MINGO LOGAN COAL CO. V. EPA

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I. Mountaintop Removal Mining

Mountaintop removal mining is a form of coal strip mining that has become increasingly prevalent in the Appalachian region of the United States in recent decades.[1] While developing a mountaintop removal mine, companies remove vegetation, soil, and rock (collectively called "overburden") from the tops of mountains and discard those waste materials into adjacent river valleys.[2] Once the coal hidden beneath the overburden has been excavated, the mining sites are restored by regrading and revegetating the soil.[3]

In a recent *Science* paper evaluating the environmental impacts of mountaintop removal, M.A. Palmer et al. found that "water-quality data from [West Virginia] streams revealed serious environmental impacts that mitigation practices cannot successfully address" and that "[p]ublished studies . . . show a high potential for human health impacts."[4] Streams "play critical roles in ecological processes such as nutrient cycling and production of organic matter for downstream food webs," and those streams are permanently destroyed when they are filled with mining spoil.[5] Filling even a portion of a stream can have significant negative impacts on water quality, including "increases in pH,

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[1] M.A. Palmer et al., *Mountaintop Mining Consequences*, 327 Sci. 148, 148 (2010).

[2] *Mid-Atlantic Mountaintop Mining*, EPA, http://www.epa.gov/region3/mtntop/ (last visited Jan. 27, 2013) (on file with the Harvard Law School Library).

[3] *Id.*

[4] Palmer et al., *supra* note 1, at 148.

[5] *Id.*

electrical conductivity, and total dissolved solids due to elevated concentrations of sulfate . . . , calcium, magnesium, and bicarbonate ions."[6] Persistent biodiversity loss has also been observed in water bodies downstream from mining fill.[7]

Mountaintop removal sites are normally restored after the mining operation is complete, but "reclaimed soils characteristically have higher bulk density, lower organic content, low water-infiltration rates, and low nutrient content."[8] Although "[c]urrent mitigation strategies are meant to compensate for lost stream habitat and functions . . . , water-quality degradation caused by mining activities is neither prevented nor corrected during reclamation or mitigation."[9] Based on these findings, Palmer et al. recommend that "[fill] permits should not be granted unless new [mitigation] methods can be subjected to rigorous peer review and shown to remedy these problems."[10]

II. Case Summary

A. Background

Mingo Logan Coal Co. v. EPA[11] addresses a mining company's challenge to the authority of the Environmental Protection Agency ("EPA") to veto a specification by the Army Corps of Engineers ("the Corps") of a fill material disposal site in an existing permit. In January 2007, the Corps issued a Clean Water Act section 404[12] permit authorizing the Spruce No. 1 Mine, which is operated by Mingo Logan, "to discharge dredged or fill material into stream segments, including Pigeonroost and Oldhouse Branches[.]"[13] According to EPA, the Spruce No. 1 Mine is "one of the largest surface mining operations ever authorized in Appalachia."[14]

In September 2009, EPA sent a letter to the Corps' district office, requesting that it revoke or modify the Spruce No. 1 permit in light of "new information and circumstances that had arisen since the issuance of the permit and that justified its reconsideration."[15] The Corps refused, and, in March 2010, EPA published a notice of its intent to withdraw, pursuant to section 404(c) of the Clean Water Act, the specification of Pigeonroost Branch, Oldhouse Branch and other streams as fill disposal sites.[16] EPA issued a "Final Determination"

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[6] *Id.*
[7] *Id.*
[8] Palmer et al., *supra* note 1, at 149.
[9] *Id.*
[10] *Id.*
[11] 850 F. Supp. 2d 133 (D.D.C. 2012).
[12] *See* 33 U.S.C. § 1344 (2012).
[13] *Mingo Logan*, 850 F. Supp. 2d at 136.
[14] *Spruce No. 1 Mine*, EPA, http://www.epa.gov/region3/mtntop/spruce1.html (last visited Jan 27, 2013) (on file with the Harvard Law School Library).
[15] *Mingo Logan*, 850 F. Supp. 2d at 137.
[16] *Id.*

to withdraw the specification of the sites listed in its initial notice in January 2011.[17]

Mingo Logan filed an action in the D.C. District Court ("Court") seeking to invalidate EPA's purported withdrawal of the Pigeonroost and Oldhouse disposal sites. Although the plaintiff challenged EPA's action on several grounds, the Court, noting that "a ruling on the legality of the post-permit veto could be dispositive of the entire case," decided to "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) . . . ."[18] Accordingly, the decision in *Mingo Logan v. EPA* is limited to the proper interpretation of section 404(c) of the Clean Water Act.

