's statement of findings/record of decision," Appellee Br. 31—require that the specification be made before the permit issues. During the permitting process, the disposal sites are proposed, reviewed—perhaps even "specified," as Mingo Logan contends—but the final specifications are included in the permit itself.

Second, Mingo Logan asserts EPA's interpretation conflicts with section 404 "as a whole." *Id.* at 35. Mingo Logan claims, for example, that "EPA's reading obliterates the choice Congress made to give the permitting authority with all of its attributes to the Corps, not EPA." *Id.* at 36. While it is true that subsections 404(a)-(b) unambiguously authorize the Secretary to issue a discharge permit—and to specify the disposal site(s) therefor—section 404(b) makes equally clear, as explained *supra pp.* 8-11, that the Administrator has, in effect, the *final* say on the specified disposal sites "whenever" he makes the statutorily required "unacceptable adverse effect" determination. Thus, insofar as site specification may be considered, as Mingo Logan asserts, an "attribute[]" of the permitting authority, the statute expressly vests final authority over this particular attribute in the Administrator.

Mingo Logan also contends that EPA's interpretation "tramples on provisions like sections 404(p) and 404(q) that are intended to give permits certainty and finality." Appellee Br. 36. Subsection 404(p) provides: "Compliance with a permit issued pursuant to [section 404], including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of [enforcement actions brought under] sections 1319 and 1365 of [title 33] . . . ." 33 U.S.C. § 1344(p).[4] According to Mingo Logan, "absent . . .

[4] Sections 1319 and 1365 of title 33 authorize an action by, respectively, (1) EPA against a violator of, inter alia, the terms of a section 404 permit; and (2) a citizen against a violator of a CWA effluent limitation or against EPA for failure to perform a

permit violations or public interest considerations, the permittee can rely on the permit shield of section 404(p)." Appellee Br. 37. But again, section 404(c)'s language is plain with regard to its enumerated "unacceptable adverse effects": the Administrator retains authority to withdraw a specified disposal site "whenever" he determines such effects will result from discharges at the sites. And when he withdraws a disposal site specification, as he did here, the disposal site's "terms and conditions specified" in the permit, *see* Spruce Mine Permit at 1 (JA 984), are in effect amended so that discharges at the previously specified disposal sites are no longer in "[c]ompliance with" the permit—although the permit itself remains otherwise in effect to the extent it is usable.[5] Moreover, as EPA notes, subsection 404(c) was enacted in 1972 and its plain meaning did not change when 404(p) was enacted five years later. Appellant Br. 33-34. As Mingo Logan acknowledges, if "the text of section 404(c) clearly and unambiguously gave

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nondiscretionary "act or duty" under the CWA. 33 U.S.C. §§ 1319, 1365.

[5] In this case for example, EPA left intact the specification as disposal site of "the Right Fork of Seng Camp Creek and its tributaries . . . in part because some of those discharges have already occurred and because the stream resources in Right Fork of Seng Camp Creek were subject to a higher level of historic and ongoing human disturbance than those found in Pigeonroost Branch or Oldhouse Branch." Final Determination, 76 Fed. Reg. at 3127 n.1.

In addition, EPA has made clear that a permittee may not be penalized for discharges that occurred in compliance with the permit before the effective date of the withdrawal of the specification.

EPA the power to act post-permit"—a reading it rejects—then section 404(p) "cannot be read to implicitly overturn section 404(c)." Appellee Br. 39 (citing Appellant Br. at 34 (citing *Vill. of Barrington, Ill. v. STB*, 636 F.3d 650, 662 (D.C. Cir. 2011))). As we have repeatedly stated throughout this opinion, the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit. Thus, subsection 404(p) does not implicitly limit section 404(c)'s scope. Nor does EPA's express statutory authority to act *post*-permit interfere with subsection 404(q)'s directive that the Secretary enter into agreements with other agency heads "to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays *in the issuance of permits* under this section" and "to assure that, to the maximum extent practicable, a decision *with respect to an application for a permit* under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section." 33 U.S.C. § 1344(q) (emphases added). The enumerated obligations apply only *pre*-permit and are therefore unaffected by EPA's post-permit actions.

Finally, Mingo Logan argues that the legislative history "confirms that Congress intended EPA to act under section 404(c), if at all, prior to permit issuance." Appellee Br. 42. In particular, it relies on the statement of then-Senator Edmund Muskie that

> *prior to* the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not

> adversely affect municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

118 Cong. Rec. at 33,699, *reprinted in* Legislative History at 177 (emphasis added). "Assuming legislative history could override the plain, unambiguous directive" of section 404(c) and "putting to one side the fact that this was the statement of a single member of Congress," the quoted language is "not necessarily inconsistent with" EPA's interpretation. *See Natural Res. Def. Council v. EPA*, 706 F.3d 428, 437 (D.C. Cir. 2013) (quotation marks and brackets omitted); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012) ("[T]he views of a single legislator, even a bill's sponsor, are not controlling."). That EPA should review the preliminary specifications *pre*-permit to determine whether discharges will have the required "unacceptable adverse effect"—as EPA in fact did here—does not mean it is foreclosed from doing so *post*-permit as well—as it also did here.[6] "Thus, 'this case does not present the very rare situation where

[6] Similarly, post-permit withdrawal is not precluded by 33 C.F.R. § 323.6(b) ("The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act.").

the legislative history of a statute is more probative of congressional intent than the plain text.' " *Va. Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Servs.*, 678 F.3d 918, 923 (D.C. Cir. 2012) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)) (brackets omitted).

For the foregoing reasons, we reverse the district court insofar as it held that EPA lacks statutory authority under CWA section 404(c) to withdraw a disposal site specification post-permit. Because the district court did not address the merits of Mingo Logan's APA challenge to the Final Determination and resolution of the issue is not clear on the present record, we follow our ususal practice and remand the issue to the district court to address in the first instance. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 n.* (D.C. Cir. 2012) (citing *Piersall v. Winter*, 435 F.3d 319, 325 (D.C. Cir. 2006)).

So ordered.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5150

MINGO LOGAN COAL COMPANY,

Appellee,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Appellant.

Appeal from the United States
District Court for the District of Columbia
(No. 1:10-cv-00541)

Filed: July 25, 2013

ORDER

BEFORE: Garland*, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, and Srinivasan*, Circuit Judges

Upon consideration of appellee's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

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* Chief Judge Garland and Circuit Judge Srinivasan did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-0541 (ABJ)

MINGO LOGAN COAL COMPANY INC.,
Plaintiff,
v.
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

Filed: March 23, 2012

MEMORANDUM OPINION

On January 22, 2007, the Army Corps of Engineers ("Corps") issued a permit to plaintiff Mingo Logan Coal Company Inc. ("Mingo Logan") pursuant to section 404 of the Clean Water Act, which authorized Mingo Logan to discharge fill material from its Spruce No. 1 coal mine into nearby streams, including the Pigeonroost and Oldhouse Branches and their tributaries. Nearly three years later, defendant U.S. Environmental Protection Agency ("EPA") published a Final Determination purporting to withdraw the specification of those two streams as disposal sites and thereby invalidate the permit for those sites. This attempt to withdraw the specification of discharge sites after a permit has

been issued is unprecedented in the history of the Clean Water Act.

Mingo Logan brought this suit seeking the Court's declaration that EPA lacks the authority to modify or revoke Mingo Logan's section 404 permit, that its attempt to modify the permit was unlawful, and that the permit is still operative. Am. Compl. [Dkt. #16] at Count I. In addition, Mingo Logan asks the Court to vacate EPA's Final Determination on the grounds that it exceeded the agency's statutory authority under section 404(c) of the Clean Water Act, and that it was arbitrary, capricious, and not in accordance with law for a number of reasons. *Id.* at Counts II-XIV. The parties have cross-moved for summary judgment.