B. The Court's Analysis

The Court first looks to the relevant statute. Section 404(c) of the Clean Water Act provides that:

> The Administrator [of EPA] 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.[19]

EPA has interpreted this provision to authorize the agency to withdraw a site specification contained in a fill permit at any time — both before and after the permit is issued.[20]

As the Court notes at the beginning of its opinion, an agency's interpretation of a statute is reviewed under the two-step framework established by *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*[21] First, the reviewing court must determine whether "Congress has directly spoken to the precise question at issue" in the agency's interpretation, or whether the statute

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[17] *Id.*
[18] *Id.*
[19] 33 U.S.C. § 1344(c) (2006).
[20] Denial of Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,076 (Oct. 9, 1979) ("[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.").
[21] 467 U.S. 837 (1984).

is ambiguous as to that question.[22] If the meaning of the statute is "clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[23] In other words, an agency interpretation contrary to the clear statutory language will not survive judicial review.[24] However, "[i]f the Court concludes that the statute is either silent or ambiguous" as to the question resolved by the agency's interpretation, the court must sustain that interpretation so long as it is "based on a permissible construction of the statute."[25]

Beginning with *Chevron* Step One, the Court argues that section 404 does not unambiguously grant EPA the veto authority it claims. As the Court observes, the meaning of the first sentence of subsection (c) is not immediately obvious. The phrase "[t]he Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area" could mean either (1) EPA has authority to prohibit the specification of an area or to prohibit the withdrawal of the specification of an area; or (2) EPA has authority to prohibit the specification of an area, which includes the authority to withdraw specifications.[26] Section 404(c) would seem to represent a paradigmatic example of *Chevron* ambiguity.

However, the Court goes on to argue that the structure of the statute as a whole "dissipate[s]" the ambiguity of section 404(c). The Court argues that since the permit is the "centerpiece of the regulatory regime established by the Clean Water Act,"[27] and 404(p) provides that "[c]ompliance with a permit issued . . . under [section 404] shall be deemed compliance [with the Clean Water Act],"[28] Mingo Logan "should be able to rely on a valid permit issued by the Corps . . . ."[29] Moreover, the purported veto power is inconsistent with 404(p), which provides "unambiguous[ly]" that a 404 permit contains all of a party's obligations under the Clean Water Act with respect to the permitted activity.[30]

After asserting that section 404 as a whole "suggests" that EPA's interpretation of section 404(c) is incorrect and pointing to bits and pieces of legislative history that tangentially relate to the scope of EPA's purported veto authority, the Court proceeds to *Chevron* Step Two.[31] It concludes that EPA's interpretation is not reasonable under the *Chevron* rubric. First, the Court reasons that the case for *Chevron* deference to EPA's interpretation is doubtful at best. Two agencies (the Corps and EPA) administer section 404, so the application of

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[22] *Mingo Logan*, 850 F. Supp. 2d at 138–39 (internal quotation marks and citations omitted).
[23] *Id.* (internal quotation marks and citations omitted).
[24] *See Chevron*, 467 U.S. at 842–43.
[25] *Mingo Logan*, 850 F. Supp. 2d at 139 (internal quotation marks and citations omitted).
[26] *See id.* at 140.
[27] *Id.* at 142.
[28] 33 U.S.C. § 1344(p).
[29] *Mingo Logan*, 850 F. Supp. 2d at 143.
[30] *Id.*; *see* 33 U.S.C. § 1344(p) ("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.").
[31] *Mingo Logan*, 850 F. Supp. 2d at 144.

Chevron is "not so straightforward."[32] The Court discusses a leading D.C. Circuit case concerning the application of *Chevron* to statutes administered by multiple agencies, *Collins v. National Transportation Safety Board*,[33] and concludes that section 404 falls under the category of statutes "where the [administering] agencies have specialized enforcement responsibilities but their authority potentially overlaps — thus creating risks of inconsistency and uncertainty[.]"[34] The *Collins* panel held that courts should review interpretations of such statutes de novo. Moreover, as the Court assures itself in a footnote, "the question of statutory interpretation at issue is not one that is informed by the agency's particular area of expertise in any event."[35] However, the Court, erring on the side of caution, decides to give EPA the benefit of *Skidmore* deference rather than no deference at all.[36]

Having decided that EPA's interpretation merits *Skidmore* deference, the Court turns to the interpretation itself and concludes that it is not "reasonable."[37] The Court reasons that it would simply not make sense to allow one agency to trigger the "automatic self-destruction" of a permit issued by another agency "after years of study and consideration."[38] Moreover, "sow[ing] a lack of certainty into [the permit] system that was expressly intended to provide finality" by allowing EPA to reopen or veto permits would "have a significant economic impact" on the industry.[39] Finally, the Court observes that a Memorandum of Agreement between EPA and the Department of the Army, issued jointly by the agencies pursuant to section 404(q), "says absolutely nothing about a post-permit veto by EPA," which, the Court implies, indicates that the two agencies never even considered the possibility of a post-permit veto.[40]

The *Mingo Logan* Court plays a shell game with the *Chevron* doctrine and resorts to the same sort of "magical thinking" it attributes to EPA in order to strike down the agency's lawful interpretation of the Clean Water Act.[41] Its decision should be reversed on appeal.

III. Deference Due to EPA's Interpretation

The *Chevron* analysis begins with the question of whether *Chevron* deference is owed to an agency's interpretation of a statute.[42] For our purposes here,

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[32] *Id.* at 148.
[33] 351 F.3d 1246 (D.C. Cir. 2003).
[34] *Mingo Logan*, 850 F. Supp. 2d at 149 (citing *Collins*, 351 F.3d at 1253).
[35] *Id.* at 152 n.16.
[36] *Id.* at 150. Under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), a court should give weight to an administrative decision according to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See also United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).
[37] *Id.*
[38] *Id.* at 152.
[39] *Id.*
[40] *Mingo Logan*, 850 F. Supp. 2d at 152.
[41] *Id.*
[42] *See* United States v. Mead Corp., 533 U.S. 218, 227–29 (2001).

there are two reasons why EPA's interpretation may not merit *Chevron* deference. First, section 404 is administered by both the Corps and EPA, and D.C. Circuit case law suggests that interpretations of statutes administered by more than one agency do not merit *Chevron* deference. Second, some authority suggests that courts should not defer to an interpretation that implicates the scope of an agency's authority under a statute.

A. Deference Due to an Interpretation of a Statutory Provision Administered by Both EPA and the Corps

Several courts have held that *Chevron* deference is not warranted for agency interpretations of statutes that, like the Administrative Procedure Act ("APA"), are administered by multiple agencies.[43] Courts have offered several justifications for this exception to *Chevron* deference. First, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities and fill gaps [where] more than one agency will independently interpret the statute."[44] Second, agencies do not have any particular expertise with respect to statutes, such as the APA or Freedom of Information Act ("FOIA"), which govern generic administrative procedure rather than a technical field of regulation.[45] Third, courts have suggested that implementation of statutes administered by multiple agencies could lead to "multiple and perhaps conflicting interpretations" of the statute and subject regulated parties to "risks of inconsistency or uncertainty."[46]

Collins, the leading D.C. Circuit case that addresses this problem and the opinion on which *Mingo Logan* relies, identifies three types of statutes subject to interpretation by multiple agencies:

> (1) "generic statutes like the APA, FOIA, and FACA" that apply to all or most agencies;[47]
> (2) statutes under which each agency "has jurisdiction over a different set of regulated parties," but any one party may be subject to the jurisdiction of more than one agency;[48] and
> (3) statutes under which "expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons," such that "there appears no danger that any one regulated party will be faced with multiple and perhaps conflicting interpretations of the same requirement."[49]

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[43] *See, e.g.*, *Collins*, 351 F.3d at 1253.
[44] Salleh v. Christopher, 85 F.3d 689, 692 (D.C. Cir. 1996).
[45] *Collins*, 351 F.3d at 1252–53 ("[S]pecialized agency expertise" is lacking when agencies administer statutes like the APA or FOIA.).
[46] *Id.* at 1253.
[47] *Id.*
[48] *Id.*
[49] *Id.*

The Court in *Mingo Logan* concludes that section 404(c), as well as section 404 as a whole, falls under the second *Collins* category.[50] The Court reasons that section 404(c) "involves both EPA and the Corps, as it calls for consultation between the two agencies."[51] Moreover, "section 404 as a whole is plainly entrusted to both agencies," since it assigns authority to the Corps to issue permits and specify disposal sites and allows EPA to veto a specification.[52] This conclusion is contrary to governing precedent.

As a paradigmatic example of the second category of statutes, the *Collins* court points to the Federal Deposit Insurance Act ("FDIA").[53] The provisions of the FDIA are administered by several agencies, including "the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision in the Treasury Department."[54] Each of these agencies has jurisdiction over a specific set of regulated parties.[55] However, those sets may overlap, such that a single regulated party may be subject to the jurisdiction of more than one agency.[56] If several agencies have jurisdiction over a single party, and each of those agencies interprets a requirement set forth in the FDIA in a different way, the regulated party may be subject to "multiple and perhaps conflicting interpretations of the same requirement."[57] Under such circumstances, *Chevron* deference to each implementing agency's interpretation of the statute would condone a regime of conflicting interpretations and expose regulated parties to "risks of inconsistency and uncertainty."[58] Under such circumstances, the goal of uniformity sought to be promoted by the *Chevron* doctrine would be undercut by the *Chevron* doctrine itself.[59] Moreover, it is difficult to argue that Congress delegated implementing authority to any particular agency when it charged four different agencies with implementing the same provisions of the same statute.

While it is true that a single party applying for a section 404 permit is subject to the authority of both the EPA and the Corps, that division of authority threatens no similar risk of "inconsistency and uncertainty."[60] With the exception of the clause calling for consultation between EPA and the Corps, section 404(c) is administered exclusively by EPA.[61] The statute gives the Corps no authority to veto disposal site specifications or to prevent EPA from exercising a veto.[62] The Corps is free to interpret section 404(c) however it

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[50] *Mingo Logan*, 850 F. Supp. 2d at 149.
[51] *Id.*
[52] *Id.*
[53] *Collins*, 351 F.3d at 1253.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Collins*, 351 F.3d at 1253.
[59] *See id.* at 1252–53 ("Where a statute is generic . . . [there is no] greater likelihood of achieving a unified view through the agency than through review in multiple courts.").
[60] *See id*.
[61] *See* 33 U.S.C. § 1344(c) (2006).
[62] *See id.*

likes, but it has no authority to implement that interpretation through regulatory actions that affect the rights of regulated parties. Therefore, there is no possible set of facts under which a regulated party will be subject to the specification veto authority of multiple agencies, each of which has adopted and implemented a different interpretation of section 404(c).[63]

Rather, a party seeking a section 404 permit will be subject to the Corps' authority as to the permit application process and the initial specification of disposal sites, and to EPA's authority as to the withdrawal of those specification sites (if EPA determines that one or more of the section 404(c) criteria is met). Section 404 gives the two agencies "mutually exclusive" authority and, unlike the FDIA, creates no risk of regulatory inconsistency.[64] Therefore, section 404 does not fall under the second *Collins* category.