The Court concludes that EPA exceeded its authority under section 404(c) of the Clean Water Act 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). Based upon a consideration of the provision in question, the language and structure of the entire statutory scheme, and the legislative history, the Court concludes that the statute does not give EPA the power to render a permit invalid once it has been issued by the Corps. EPA's view of its authority is inconsistent with clear provisions in the statute, which deem compliance with a permit to be compliance with the Act, and with the legislative history of section 404. Indeed, it is the Court's view that it could deem EPA's action to be unlawful without venturing beyond the first step of the

analysis called for by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But it is undeniable that the provision in question is awkwardly written and extremely unclear. So, the Court will go on to rule as well that even if the absence of a clear grant of authority to EPA to invalidate a permit is seen as a gap or ambiguity in the statute, and even if the Court accords the agency some deference, EPA's interpretation of the statute to confer this power on itself is not reasonable. Neither the statute nor the Memorandum of Agreement between EPA and the Corps makes any provision for a post-permit veto, and the agency was completely unable to articulate what the practical consequence of its action would be. Therefore, the Court will grant plaintiff Mingo Logan's motion for summary judgment [Dkt. #26] and deny defendant's cross-motion [Dkt. #46].

BACKGROUND

A. Factual Background

a. The Spruce No. 1 Mine permit process

Mingo Logan owns and operates the Spruce No. 1 mountaintop coal mine in Logan County, West Virginia. Administrative Record ("AR") 10117, 10120-24. Mountaintop mining involves removing the top of a mountain to recover the coal within it. AR 10118. This process generates excess rock, topsoil, and debris ("spoil") that cannot be returned to the mined area. *Id.* Typically, these materials are deposited in adjacent valleys, creating valley fills. *Id.*

In accordance with the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1201, *et seq.*, Mingo Logan obtained an SMCRA permit from the State of West Virginia for the Spruce No. 1 mine in 1998.[1] AR 8277. The original design called for the discharge of spoil in portions of Seng Camp Creek, Pigeonroost Branch and White Oak Branch of Spruce Fork. AR 8277.021.

Mingo Logan also applied for and obtained a National Pollutant Discharge Elimination System ("NPDES") permit under section 402 of the Clean Water Act ("CWA") from the State of West Virginia. AR 8062, 43101. EPA initially opposed the proposed permit, but ultimately withdrew its objections, noting that it would "allow limited mining and discharging during the five-year permit period, averting pending economic hardships from layoffs while requiring mitigation compensation for the limited stream portions filled." AR 8414-17. In withdrawing its objections, EPA also stated that:

> During the first two years of [Mingo Logan]'s five-year NPDES permit, EPA will join with other federal and state agencies to undertake a comprehensive environmental evaluation of impacts and possible alternatives associated with mountaintop

[1] The permit was actually obtained by Mingo Logan's predecessor, Hobet Mining, Inc., but since prior ownership is unimportant to the disposition of this case, the Court will refer to Mingo Logan and all prior owners and operators of the Spruce No. 1 mine as "Mingo Logan." *See* Statement of Points and Authorities in Support of Mingo Logan's Mot. for Summ. J. ("Pl.'s MSJ Mem.") at 4 n.2.

> mining and associated valley filling in West Virginia and other mountaintop mining states. EPA will use the findings from this evaluation in review of any draft NPDES permit which may be applied for by the company for extending its valley fills and associated discharge points.

Id. The NPDES permit was subsequently modified twice. AR 8081. As contemplated, EPA conducted a Programmatic Environmental Impact Statement ("PEIS") on Mountaintop Mining, which it finalized in October 2005.

Mingo Logan also applied to the Corps for a CWA section 404 permit, the subject of this action. AR 2634-66. Originally, the permit application was submitted under Nationwide Permit 21 and approved by the Army Corps without preparing an Environmental Impact Statement ("EIS").[2] *See Bragg v. Robertson*, 54 F. Supp. 2d 635, 639-40 (S.D.W.V. 1999). But, before any mining could take place, a federal court in West Virginia preliminarily enjoined the approval, and the Corps withdrew its nationwide permit authorization. *Bragg*, 54 F. Supp. 2d 635; Mingo Logan Response to EPA Statement of Undisputed Material Facts ("ML SMF") ¶ 38(e).

Mingo Logan subsequently applied to the Corps for an individual permit, under section 404(a) of the CWA, to discharge material from the Spruce No. 1

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[2] The Nationwide Permit program was available to mining projects that would "cause only minimal adverse effects when performed separately, and w[ould] have only minimal cumulative adverse effect on the environment." *Bragg v. Robertson*, 54 F. Supp. 2d 635, 637-38 (S.D.W.V. 1999).

Mine into the Right Fork of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and White Oak Branch. AR 3052-70. The Corps began the process of developing an EIS for the project. EPA commented on a preliminary draft EIS in August 2001 and a draft EIS in August 2002, expressing its concerns about each version, and also noting "the absence of information necessary to fully assess potential adverse environmental impact associated with this project." AR 19487; *see also* AR 19486-90, 45054-734, 42912-16. In the letter commenting on the draft EIS, EPA concluded that it "remains committed to working with the Corps, the state, and the applicant to identify and develop an environmentally acceptable project" and "would encourage additional discussions in an effort to clarify and resolve the issues raised in this letter." AR 19489. It also stated that "this matter is . . . subject to review under our authorities at CWA [s]ection 404(q) and [s]ection 404(c)." AR 19489-90.

In December 2005, the West Virginia Department of Environmental Protection granted state certification for the individual permit based on its determination that the project would not violate state water quality standards or anti-degradation regulations.[3] AR 20924-28.

In 2006, the Corps published for public comment a revised Draft EIS for the Spruce No. 1 Mine. ML SMF ¶ 52. AR 12991-13388. EPA commented on the draft in June of that year. AR 8312-29. The comment

[3] The certification was granted subject to Mingo Logan's compliance with a mitigation agreement. AR 20925, 20928.

letter expressed concern about the impacts of the project, particularly to the Little Coal River watershed. AR 8313. However, the letter also noted in several places that the agency was encouraged by the progress that Mingo Logan had made to date, and it voiced optimism that EPA could work with the Corps, federal and state agencies, and Mingo Logan to address its concerns and develop appropriate mitigation plans, as well as a Little Coal River cumulative impact assessment and restoration plan. *Id.* at 8314-15.

The Corps released the final EIS in September 2006, and EPA again submitted comments by letter. AR 8330-34, 34962-35342. The comment letter again included concerns about potential adverse impacts to the Little Coal watershed and gaps in the mitigation plan, but also acknowledged Mingo Logan's progress in reducing impacts and EPA's willingness to work with the responsible agencies to resolve its concerns prior to a section 404 permit decision. AR 8331-32.