But section 404 does not quite fit in the third *Collins* category, either. Although EPA and the Corps have "mutually exclusive authority" as to different aspects of the section 404 permitting process, any given regulated party may be subject to the jurisdiction of both the Corps and EPA.[65] That is, although the Corps and EPA each exercise authority over a distinct aspect of the permitting process, they exercise that authority over the same set of regulated parties.

However, this distinction should not persuade a court to refuse *Chevron* deference to EPA's interpretation of 404(c). As the *Mingo Logan* Court itself acknowledges, "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."[66] Application of *Chevron* deference in such a case does not implicate the concerns raised by the courts that have declined to apply *Chevron* to statutes administered by multiple agencies. First, when each agency has mutually exclusive statutory authority, there is no risk that one regulated party will be subject to "multiple and perhaps conflicting interpretations" of the statute.[67] Second, it cannot be said that EPA, the agency responsible for implementing the federal water pollution control program, has no expertise with respect to implementation of section 404(c), which in water courses requires judgments concerning the environmental impacts of fill pollution. Therefore, section 404(c) is most similar to the third

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[63] *Cf.* U.S. Postal Serv. v. Postal Regulatory Comm'n, 599 F.3d 705, 710 (D.C. Cir. 2010) (giving *Chevron* deference to an interpretation of a statute administered by two agencies because "there is no dispute that the issue before us is the proper interpretation of § 404(e)(3), and that provision was clearly delegated to the [Postal Regulatory] Commission to implement and thereby to interpret").

[64] *See Collins*, 351 F.3d at 1253.

[65] *Cf. id.* (noting that jurisdictions of agencies implementing the Convention on the International Regulations for Preventing Collisions at Sea enforcement scheme "are exclusive as to specific sets of mariners").

[66] *Mingo Logan*, 850 F. Supp. 2d at 149 (quoting *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 122–23 (D.D.C. 2010)).

[67] *See Collins*, 351 F.3d at 1253.

category of statutes identified by *Collins*, and EPA's interpretation of that section merits *Chevron* deference.

B. Deference Due to an Interpretation that Implicates the Scope of EPA's Statutory Authority

The *Mingo Logan* opinion's enigmatic sixteenth footnote, which asserts that "the question of statutory interpretation at issue is not one that is informed by [EPA's] particular area of expertise in any event,"[68] points to what appears to be one of the Court's primary concerns about the application of *Chevron* deference to EPA's interpretation of section 404. There is a strong argument that the agency-expertise and implied-delegation justifications for *Chevron* deference do not apply when the agency is not using its expertise to solve a technical regulatory problem but is interpreting the scope of its authority under the statute.[69] This is no ordinary question of statutory interpretation, and courts have been less inclined to apply *Chevron* to such "jurisdictional" questions.[70]

The proper application of *Chevron* to jurisdictional questions has divided both the D.C. Circuit and the Supreme Court. The Supreme Court has implied, but never held, that courts should defer to an interpretation that implicates the scope of the agency's jurisdiction.[71] Similarly, although individual panels of the D.C. Circuit have held that *Chevron* deference is applicable even to the resolution of jurisdictional questions, the Circuit has not resolved the question definitively.[72]

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[68] *Mingo Logan*, 850 F. Supp. 2d at 152 n.16.

[69] *Cf. Chevron* at 844 (noting that interpretation of "stationary source" was a technical question requiring "accommodation of conflicting policies"). It is difficult to understand why the Court would contort the *Chevron* doctrine as much as it does if it were not motivated by this concern. *See also Mingo Logan*, 850 F. Supp. 2d at 139 ("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[.]").

[70] *See, e.g.*, Am. Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (recognizing a "pivotal distinction" between jurisdictional and non-jurisdictional questions of statutory interpretation); N.Y. Shipping Ass'n, Inc. v. Fed. Mar. Comm'n, 854 F.2d 1338, 1363 (D.C. Cir. 1988) (noting, in dictum, that it "would also be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction").

[71] *See* CFTC v. Schor, 478 U.S. 833, 845 (1986) (rejecting the Court of Appeals' argument that "the CFTC's expertise was not deserving of deference because of the 'statutory interpretation-jurisdictional' nature of the question at issue").

[72] *See* Okla. Natural Gas Co., a Div. of ONEOK, Inc. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (collecting U.S. Supreme Court and D.C. Circuit cases that apply *Chevron* to jurisdictional questions); Maine Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 479 (D.C. Cir. 2008) *rev'd in part sub nom.* NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n, 558 U.S. 165 (2010) (FERC's "interpretation of the scope of its jurisdiction is entitled to *Chevron* deference." (citing *Okla. Natural Gas Co.*)). *But see Am. Civil Liberties Union*, 823 F.2d at 1567 n.32 (recognizing a "pivotal distinction" between jurisdictional and non-jurisdictional questions of statutory interpretation); *N.Y. Shipping Ass'n, Inc.*, 854 F.2d at 1363 (noting, in dictum, that it "would also be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction").

Justice Scalia and Justice Brennan wrote separate opinions addressing this question in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.[73] Citing *Commodity Futures Trading Commission v. Schor*, Scalia argued that deference to "an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate," because, in the first place, it is impossible to imagine a clear line between questions concerning the boundaries of an agency's authority and questions concerning the proper application of authority within those boundaries, and, second, deference is consistent with Congress's expectation that "the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction."[74]

Justice Brennan, on the other hand, argued that deference is not appropriate when agencies interpret statutes limiting their authority. He noted that "[o]ur agency deference cases have always been limited to statutes the agency was 'entrusted to administer,'" and "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction.'"[75] Moreover, it cannot be said that "statutes confining an agency's jurisdiction . . . reflect conflicts between policies that have been committed to the agency's care," and "agencies can claim no special expertise in interpreting a statute confining its jurisdiction."[76] Finally, it is unlikely that Congress intended that the agency would "fill 'gaps' in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power."[77]

The conflict between Justices Scalia and Brennan reflects two central problems: (1) whether it is possible to distinguish between jurisdictional and non-jurisdictional questions; and (2) whether it can be said that Congress normally intends to permit agencies to resolve questions concerning the scope of their statutory authority.

Justice Scalia's observation that it is impossible to draw a clear line between those questions of statutory interpretation that implicate the scope of an agency's jurisdiction and those that do not seems to be correct. In *Chevron* itself, the statutory provision at issue was the meaning of "stationary source" for purposes of the Clean Air Act's "nonattainment" program.[78] Under the nonattainment program, "new or modified major stationary sources" in nonattainment areas are required to obtain a state permit imposing several requirements on the operation and design of that stationary source.[79] EPA promulgated a regulation permitting states to adopt a "plantwide" definition of stationary source, which would permit a plant with several pollution-emitting devices to modify one of those devices or install a new device without obtaining a new

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[73] 487 U.S. 354 (1988).
[74] *Id.* at 381–82 (Scalia, J., concurring).
[75] *Id.* at 386–87 (Brennan, J., dissenting) (quoting *Chevron*, 467 U.S. at 844).
[76] *Id.* at 387 (Brennan, J., dissenting).
[77] *Id.* (citation omitted).
[78] 467 U.S. at 840.
[79] *Id.*

permit so long as the total emissions from the plant did not change.[80] If EPA had, on the other hand, interpreted "stationary source" to mean each individual pollution-emitting device at a plant, any modification of any device would trigger the permit requirement. Therefore, the adoption of one interpretation of the statute rather than another determines which modifications are subject to the permit requirement and, therefore, the scope of EPA's jurisdiction under the Clean Air Act. If the interpretation of "stationary source" is framed this way, *Chevron* itself concluded that it is appropriate to defer to an agency's resolution of a jurisdictional question.

The fact that this distinction is difficult to administer has no bearing on the argument that the basic justification for the *Chevron* doctrine — that Congress implicitly delegates authority to agencies to resolve questions that involve their regulatory expertise — cannot justify deference to agency interpretations that do not implicate that expertise. As the D.C. Circuit wrote in noting that the distinction between jurisdictional and non-jurisdictional questions is "pivotal":

> Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent. The reason is that *it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power*.[81]

In other words, the underlying rationale of the *Chevron* doctrine — that Congress normally intends to permit agencies to resolve questions of statutory interpretation that implicate their expertise, but not those questions that have no bearing on expertise — militates against application of that doctrine to large-scale "boundary" questions, despite the difficulty of identifying "boundary" questions in practice. While *Chevron* might reasonably allow EPA to determine whether to require PSD permits for the construction of individual pollution-emitting devices by interpreting the phrase "stationary source," *Chevron* cannot allow EPA to interpret the statute so as not to require PSD permits at all.[82]

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[80] *Id.*

[81] *Am. Civil Liberties Union*, 823 F.2d at 1567 n.32 (emphasis added). *See also* AKM LLC v. Sec'y of Labor, 675 F.3d 752, 767 (D.C. Cir. 2012), in which Judge Brown rejected the argument that an agency's interpretation of a statute of limitations should be entitled to deference. In reaching this conclusion, Judge Brown reasoned that "statutes of limitations are not the sort of technical provisions requiring or even benefiting from an agency's special expertise," but, on the contrary, "are texts with which courts are intimately familiar, as we interpret and apply them every day." *Id.* That is, the comparative expertise of courts and agencies with respect to the interpretation and application of statutes of limitations argues in favor of entrusting courts with primary authority to interpret such provisions. *See id.*

[82] Compare Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990), which notes:

In an attempt to accommodate both of these concerns, Cass Sunstein has proposed an alternative rubric: "[T]he question is whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases."[83] While it might be impossible to develop and apply a bright-line rule distinguishing between jurisdictional and non-jurisdictional questions of statutory interpretation, Sunstein's blunt rule is perhaps somewhat more "easily administered."[84] And, more importantly, it allows courts to follow their intuition that *Chevron* should not be applied to broad jurisdictional questions.