The Corps responded to the concerns expressed in EPA's comments to the final EIS. AR 23657-62, 24637-43. And through December 2006, representatives from EPA, including William J. Hoffman, Director of the Office of Environmental Programs Environmental Assessment and Innovation Division of the EPA, and from the Corps continued to communicate with one another about the Spruce No. 1 Mine proposal. AR 23084-109, 23657-62, 24424, 24619-25, 24637-43. Although the communications establish that EPA had some lingering technical concerns, they also establish that EPA intended to "work together" with the Corps to

address them. AR 23085. In a November 2, 2006 email to Teresa Spagna of the Corps, Mr. Hoffman expressed that "we have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint . . . ." *Id.*

On January 22, 2007, the Corps issued Mingo Logan a section 404 permit for the Spruce project. AR 25763-77. The permit authorized Mingo Logan to discharge dredged or fill material into stream segments, including Pigeonroost and Oldhouse Branches, until December 31, 2031. AR 25763-68. It also bound Mingo Logan to carry out certain post-project stream restoration and compensatory mitigation efforts. AR 25763, 25769-77. The permit contained an express notification that "This office [(The Huntington District office of the Army Corps of Engineers)] may reevaluate its decision on this permit at any time the circumstances warrant." AR 25765. It says nothing about the EPA's authority to withdraw the specification of a discharge site or to modify or revoke the permit.

b. EPA's "withdrawal" of the Pigeonroost and Oldhouse Branch discharge specifications

On September 3, 2009—almost two years after the Corps issued the section 404 permit—EPA sent a letter to the Huntington District Office of the Corps, requesting that it "use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke, or modify the permit issued authorizing Mingo Logan Coal Company to discharge dredged and/or fill material into the waters of the United States in conjunction with the construction, operation, and

reclamation of the Spruce Fork No. 1 Surface Mine . . . ."[4] AR 12754. The letter described what EPA considered to be new information and circumstances that had arisen since the issuance of the permit and that justified its reconsideration. *Id.* Specifically, the letter asserted that recent data and analyses had revealed downstream water quality impacts that were not adequately addressed by the permit. AR 12754-58.

The Corps rejected EPA's request, finding no grounds to suspend, revoke, or modify the permit. AR 12781-88.

Six months later, on March 26, 2010, EPA published a notice of its proposed determination to withdraw or restrict the specification of Seng Camp Creek, Oldhouse Branch, Pigeonroost Branch, and certain of their tributaries, as disposal sites for fill material. AR 4. On September 24, 2010 it published a "Recommended Determination" to withdraw the specification of Oldhouse Branch, Pigeonroost Branch, and certain of its tributaries. AR 9888-970. And on January 13, 2011, EPA issued its Final Determination to "withdraw the specification of Pigeonroost Branch, Oldhouse Branch and their tributaries . . . as a disposal site for dredged or fill material in connection with the construction of the Spruce No. 1 Surface Mine . . . ." These branches

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[4] Although the request was issued two years after the issuance of the permit, Mingo Logan had not yet disposed of any dredged or fill material in the Pigeonroost or Oldhouse sites due to ongoing legal battles. Tr. at 15, Nov. 30, 2011. At the time of oral argument in this case, there still had been no disposal of material into those sites. *Id.*

make up roughly eighty eight percent of the total discharge area authorized by the permit. EPA Response to Mingo Logan's Statement of Undisputed Material Facts ("EPA SMF") at ¶ 65.

B. Procedural Background

Mingo Logan challenged EPA's purported withdrawal in an amended complaint, [Dkt. #16], filed in this Court on February 28, 2011. All fourteen Counts arise under the Administrative Procedure Act ("APA"). Before the Court heard oral argument in this matter, it issued a Minute Order explaining that since a ruling on the legality of the post-permit veto could be dispositive of the entire case, it would first hear argument on the question of whether the EPA had the authority under section 404(c) of the Clean Water Act to withdraw its specification of the disposal site after the Corps had already issued a permit under section 404(a) (Count I). *See* Minute Order, Nov. 28, 2011. Because the Court finds that EPA exceeded its section 404(c) authority, and it will therefore vacate the Final Determination, it need not reach the remaining Counts.[5]

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the

[5] The remaining counts question whether the agency's determination was otherwise lawful, and whether it was reasonable and supported by the record.

basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). To defeat summary judgment, the non-moving party must "designate specific facts showing there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). The existence of a factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the nonmoving party; a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id.*; *see also Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987).

"The rule governing cross-motions for summary judgment . . . is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion." *Sherwood v. Washington Post*, 871 F.2d 1144, 1148 n.4 (D.C. Cir. 1989), quoting *McKenzie v. Sawyer*, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982), *abrogated on other grounds by Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111 (D.C. Cir. 1999). In assessing each party's motion, "[a]ll underlying facts and inferences are analyzed in the light most favorable to the non-moving party." *N.S. ex rel. Stein v. District of Columbia*, 709 F. Supp. 2d 57, 65 (D.D.C. 2010), citing *Anderson*, 477 U.S. at 247.

ANALYSIS

The question of whether the EPA exceeded its authority under section 404(c) of the CWA by withdrawing the specification of disposal sites after the Corps had issued a permit authorizing discharge of spoil at those sites is a question of law that the Court may properly decide on summary judgment. The Court is required to analyze an agency's interpretation of a statute by following the two-step procedure set forth in *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First, the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Courts "use 'traditional tools of statutory construction' to determine whether Congress has unambiguously expressed its intent," *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998), quoting *Chevron*, 467 U.S. at 843 n.9, including an examination of the statute's text, structure, purpose, and legislative history. *Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

If the Court concludes that the statute is either silent or ambiguous, the second step of the review process is to determine whether the interpretation proffered by the agency is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Once a reviewing court reaches the second step, it must accord "considerable weight" to an executive

agency's construction of a statutory scheme it has been "entrusted to administer." *Id*. at 844.

A. The first step of the *Chevron* analysis suggests that Congress did not grant EPA the authority it purports to exercise.

EPA's position is that section 404(c) grants it plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps—the only permitting agency identified in the statute—and to do so at any time. This is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute. It is not conferred by section 404(c), and it contrary to the language, structure, and legislative history of section 404 as a whole.

a. The statutory provision does not clearly grant EPA the authority to exercise a post-permit veto.

The statute vests the full authority to issue permits for discharges into navigable waters with the Corps. Section 404(a) provides that "[t]he Secretary may issue permits . . . at specified disposal sites." 33 U.S.C. § 1344(a) (2006). And section 404(b) provides: "each such disposal site shall be specified for each such permit by the Secretary [of the Army]." 33 U.S.C. § 1344(b). So, a permit can be issued only for a "specified" site, and it is up to the Corps to do the specifying, although that exercise must be undertaken through the application of guidelines developed by the EPA in conjunction with the Corps. *Id.* But the statute does give EPA the opportunity to derail the process and "prohibit" the specification of an area as a disposal site if it determines that the

discharge would have certain "unacceptable" environmental consequences. 33 U.S.C. § 1344(c).

The EPA rests its case on this section, which is entitled, "Denial or restriction of use of defined areas as disposal sites." The provision states:

> The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearing, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary [of the Army].

Id. According to the EPA, this provision, and in particular, its use of the word "whenever" means that the EPA is permitted to withdraw its assent to a disposal site *at any time*, even if the agency did not exercise its authority to prohibit or deny the specification at the outset, and a permit has already been issued. This reading does not exactly leap off the page.

Putting aside the parenthetical phrases for the moment, the straightforward portions of the provision authorize the EPA to "prohibit" the specification of any defined area as a disposal site or

to "deny or restrict" the use of any defined area for specification as a disposal site. *Id.* Since a permit can only be issued by the Corps for a "specif*ied*" (note the past tense) site, the act of prohibiting a specification, or denying the use of an area for specification, eliminates the necessary foundation for the issuance of a permit. 33 U.S.C. § 1344(a) (emphasis added). Thus, the clear import of the provision, as all of the parties agree, is that Congress gave EPA the right to step in and veto the use of certain disposal sites at the start, thereby blocking the issuance of permits for those sites.