Both parties in *Mingo Logan* agree that section 404(c) gives EPA the power to veto a site specification *before* a permit is issued, but EPA claims that it has the power to veto a specification *after* a permit is issued as well. Therefore, the statutory interpretation question is not whether EPA has the power to veto a specification at all, but only whether EPA has the power to veto a specification *in an existing permit*. Therefore, EPA is not using statutory interpretation to extend its authority "to a broad area of regulation"; rather, it is merely deciding whether its veto authority may be exercised in a limited subset of cases. It is a close question, but applying Sunstein's blunt rule, the better conclusion is that courts should defer to EPA's interpretation of the Clean Water Act under these circumstances.

IV. Application of *Chevron* to EPA's Interpretation

If a court determines that *Chevron* applies to a statutory interpretation, it then proceeds to ask whether the provision in question is ambiguous, or whether "Congress has spoken to the precise question at issue" in the case.[85] If the meaning of the provision is unambiguous, then the agency's interpretation will fail unless it conforms to that meaning; however, if the provision is "silent or ambiguous with respect to the specific issue," the agency's interpretation will stand so long as it is "permissible" or "reasonable."[86]

> Probably the best reconciliation of the competing considerations of expertise, accountability, and partiality is to say that no deference will be accorded to the agency when the issue is whether the agency's authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of fact and policy. On this approach, there is no magic in the word "jurisdiction." Instead, the question is whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases. This distinction it [sic] is not always extremely sharp, and it will call for an exercise of judgment. But in the vast majority of cases, it is easily administered.

Id. at 2100. This concern appears to underlie Justice Scalia's treatment of the FCC's interpretation of "modify" in *MCI Telecomm'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231–32 (1994) ("What we have here, in reality, is a fundamental revision of the statute . . . . [It] may be a good idea, but it was not the idea Congress enacted into law in 1934.").

[83] Sunstein, *supra* note 82, at 2100.

[84] *See id.*

[85] Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[86] *Id.* at 1047, 1049 ("permissible"); *Chevron*, 467 U.S. at 844 ("reasonable").

A. Chevron *Step One*

The *Mingo Logan* Court does not apply the traditional two-step inquiry. It purports to begin with Step One, and concludes that "[t]he first step of the *Chevron* analysis suggests that Congress did not grant EPA [veto] authority."[87] But *Chevron* Step One is concerned not with whether the statute "clearly grant[s] EPA the authority to exercise a post-permit veto"[88] or whether "[t]he legislative history of the Clean Water Act . . . support[s] EPA's claimed power,"[89] but with whether the statute has only one clear interpretation. If the provision is ambiguous, and the Court acknowledges that it is,[90] the Court must proceed to Step Two. Instead, the Court appears to require EPA to demonstrate, not that the statute is ambiguous, but that it *unambiguously supports* EPA's interpretation.[91] Although EPA's interpretation would certainly survive judicial review if the agency could demonstrate that section 404(c) unambiguously gives it the power it claims, *Chevron* does not require reversal if it fails to do so.[92] An agency's interpretation will only fail at Step One if the party seeking judicial review can demonstrate that the statute unambiguously supports an interpretation contrary to the agency's interpretation.[93] It is clear that Mingo Logan did not do so here.[94]

The Court is correct that the materials it cites to undermine EPA's interpretation are relevant to the *Chevron* analysis. However, at Step One, they are only relevant to the extent that they establish that the statute, its legislative history, and its purpose unambiguously militate *for* an interpretation other than that promoted by EPA.[95] To the extent that such materials argue *against* EPA's interpretation of an *ambiguous* statute, they are only relevant to Step Two of the *Chevron* analysis.[96]

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[87] *Mingo Logan*, 850 F. Supp. 2d at 139.
[88] *Id.* at 139.
[89] *Id.* at 144.
[90] *See id.* at 141 ("At best, the text is ambiguous.").
[91] *See id.* at 148 ("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.").
[92] *See Chevron*, 467 U.S. at 843–44.
[93] *See id.* at 842–43; *see also Bell Atl. Tel. Cos.*, 131 F.3d at 1049 ("Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation.").
[94] *Mingo Logan*, 850 F. Supp. 2d at 148 ("[T]he 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.").
[95] *Chevron*, 467 U.S. at 843–44.
[96] *See Bell Atl. Tel. Cos.*, which notes:

> [W]e will defer to the Commission's interpretation if it is reasonable and consistent with the statutory purpose and legislative history . . . . Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two we consider text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency.