But the parentheticals muddy the waters. They are so poorly written that it is difficult to ascertain what it is that they are supposed to modify. What does "[t]he Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area" mean? 33 U.S.C. § 1344(c). Does it mean that the EPA is authorized to prohibit the specification and that it is also authorized *to prohibit* the withdrawal of specification? That interpretation of "including" would make sense grammatically since "specification" and "withdrawal" are both nouns that could be included among the objects of the verb "prohibit." *Id.* But it is not clear why Congress would find it advisable to give the EPA the right to bar the Corps from *withdrawing* a specification. So does the sentence mean that the EPA is authorized to prohibit the specification of a site and that this *authorization* includes the authority to withdraw a specification? That may be what Congress had in mind, although the concept was expressed in a clumsy way, and there is no legislative history that expressly

illuminates the provision. Moreover, this reading 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. *See* 33 U.S.C. § 1344(b) ("Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit *by the Secretary* [of the Army] . . . .); 33 U.S.C. § 1344(c) ("The Administrator [of the EPA] is authorized to prohibit the specification . . . ."). So it is not clear how the EPA could "withdraw" a decision it has not made.[6]

The awkwardly worded provision also raises another more troubling textual issue. If the parentheticals mean that the EPA can withdraw a specification, can it do so after a permit has already been issued? Does the use of the word "whenever" signify that this could occur at any time whatsoever and therefore embrace the concept of nullifying a valid permit? The Court thinks not. The provision

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[6] The only interpretation of the provision that would actually make sense is that Congress intended the term "withdraw" to pertain to specifications that were already in existence in 1972, at the time section 404(c) was enacted. In its memorandum, Mingo Logan explains that before 1972, the Corps designated a number of disposal sites for the discharge of material under the River and Harbors Act. *See* Pl.'s MSJ Mem. at 23, citing 33 C.F.R. pt. 205 (1972). As part of the 1972 amendments, Congress enacted section 401(c), which reaffirmed the Corps' authority over those disposal sites and authorized it to use those sites in its section 404 permit system. Thus, the term "withdraw" could be read as simply giving EPA the authority to withdraw the specification of those sites that it had never been given the opportunity to review before the Corps could lock them in under section 404 permits. *Id.* at 23-25.

certainly does not clearly state that the EPA can withdraw its consent at any time, or whenever it sees fit, or even just "whenever." It says that the EPA Administrator can prohibit—with that strange parenthetical—the Army's specification of a site "whenever he determines . . . that the discharge . . . will have an unacceptable adverse effect . . . ." Using "whenever" as a conjunction in this manner may be intended simply to convey the meaning that the EPA may act "at such time as" it makes the necessary determination—in other words, that the determination is the predicate for the action.[7]

But even if, as EPA argues, the use of "whenever" indicates that the EPA can assert its section 404(c) authority at any time that it makes the necessary determination, the provision still does not go so far as to confer the express authority to undermine an existing permit. As plaintiff notes, whatever section 404(c) means, it only talks about prohibiting, restricting, or withdrawing a *specification*, and it does not give EPA any role in connection with permits.[8] Congress utilized both

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[7] *See* "*whenever*," Merriam-Webster Dictionary, *available at* http://merriamwebster.com/dictionary/whenever (defining "whenever" as "at any or every time that" and providing examples including, "We'll begin the meeting *whenever* the boss gets here.").

[8] EPA argues in its papers that the word "withdrawal" would be rendered meaningless by an interpretation that deprives it of the authority to reverse a specification after a permit has been issued because "specification" under 404(b) only occurs when a permit is issued. EPA's Mem. in Support of its Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. ("Def.'s MSJ Mem.") at 16-20. And at the hearing, EPA insisted that specification is not a separate process: "Mingo Logan's kind of making that up. It is

terms throughout the statute, so it must be assumed that Congress understood the difference between the two terms and that its choices have meaning. *See*

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only specified through the issuance of a permit. That's when it happens." Tr. at 43, Nov. 30, 2011. The agency also expresses the view that specifying a site is the same thing as issuing a permit in the preamble to its regulations. *See* Def.'s MSJ Mem. at 5, citing 44 Fed. Reg. 58,076, 58, 077 (Oct. 9, 1979) (codified in 40 C.F.R. § 231.1(a) ("[The statute] refers twice to the 'withdrawal of specification' which clearly refers to action by EPA after the Corps has specified a site [*e.g. issued a permit* or authorized its own work.]") (emphasis added). But EPA's attempt to conflate specification with permitting ignores the fact that the statute uses the two separate terms distinctly when it defines the roles to be played by the two separate agencies in separate subsections of the CWA. *See* 33 U.S.C. § 1344(a) ("The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material . . . at specified disposal sites."); (b) ("each such disposal site shall be specified for each such permit by the Secretary . . . ."); and (c) ("The Administrator [of EPA] is authorized to prohibit the specification . . . of any defined area as a disposal site . . . ."). And EPA's position ignores certain of its own regulations, which specifically contemplate exercising 404(c) authority even prior to the issuance of a permit. *See* 40 C.F.R. § 231.3. It also ignores the fact that as it has previously recognized, specifications can exist independent of section 404(a) permits. *See* AR 10578-79 ("For purposes of section 404(c), the term 'specification' is necessarily broader than the term 'permit' because there are situations in which a discharge is authorized but a permit issued by the Corps is not required."); Def.'s Reply Mem. in Supp. of Mot. to Dismiss [Dkt. #11] at 21 (explaining that one reason why Congress may have directed EPA's authority to the specification of disposal sites is that "Congress intended EPA's [s]ection 404(c) authority to apply not only to specified disposal sites in permits, but also to sites that the Corps specifies for disposal outside of the permitting context . . . ."), citing 33 U.S.C. § 1344(r), 40 C.F.R. § 230.2(a); Def.'s MSJ Mem. at 18-19 (same).

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62-63 (2006) ("We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citations omitted). EPA responds by claiming that it did not withdraw a permit, it only did what it is authorized to do under 404(c): withdraw a specification. EPA's Reply Mem. in Support of its Mot. for Summ. J. ("Def.'s MSJ Reply") at 9. But that innocent pose is entirely disingenuous since EPA also insists that its action absolutely had the legal effect of invalidating Mingo Logan's permit for the streams that are no longer specified. Tr. at 45-47, Nov. 30, 2011. EPA cannot have it both ways.

There is no question that the sole provision relied upon by EPA does not expressly authorize it to exercise the power it purported to exercise here, so the case cannot be resolved in EPA's favor on *Chevron* I grounds. At best, the text is ambiguous. But in determining at this stage whether the statute clearly prohibits the agency action or whether Congress deliberately left a gap for the agency to fill, the Court must consider not only the provision in question, but also the statutory structure as a whole, and the legislation's purpose and history. *Bell Atlantic Tel. Cos.*, 131 F.3d at 1047; *see also United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect

that is compatible with the rest of the law.") (internal citations omitted). This analysis also favors plaintiff because EPA's reading of section 404(c) conflicts with other clearer provisions.

b. The statute as a whole does not confer authority on EPA to invalidate an existing permit.

As soon as the Court moves beyond the garbled language of section 404(c), the ambiguity begins to dissipate. As a review of the statute makes clear, and as other courts have observed, the permit is the centerpiece of the regulatory regime established by the Clean Water Act.

> The Clean Water Act was passed in 1972 to restore and maintain the chemical, physical, and biological integrity of the nation's waters . . . . In order to achieve these goals, Section 301 of the Act makes the discharge of any pollutant into navigable waters unlawful unless authorized in accordance with specified sections of the Act.
>
> The specified sections of the Act are Sections 402 and 404. Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES") under which the Administrator of the Environmental Protection Agency ("EPA") may issue permits authorizing the discharge of pollutants. Once a Section 402 permit has been issued, the permittee's obligation to comply with the regulatory scheme is determined by reference to the terms and conditions of the permit . . . .

> Section 404 of the Clean Water Act allows the Secretary of the Army Corps of Engineers to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into navigable waters at specified disposal sites. *Here again, once a Section 404 permit has been issued, the permittee's obligation to comply with the regulatory scheme of the Clean Water Act is determined by referring to the terms and conditions of the Section 404 permit*.

Coeur D'Alene Lake v. Kiebert, 790 F.Supp. 998, 1007-08 (D. Idaho 1992) (internal statutory citations omitted) (emphasis added). In short, the Clean Water Act deems any discharges made without a permit to be unlawful, but it also expressly provides that discharges made pursuant to a permit are lawful. 33 U.S.C. § 1344(p); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987).

Plaintiff argues that it should be able to rely upon a valid permit issued by the Corps and that EPA's interpretation runs counter to the unambiguous Congressional directive embodied in section 404(p). Tr. at 14, Nov. 30, 2011. The Court agrees. Indeed, the fact that EPA's interpretation cannot be squared with the statutory scheme became abundantly clear at the hearing, when the EPA groped for a way to articulate how its purported retroactive veto of EPA's specification of certain disposal sites would affect plaintiff's existing permit to discharge in those very sites.

THE COURT: Mingo Logan has a permit. Can they walk out tomorrow and discharge in Pigeonroost Branch?

COUNSEL FOR EPA: No.

THE COURT: Why not?

COUNSEL FOR EPA: EPA 404(c) authority authorizes it to withdraw specifications whenever it makes its determination. . . . I grant you that the effect of that, the practical effect of that, would be that the company would no longer be able to operate under the permit . . . .

THE COURT: They have a permit that says this permit is final until it's suspended or revoked. There's a missing step here. Why can't they walk out tomorrow and dump fill in those sites? You say, we've withdrawn the specification, but the permit exists.

Is the Corps required now to revoke or modify the permit in light of your determination?

COUNSEL FOR EPA: I don't think they need to take that extra step. EPA's withdrawal of that specified site has been final. It has been made. . . .

THE COURT: So everybody with a permit has to on a daily basis compare their permit to your list of specified sites? They can't do what they've been permitted to do by the United States? . . . Where does it say in the statute that they can't dump tomorrow?

COUNSEL FOR EPA: Well, they can only dump, even according to their permit, in areas that are specified.

THE COURT: No. The permit doesn't say that. The statute says you can only issue a permit for areas that are specified. The permit says you can go to Stream A, B, C.[9]

So, does the Corps have to do something tomorrow to give effect to your order, and where is that in the statute?

COUNSEL FOR EPA: No, I don't think that they would need to do that. The permit authorizes—the permit is very specific about what you may dispose of and where you may dispose of it. And when EPA takes away the specification and says you cannot dispose of it in these particular places, they can't—

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[9] EPA's assertion that plaintiff "can only dump, even according to the permit, in areas that are specified," is not borne out by a review of the permit itself. Tr. at 47, Nov. 30, 2011. It is true that a permit can only be *issued* for specified areas, but the issued permit does not make reference to "specification." Department of the Army Permit No. 199800436-3, issued to the Mingo Logan Coal Company on January 22, 2007, expressly authorizes the mining company to place dredged and fill material from the Spruce No. 1 mine into specific waterways: the Right Fork of Seng Camp Creek, Pigeonroost Branch and certain ones of its tributaries, and Oldhouse Branch and certain ones of its tributaries. AR 25763-77. The permit states that the Corps could reevaluate its decision and initiate suspension, modification, or revocation of the permit pursuant to the procedures set forth in 33 C.F.R 325.7, but it does not indicate that the EPA has the authority to modify or invalidate it in any way. AR 25763-77.

> THE COURT: Doesn't that mean somebody has to modify the permit?
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> COUNSEL FOR EPA: That I think happens. Maybe it would be appropriate to go back and do that, but I don't think it has to. I think it would be self-implementing when EPA exercises its 404(c) authority.
>
> THE COURT: So they do it and then you bring an enforcement action against them. And you come into court and they say, Judge, we didn't violate the permit. 404(p). And you say, well, there's this other piece of paper. It's from us.
>
> Aren't you conceding that there's an ambiguity inherent in the statute between the authority that you're seeking and 404(p)?
>
> COUNSEL FOR EPA: I don't see any ambiguity in the statute with respect to the authority of the EPA to withdraw the specification after the permit is issued. . . .
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> THE COURT: . . . But . . . what are they supposed to do tomorrow? And if your exercise of that power essentially undermined the finality of the Corps' exercise of their power in 404(a), wouldn't it have been essential for Congress to say that?
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> There's this huge gap. I mean, you looked at me very blankly when I said what is Mingo Logan supposed to do tomorrow.

Tr. 45-49, 63, Nov. 30, 2011. Counsel's comments that "maybe" it would be appropriate to modify the

permit, and that "I think" the invalidation of the permit would be self-implementing were indicative of the absence of a firm foundation for EPA's position. The idea that a permit—and in particular, a permit *which EPA refused to suspend or modify*—will simply evaporate upon EPA's say-so is at odds with the exclusive permitting authority accorded the Corps in section 404(a) and the legal protection Congress declared that a permit would provide in section 404(p).

Plaintiff also suggests that EPA's interpretation of section 404(c) is inconsistent with section 404(q), entitled "Minimization of duplication, needless paperwork, and delays in issuance; agreements." 33 U.S.C. § 1344(q). That section called for EPA and the Corps to work out agreements promptly after the legislation was enacted "to minimize, to the maximum extent practicable, . . . delays in the issuance of permits under this section," and "to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section." *Id*. EPA's claim that the statute contemplates that a permit is never really final is not easily squared with Congress's clear desire to limit duplication and delay so that commerce would not be disrupted more than necessary. What would be the point of insisting upon expedition in granting permits if a permit isn't worth the paper it's printed on and commerce could be interrupted at any time?

Thus, a review of section 404 in its entirety suggests that EPA's action is invalid.

c. The legislative history of the Clean Water Act does not support EPA's claimed power.

The first step of the *Chevron* analysis also includes a review of the legislative history, but the parties have provided the Court with very little to go on. As EPA points out, plaintiff has cited only one excerpt from a statement by only one Senator:

> … *[P]rior to the issuance of any permit* to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies … [etc.]. Should the Administrator so determine, no permit may issue.

Senate Consideration of the Report of the Conference Committee ("Senate Consideration"), s. 2770, 93rd Cong. 1st Sess., Oct. 4, 1972, *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177 (1973) (emphasis added). But, as plaintiffs point out, the speaker, Senator Edmund Muskie, was the Senator who played the most significant role in the passage of the legislation, the statement is quite clear, and EPA has not directed the Court to any legislative statements to the contrary. The Court finds that Senator Muskie's comments are instructive, and furthermore, that its own review of the legislative history as a whole suggests that EPA's position is inconsistent with what Congress had in mind.

On October 4, 1972, Senator Muskie submitted the conference report on the Federal Water Pollution Control Act Amendments of 1972 to his colleagues on the Senate Floor.

> I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope.

Id. at 161. Senator Muskie included a detailed discussion of each of the significant provisions in the bill, including section 404, in his prepared remarks to be made part of the record, and he observed:

> I do this because the complexities of the individual provisions are such that the legislative history will be important to those charged with the responsibility for administering the program. At the same time, however, I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress.