131 F.3d at 1049 (emphasis in original).

B. Chevron *Step Two*

When a court evaluates an agency interpretation under *Chevron* Step Two, it considers whether the interpretation is consistent with the text of the statute, its purpose, and its legislative history.[97] So long as the statute *permits* the agency's interpretation, that interpretation will survive judicial review.

1. *Text of Section 404(c)*

The plain language of section 404(c) permits EPA's interpretation. Section 404(c) provides, in relevant part, that:

> The Administrator [of EPA] 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.[98]

According to EPA's interpretation, the Administrator is permitted, pursuant to his section 404(c) authority, to withdraw a disposal site specification at any time.[99] The plain language of section 404(c) supports this interpretation.

The language quoted above provides that the Administrator may exercise his section 404(c) authority "whenever" he determines that one of the listed criteria is met.[100] Webster's Dictionary defines "whenever" as "at any or every time that."[101] That is, rather than impose a time limit on EPA's section 404(c) authority, the statute expressly disclaims any such time limit.

However, as the Court notes, "whenever" may merely indicate that EPA's determination that one of the listed criteria is met is a condition precedent to EPA's exercise of section 404(c) authority.[102] This interpretation is somewhat strained, since the drafters could have used "if" instead of "whenever" if they intended to indicate nothing more than a condition precedent. However, even if it is true that "whenever" is meant to indicate a condition precedent rather than emphasize that EPA's authority is not time-limited, there is no reason to believe that the text of section 404(c) therefore forecloses post-permit action. What if EPA determines, after a permit has already been issued, that fill discharge at the specified site will "have an unacceptable adverse effect on municipal water

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[97] *See id.* at 1049.
[98] 33 U.S.C. § 1344(c).
[99] *Mingo Logan*, 850 F. Supp. 2d at 133.
[100] 33 U.S.C. § 1344(c).
[101] *Whenever*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/whenever (last visited Jan. 27, 2013) (on file with the Harvard Law School Library).
[102] *See Mingo Logan*, 850 F. Supp. 2d at 141.

supplies"? Although the permit has already been issued, the condition precedent to section 404(c) action has been met, and there is no indication in the plain language of section 404(c) that the permit's existence makes any difference. On the contrary, the use of "whenever" rather than "if" to indicate a condition precedent emphasizes that it is the fulfillment of that condition, not the time at which the condition is met, that is important in determining whether EPA may exercise its veto authority. In short, there is no important practical difference between the Court's and EPA's interpretations of "whenever."

2. *Legislative History*

The Court cites several other sources of authority to support its argument that "whenever" simply cannot mean "whenever." First, it indicates that, during floor debate, Senator Muskie, the sponsor of the bill that added section 404 to the Clean Water Act, said 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 [or other environmentally protected resources]."[103] Statements by individual sponsors of legislation are not controlling in interpreting statutes,[104] however, and the Court appeals to no other sources of legislative history.[105]

Moreover, the quoted language is not inconsistent with EPA's position, since it only indicates that EPA will make a determination with respect to the lawfulness of a specification before the permit is issued; it does not disavow EPA's authority to make a new and contrary determination after the permit is issued. If this statement has any bearing on post-permit withdrawals of specifications, it is only by negative implication. This is a weak basis indeed for an argument that an agency's interpretation is unreasonable under *Chevron*.

3. *Statute Read as a Whole*

Throughout its opinion, the Court relies heavily on the fact that EPA's interpretation would allow EPA, under the guise of "withdrawing a specification," effectively to withdraw a permit, something that the other provisions of the statute simply do not allow the agency to do. The Court insists that EPA's "innocent pose" that withdrawal of a specification is different from withdrawal of a permit is "entirely disingenuous," since "EPA also insists that its action

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[103] *Id.* at 146.

[104] *See* Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."); *see also* Overseas Educ. Ass'n, Inc. v. Fed. Labor Relations Auth., 876 F.2d 960, 966 n.41 (D.C. Cir. 1989) ("[S]ponsor's statements . . . are not controlling; they are merely aids to interpretation. But ordinarily they do bear significance — just how much varies from case to case."). *But see* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976) (noting that statement of legislation's sponsor "deserves to be accorded substantial weight in interpreting the statute").

[105] *See Mingo Logan*, 850 F. Supp. 2d at 144–47.

absolutely had the legal effect of invalidating Mingo Logan's permit for the streams that are no longer specified."[106]

But EPA's position is hardly "disingenuous." It is true that the statute distinguishes between "permits" and "specifications," and it is also true that withdrawal of a specification could prohibit activity that was previously permitted. However, there is nothing illogical about the position that EPA could withdraw a specification without revoking a permit, even if removing a specification has the *legal effect* of nullifying a permit as to discharge at the specified site. The argument that section 404(c) cannot allow EPA to take an action with the legal effect of nullifying a permit because no other provision of the statute gives EPA authority with respect to permits merely begs the question: Why is it so difficult to believe that section 404(c) itself provides the "missing" authority?