Id. at 163-64. These statements reinforce the Court's view that there must be clear statutory authority for the power the EPA purports to exercise here.

It is true that Senator Muskie emphasized that the fundamental purpose of the legislation was to

restore and protect the nation's waterways. *See, e.g.*, *id.* at 161, 164 ("Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. . . . Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? . . . Those questions were never asked as we destroyed the waters of our Nation, and they deserve no answers as we finally move to restore and renew them."). And with respect to section 404 in particular, his submission emphasized: "[T]he Committee expects the Administrator and the Secretary to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States . . . ." *Id.* at 177-78. But Senator Muskie also reminded the chamber that there were "three essential elements" to the legislation: "[u]niformity, finality, and enforceability." *Id.* at 162.

A review of the detailed description of section 404 made part of the record reveals that EPA's interpretation is inconsistent with the clear scheme of shared responsibility that was carefully established when the House and Senate versions of the bill were harmonized by the Conference Committee.

> A major difference between the Senate bill and the House amendment related to the issue of dredging. The Senate Committee had reported a bill which treated the disposal of dredged spoil like any other

> pollutant. . . . The House bill not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protection Agency as the permit issuing authority. The Conference agreement follows those aspects of the House bill with related to the Secretary of the Army's regulatory authority. However, consistent with the Senate provision, the Administrator . . . has three clear responsibilities and authorities.
>
> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. . . .
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters. . . .
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

Id. at 177. This excerpt from the legislative history demonstrates that the final bill was the product of a compromise between the Senate, which had lodged

authority with EPA, and the House, which insisted upon the primacy of the Corps when dealing with dredged material. The record expressly states that EPA's 404(c) veto authority will be exercised prior to the issuance of a permit, and it also reflects the Conferees' understanding that EPA's responsibilities were to be limited to those specifically assigned. As another court in this district has noted:

> [W]hile it is true that the EPA does have some role to play in the Section 404 permitting process, the carving out of limited circumstances for EPA involvement in the issuance of Section 404 permits appears to be a statutory ceiling on that involvement. . . . The statute is not ambiguous, as it establishes the Corps as the principal player in the permitting process, and then specifies certain roles for the EPA to play in that process. Thus, if a responsibility involving the permitting process has not been delegated to the EPA by Congress, that function is vested in the Corps as the permitting authority.

Nat'l Mining Ass'n v. Jackson, -- F. Supp. 2d --, 2011 WL 4600718, at *5 (D.D.C. Oct. 6, 2011).

Senator Muskie's transmittal of the Conference Committee report goes on:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits

> already existed.[10] At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determinations as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator . . . should have a veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.
>
> The decision is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site.

Senate Consideration, at 177.

So, while EPA is correct that Congress expected it to fulfill its unique role as the steward of the environment when carrying out its functions under section 404, it is also clear from the forward looking language in the legislative history that Congress

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[10] This excerpt supports Mingo Logan's interpretation that the term "withdrawal" in Section 404(c) refers to specifications of discharge sites that were in place prior to Congress's adoption of the section 404 permitting scheme because it shows that Congress was aware that there was already a permitting system for disposing of material discharges in place. *See supra* note 6.

anticipated that EPA would act before a permit was issued, and indeed, that it would not unnecessarily slow down the process while doing so. In sum, the Court finds nothing in the legislative history of the amendments that would show an intent by Congress to confer permit revocation authority on the Administrator of EPA, and EPA's assumption of that authority runs counter to what Congress did express about how the regulatory scheme would be administered.

d. The case law cited by EPA is not controlling or persuasive.

Finally, EPA asserts that three courts have already concluded that section 404(c) authorizes it to withdraw a specification after the Corps issues a section 404 permit. *See* Def.'s MSJ Mem. at 14-16, citing *City of Alma v. United States*, 744 F. Supp. 1546 (S.D. Ga. 1990); *Russo Devel. Corp. v. Reilly*, No. 87-3916, 1990 U.S. Dist. LEXIS15859 (D.N.J. Mar. 16, 1990); *Hoosier Envtl.Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp. 2d 953 (S.D. Ind. 2000). But those decisions are not binding on this Court, and, more importantly, their statements about EPA's post-permit authority were simply dicta. Those courts were not presented with the question that is before this Court, and they did not purport to address it.

In *City of Alma*, a permit had been issued for the disposal of fill material from the proposed construction of an artificial lake, and EPA subsequently invoked its section 404(c) authority to prohibit the specification of the site. Plaintiffs argued that EPA had violated its own regulations for the

exercise of 404(c) authority, pointing to policy statements contained in the preamble to those regulations. In particular, the plaintiffs complained that EPA was constrained by statements of its policy to not interpose objections after it had previously acceded to the designation of the site and a permit had already been issued. 744 F. Supp. at 1558-59. But, as the court pointed out, another court had invalided the permit in the meantime, and EPA's action was in response to the Corps' specification of the site for a *new* permit. *Id.* at 1559. The court did observe that EPA's regulations claimed the authority to withdraw a specification even after a permit had been issued, *id.* at 1559-60, but the agency's power to do so in general was not contested by the parties, and the court's statement in dicta was made without the benefit of the full analysis that *Chevron* requires. *Id.* Since at bottom, the case involved a section 404(c) challenge to a specification at a time when there was no valid, operative permit, it does not govern here.

Similarly, the *Hoosier* and *Russo* courts' statements regarding EPA's power to withdraw a specification after a permit is issued were mere dicta, and not based on a thorough analysis of the authority delegated by Congress in the CWA. In *Russo*, the Court was presented with the question whether EPA could veto a specification when a landowner had already converted the land in question into a disposal site. 1990 U.S. Dist. LEXIS 15859, at *3. Although the court read section 404(c) as granting EPA the authority to withdraw a specification after the Corps has issued a permit, the Corps had not yet issued a section 404 permit in the case before it. Rather, EPA

was seeking to withdraw the specification *before* the section 404(b) was actually issued.

The *Hoosier* court was also presented with a different question than the one before this Court: it considered whether an environmental assessment conducted by the Army Corps had failed to address certain indirect effects of a development project, rendering it legally deficient. 105 F. Supp. 2d at 971. In rejecting that argument, the court found inapposite a letter from the EPA, dated two months after a section 404 permit had been issued, which raised the Corps' failure to examine indirect effects. *Id.* The court determined that EPA wrote the letter under the false impression that the permit had not yet been issued, and so the court found it "difficult to read the EPA's letter as condemning the [Corps'] review as 'legally deficient,' especially when the EPA took no subsequent action to overrule or otherwise challenge the [Corps'] decision," such as exercising its section 404(c) veto authority. *Id.* Again, while it may have assumed the existence of such a power, the court did not squarely consider whether EPA actually would have had the authority to exercise its 404(c) authority after a permit had been issued because that was not the situation before it.

For all of the reasons set forth above, the Court is of the view that EPA's position is inconsistent with the statute as a whole, and that its action could be deemed to be unlawful at the first step of the *Chevron* analysis. But the Court acknowledges that there is some language in section 404(c) itself that could be considered to be sufficiently ambiguous to require the Court to go on to the second step, and

therefore, it will review EPA's interpretation under that standard as well.

B. EPA's interpretation of the statute is not reasonable and does not survive scrutiny under *Chevron* step two.

a. The level of deference to be accorded when a statute is jointly administered by two agencies.