Moreover, although the Court is correct that a post-permit withdrawal would prevent the permittee from discharging fill at a site specified in a Corps permit, it is not true that such a withdrawal will, in all circumstances, "nullify" the permit. For example, if the Corps permits a mining company to discharge fill at sites *X*, *Y*, and *Z*, and EPA later withdraws the specification of site *X*, the permittee is still permitted to discharge into sites *Y* and *Z*. In fact, that is precisely what happened here: EPA withdrew specification for some, but not all, of the Spruce No. 1 disposal sites.[107] The permit is not nullified, but modified. Therefore, to the extent that the Court believes that a withdrawal of specification has the same effect as permit revocation, it simply misconstrues the statute.

The Court's appeals to various other provisions of the statute amount to little more than additional question-begging. For example, the Court asserts that the authority to veto a specification would be contrary to section 404(q), which calls for EPA and the Corps "to minimize, to the maximum extent practicable . . . delays in the issuance of permits under this section."[108] But the phrase "to the maximum extent practicable" does not wipe away all potential sources of delay in the permit approval process; on the contrary, that language assumes that there will be some inevitable regulatory hurdles, one of which could be the possibility that EPA will exercise its veto authority. Therefore, EPA's interpretation is in no way irreconcilable with section 404(q).

The Court also argues that EPA's interpretation is contrary to section 404(p). That section provides that "[c]ompliance 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 [with the various provisions of the Clean Water Act]."[109] The Court asserts that this language contains an "unambiguous Congressional directive" that "discharges made

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[106] *Id.* at 142.

[107] *Id.* at 137 ("[The withdrawn] branches make up roughly eighty eight percent of the total discharge area authorized by the permit."). While it is true that the withdrawal of eighty-eight percent of site specifications is not a minor modification to Mingo Logan's permit, it is still a far cry from permit nullification.

[108] 33 U.S.C. § 1344(q).

[109] *Id.* § 1344(p).

pursuant to a permit are lawful," and, therefore, a permittee "should be able to rely upon a valid permit issued by the Corps."[110] Therefore, EPA can only impose additional obligations on the permittee if it modifies or revokes the permit.[111]

Even if the Court's interpretation of section 404(p) is correct, EPA's interpretation of section 404(c) is only irreconcilable with section 404(p) if a specification withdrawal purports to alter Mingo Logan's obligations without modifying the permit. But there is nothing in the statute that indicates EPA may not modify a permit by, for example, exercising its section 404(c) veto power. So long as a withdrawal of a specification modifies the permit, the permit will still contain all of the permittee's obligations under the Clean Water Act. Nothing in the statute or regulations indicates that the Corps has exclusive authority to modify a permit,[112] and there is no reason to believe that 404(c) does not itself give EPA authority to modify permits by exercising its withdrawal authority. The Court's assertion that post-permit veto authority "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),"[113] like most of its other arguments, merely begs the question.

4. *The Court's Remaining Arguments*

Finally, the Court opines that it is "unreasonable to sow a lack of certainty" into the section 404 permit process, since such a lack of certainty "would have a significant economic impact on the construction industry, the mining industry, and other 'aggregate operators.'"[114] However, the Court cites no authority for the proposition that the economic impact of an agency's interpretation has any bearing on whether that interpretation is "reasonable" for purposes of *Chevron* Step Two.[115] If the Clean Water Act required EPA to consider the economic impact of its regulations, there might be some basis for the Court's position. However, section 404 contains no such provision, and nothing in the legislative history of that section suggests that EPA was expected to take a certain position with respect to the economic impact of its permitting decisions. On the contrary, the impact of a regulatory policy on industry is just the sort of consideration an agency takes into account when making a reasonable choice among several permissible policies, and just the sort of consideration

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[110] *Mingo Logan*, 850 F. Supp. 2d at 143.
[111] *See id.* at 144.
[112] *See* 33 C.F.R. § 325.7 (2012). Although 33 C.F.R. § 325.7(b) assigns a certain type of permit modification authority to the Corps, there is no reason to believe that this authority was meant to be *exclusive*. Surely the fact that the Corps has authority to do something called "permit modification" does not necessarily prevent EPA from exercising its explicit statutory authority to withdraw site specifications merely because a site specification withdrawal could also be characterized as a "permit modification."
[113] *Mingo Logan*, 850 F. Supp. 2d at 144.
[114] *Id.* at 152.
[115] *See id.*

a court should avoid when deferring to an agency.[116] In other words, the economic impact prong of the Court's analysis can amount to little more than sympathetic noise for the mining industry.

V. Conclusion

It may be true that some of the authority cited by the Court suggests that EPA's interpretation is less reasonable than the interpretation advanced by Mingo Logan. But that is not the Court's judgment to make. So long as EPA's interpretation is reasonable, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency."[117] That is the point of *Chevron*.

[116] Drummond Coal Co. v. Hodel, 796 F.2d 503, 507 (D.C. Cir. 1986) ("We have no warrant to set aside the Secretary's interpretation, if reasonable, merely because we might strike this policy balance [between 'impact on industry' and 'the need . . . to meet program objectives'] in a different fashion.").

[117] *Chevron*, 467 U.S. at 844.