Under *Chevron* step two, an agency's interpretation of a statute that it administers is generally entitled to substantial deference, such that the court should uphold it as long as it is "reasonable." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998). But when more than one agency is tasked with administering the statute, the determination of how much deference the court owes any one of those agencies is not so straightforward. In *Collins v. National Transp. Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003), the D.C. Circuit set out three different types of shared enforcement schemes:

- For generic statutes like the APA, FOIA, and FACA, the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions de novo;
- For statutes like the FDIA, where the agencies have specialized enforcement responsibilities but their authority potentially overlaps—thus creating risks of inconsistency or uncertainty—de novo review may also be necessary;
- For statutes where expert enforcement agencies have mutually exclusive authority

> over separate sets of regulated persons, the above concerns do not work against application of *Chevron* deference.

Id. at 1253. In *Collins*, the Court found that the Coast Guard's interpretation of a maritime safety treaty called COLREGS—which was enforced by the Coast Guard against pilots operating U.S.-flagged vessels, the Navy against Naval officers, and various state maritime commissions against pilots of foreign-flagged vessels—was entitled to some deference, but that interpretive uniformity across the agencies was also important. *Id.*

EPA directs the Court to *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 122-23 (D.D.C. 2010), in which another court in this district explained that there is "some support" for the argument that the exception to *Chevron* deference that arises where multiple agencies are charged with administering a statute would not apply "where the text has carved out an area more clearly the domain of one agency over another." *Id.*; *see* Def.'s MSJ Mem. at 30. The agency argues that section 404(c) is an area more clearly the domain of EPA than the Corps because it authorizes only EPA to act. But section 404(c) involves both EPA and the Corps, as it calls for consultation between the two agencies. Moreover, the *Chevron* step one analysis that the Court must engage in involves the interpretation of the entire statute, not just section 404(c), and the administration of section 404 as a whole is plainly entrusted to both agencies. The Corps is assigned the authority to issue permits under 404(a); the Corps specifies the disposal sites under 404(b), but it must

utilize jointly developed guidelines; and the EPA can veto a specification under 404(c), but only after consultation with the Corps. Thus, this regulatory regime seems to fit squarely into the second *Collins* category.[11] *Collins*, 351 F.3d at 1252.

Accordingly, the Court could conclude that de novo review is called for and that EPA is entitled to no deference at all. *See Salleh v. Christopher*, 85 F.3d 689, 691 (D.C. Cir. 1996) (no deference to the Secretary of State's interpretation of the Foreign Service Act where one provision grants the Secretary the power to discharge employees and another gives the Grievance Board the authority to hear and decide grounds for discharge); *see also Grant Thornton, LLP v. Office of Comptroller of the Currency*, 514 F.3d 1328, 1331 (D.C. Cir. 2008) (OCC's interpretation of FIRREA is reviewed de novo because multiple

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[11] Counsel for the government insists that there is no disagreement between EPA and the Corps about the scope of EPA's authority, but it is notable that before EPA undertook the challenged effort under section 404(c), it followed the Corps' procedures, asked the Corps to modify the permit, and was turned down. *See* AR 12754-56 (request by EPA), 12,781-84 (Corps denial of EPA's request). EPA's decision to then move to withdraw the specification has the air of a disappointed player's threat to take his ball and go home when he didn't get to pitch. Because EPA's interpretation of the statute is grounded in its difference of opinion with another agency charged with implementing the statute, and it is the other agency that has been accorded the sole statutory authority to issue and enforce permits, *see* 33 U.S.C. § 1344(a) and (s), and that has the sole authority to revoke or modify a permit, *see* 33 C.F.R. § 325.7, the situation seems to fall well within in the category of cases where the agency's interpretation should not be entitled to *Chevron* deference.

agencies administer the act). But instead, the Court will follow *Collins*, which accorded some level of deference to the Coast Guard's interpretation because of its expertise in regulating maritime safety—the matter at issue. *Collins*, 351 F.3d at 1253-54. The *Collins* court found that "even if *Chevron* deference is not called for," the Coast Guard was entitled to *Skidmore* deference, which the court defined as "obviously less than *Chevron*," but a "non-trivial boost." *Id.* at 1253-54. Yet, even according EPA this level of deference, the Court finds EPA's interpretation to be unreasonable.

b. What is the interpretation that EPA is advancing, to which some deference is due?

In 1979, EPA promulgated regulations establishing the procedures it would follow when invoking section 404(c) to prevent the discharge of material at particular sites. In its introduction to those regulations, the agency asserted: "[S]ection 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued." 44 Fed. Reg. 58,076, 58076 (Oct. 9, 1979), codified at 40 C.F.R. pt. 231.[12] But in

[12] Interestingly, although the summary in the Federal Register emphatically sets out EPA's position that it "clearly" has the authority to withdraw a specification after a permit had been issued, *see* 44 Fed. Reg. at 58077 ("The statute on its face clearly allows EPA to act after the Corps has issued a permit; it refers twice to the 'withdrawal of specification' which clearly refers to action by EPA after the Corps has specified a site [*e.g.* issued a permit or authorized its own work.]"), there is only one regulation that explicitly refers to the time period after a permit has been issued: the emergency procedure provision. *See* 40

the same preamble to the published regulations, EPA also assured worried commenters: "EPA agrees with the suggestion that it would be inappropriate to use 404(c) after issuance of a permit where the matters at issue were reviewed by EPA without objections during the permit processing, or where the matters at issue were resolved to EPA's satisfaction during the permit proceeding, unless substantial new information is first brought to the Agency's attention after issuance." *Id.* at 58077.[13] And in the course of

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C.F.R § 231.7. This regulation makes no mention of section 404(c), but it permits the agency to ask the Corps to suspend the permit or to invoke its emergency powers under section 504 when a discharge presents an imminent danger of irreparable harm. *Id*. The rest of the provisions simply talk about the prohibition, restriction, or withdrawal of a specification in general, and they do not explain how that could be accomplished in the time period after a permit has been issued any more than the statute does. *See* 40 C.F.R. § 231.1 *et. seq*. Even EPA's own definition of "withdraw specification" does not make any explicit reference to permits. *See* 40 C.F.R. § 231.2(a) ("Withdraw specification means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area.").

[13] This was the provision relied upon by the plaintiff in *City of Alma*, 744 F. Supp. at 1559. EPA went to some length in the preamble to allay commenters' objections to a post-permit veto. It explained: "[O]ne can anticipate that there will be circumstances where it may be necessary to act after issuance in order to carry out EPA's responsibilities under the Clean Water Act. For example, new information may come to EPA's attention; there may be new scientific discoveries; or in very rare instances, EPA may not receive actual notice of the Corps' intent to issue a permit in advance of issuance. While these are the most likely occasions necessitating 404(c) action after

the ensuing thirty-plus years, the agency has never before invoked its 404(c) powers to review a permit that had been previously duly issued by the Corps. AR 11907.[14]

So, in order to determine whether EPA's interpretation of the statutory provision is reasonable for *Chevron* II purposes, the Court finds it necessary to clarify what that interpretation might be. At the hearing, the Court inquired whether it was the agency's position that it had the authority under the statute to veto a specification at any time, or whether it was simply advancing the position that it had the authority to do so when significant new information, which was not available to the agency when the permit application was reviewed, alters the

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issuance, EPA does not wish to unwittingly restrict action in other appropriate circumstances." *Id.*

[14] EPA cites the Final Determination of the Administrator Concerning the North Miami Landfill Site for the proposition that its interpretation has "been used to support EPA's exercise of its Section 404(c) authority to withdraw a specification in a Section 404 permit," Def.'s MSJ Mem. at 29, but that determination was actually in response to an application to modify the section 404 permit in question, and the site that EPA "withdrew" was both specified in the existing permit and also proposed to be specified in the new modified permit, *see* EPA, Final Determination of the EPA's Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act (1981), *summarized in* 46 Fed. Reg. 10,203, 10, 203-04 (Feb. 2, 1981); *see also* Def.'s MSJ Reply at 27 n.21; Brief of *Amici Curiae* The Chamber of Commerce of the United States *et al.* [Dkt. #50] at 6 n.4. EPA does not point to any other instances where it has invoked its section 404(c) authority to withdraw a specification in a duly issued section 404 permit.

environmental calculus. The Court posed this question several times, and EPA made it clear that the preamble to the regulations was simply a policy statement, and that the agency expected the Court to accord deference to a broad interpretation of agency authority:

> THE COURT: . . . I want to know, is the preamble part of the interpretation of the statute that you are asking me to deem reasonable or isn't it? Are you saying that you have unlimited authority to withdraw post permit or are you saying that your interpretation of the statute is that you have the authority to withdraw post permit based on new information? What is your position?
>
> COUNSEL FOR EPA: I'll answer as clearly as I can. I think the statute and regs do not provide that limitation.

Tr. at 67; *see also* Tr. at 56-58; 67-68; and 74, Nov. 30, 2011. Therefore, the Court must decide whether EPA's reading of the statute to permit post permit revocation without limitation is reasonable.[15]

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[15] EPA asked the Court to go on and find its revocation reasonable *in this case* because it was based on new scientific information (which plaintiff disputes), *see* United States' Post-Hearing Brief [Dkt. #79]; Pl.'s Opp. to Def.'s Post-Hearing Brief [Dkt. #82], but to do so would turn the inquiry on its head. The Court does not get to consider whether the agency's exercise of a power was arbitrary and capricious under the APA if under *Chevron*, the agency did not have the power to act in the first place. And any review of the reasonableness of EPA's action in this case would have to take into account the fact that EPA participated fully in the ten year, exhaustive process that preceded the issuance of the permit here in which EPA

c. EPA's interpretation of section 404(c) is not reasonable, even if it receives some deference.

Since EPA is one of two agencies entrusted with the implementation of the Clean Water Act, and there are aspects of the regulatory regime committed solely to its expert discretion, the Court has concluded that EPA's interpretation of the statute is entitled to some, non-trivial quantum of respect, although it need not receive full *Chevron* II deference. But even if the Court accords the agency some deference, it finds EPA's position to be unreasonable.[16]

First and foremost, EPA's interpretation fails because it is illogical and impractical. EPA claims that it is not revoking a permit—something it does not have the authority to do—because it is only withdrawing a specification. Yet EPA simultaneously insists that its withdrawal of the specification effectively nullifies the permit. To explain how this would be accomplished in the absence of any statutory provision or even any regulation that details the effect that EPA's belated action would

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ultimately stated that it did not intend to exercise its 404(c) authority. The permit was issued, and nothing had even been discharged into the streams when EPA claimed that the new studies supported a finding that the downstream water quality consequences—which plaintiff and amicus West Virginia argue EPA could not even consider under the statute—would be unacceptable.

[16] The Court notes that the question of statutory interpretation at issue is not one that is informed by the agency's particular area of expertise in any event.

have on an existing permit, EPA resorts to magical thinking. It posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this non-revocation revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit.

It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality. Indeed, this concern prompted a number of amici to take up their pens and submit briefs to the Court. They argued that eliminating finality from the permitting process would have a significant economic impact on the construction industry, the mining industry, and other "aggregate operators," because lenders and investors would be less willing to extend credit and capital if every construction project involving waterways could be subject to an open-ended risk of cancellation. *See* Brief of *Amicus Curiae* The National Stone, Sand and Gravel Association in Supp. of Pl. Mingo Logan Coal Co., Inc. [Dkt. #51] at 5-13; Brief of *Amici Curiae* the Chamber of Commerce of the United States *et al.* in Support of Pl. [Dkt. #50] at 7-14. EPA brushed these objections away by characterizing them as hyperbole, Tr. at 66, but even if the gloomy prophesies are somewhat overstated, the concerns the amici raise supply additional grounds for a finding EPA's interpretation to be unreasonable.

After all, EPA itself has given voice to the importance of finality, and it has acknowledged that the statute vests final authority in the Corps. The Memorandum of Agreement between EPA and the Department of the Army ("MOA"), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm, that was developed pursuant to section 404(q), begins with a definitive declaration: "The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 102, including final determinations of compliance with the Corps permit regulations [and] the Section 404(b)(1) Guidelines . . . ." If there is any set of rules that should be subject to deference it would be those embodied in the MOA: Congress specifically directed the two agencies to work together to devise procedures that would implement section 404 and minimize unnecessary delay, and the MOA was the result. The fact that this document says absolutely nothing about a post-permit veto by EPA, and that it references Army regulations that specifically allow EPA to petition the Corps to rescind or modify a permit, but are themselves silent about the possibility of post-permit veto by EPA, *see* 33 C.F.R. pts. 320-330, is another factor leading the Court to conclude that EPA's position is unreasonable.

Furthermore, that portion of the MOA that does address EPA's exercise of its 404(c) veto authority expressly contemplates that the agency would act before the Corps issues a permit:

> The EPA reserves the right to proceed with Section 404(c). To assist the EPA in reaching

> a decision whether to exercise its Section 404(c) authority, the District Engineer will provide EPA a copy of the Statement of Findings/Record of Decision prepared in support of a permit decision after the ASA (CW) review. The permit shall not be issued during a period of 10 calendar days after such notice unless it contains a condition that no activity may take place pursuant to the permit until such 10th day, or if the EPA has initiated a Section 404(c) proceeding during such 10 day period, until the Section 404(c) proceedings is concluded and subject to the final determination in such proceeding.

MOA § IV(3)(h).

EPA pointed the court to its own regulations, then, instead of the MOA. The regulations do not explicitly address the post-permit issue, but they were published with a preamble that states that the agency has the power to withdraw a specification before, during, or after the permit process. 44 Fed. Reg. at 58076. EPA argued that the Court should find that interpretation to be reasonable because, after all, the regulations were the result of the notice and comment process. Tr. at 54. But that argument was not persuasive because EPA insisted at the same time that other statements in the preamble—in particular, those responding to commenters' concerns about the legality and fairness of a post-permit veto—were simply policy guidelines that did not tie its hands. Why would the fact that the interpretation survived notice and comment be meaningful if the

agency's specific response to those comments is not considered to be part of the interpretation?

Based upon all of the facts and circumstances set forth above, the Court cannot find that EPA's interpretation of section 404(c), extending its veto authority indefinitely after a permit has been issued, is reasonable.

CONCLUSION

Because the Court finds that EPA exceeded its authority under section 404(c) of the Clean Water Act by issuing its Final Determination on January 13, 2010, purporting to modify Mingo Logan's section 404 permit by revoking the permit's authorization to discharge fill into Pigeonroost Branch and Oldhouse Branch and their tributaries, the Court will grant plaintiff's motion for summary judgment [Dkt. #26] and deny defendant's cross-motion [Dkt. #46]. A separate Order will issue.

AMY BERMAN JACKSON
United States District Judge

DATE: March 23, 2012

Appendix D

33 U.S.C. § 1344
Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of

specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, 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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters,

causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate

compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority

with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be

affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State

and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate

corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to

provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance

of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(*l*) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting

through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(*o*) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such

environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a

permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton [1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or

interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.