HOWMET CORP. V. EPA

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I. INTRODUCTION

In *Howmet Corp. v. EPA*,[1] The Court of Appeals for the District of Columbia Circuit upheld a U.S. Environmental Protection Agency ("EPA" or "the Agency") enforcement action as consistent with EPA's regulations defining regulable "spent material" under the Resource Conservation and Recovery Act ("RCRA").[2] The court's decision is a striking abdication of the judicial responsibility to ensure that administrative agencies act only within statutory limits. In deferring to EPA's position as a reasonable interpretation of the Agency's rule, the majority failed to consider the overarching statutory limits that arguably render EPA's reading of the regulation inconsistent with RCRA. When review of the original rule has been time-barred by statute, this shortsighted deference allows an agency to interpret an ambiguous rule in order to exercise power over activities outside the agency's congressional grant of authority. In dissent, Judge Kavanaugh moved toward an interpretive approach that would prevent such agency overreach by allowing the text of the statute to inform judgments of the reasonableness of the agency's reading of its rules.

This Comment first addresses the statutory, regulatory, and factual background of the case and relates the decision of the district court. Then, it discusses the majority and dissenting opinions in the Court of Appeals. Third, the Comment briefly lays out the rationale for *Seminole Rock*[3] deference and some criticisms of it. Finally, it examines how the *Howmet* majority's opinion interacts with *Seminole Rock* deference and argues that courts could better enforce statutory limits on agency power by evaluating the reasonableness of agency regulatory interpretations in the light of the authorizing statute.

II. BACKGROUND

RCRA creates "a stringent 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste."[4] For example, generators of hazardous waste must prepare hazardous waste manifests[5] and may not send hazardous waste to facilities that do not have

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[1] 614 F.3d 544 (D.C. Cir. 2010).

[2] 42 U.S.C. §§ 6901–92 (2006).

[3] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[4] Military Toxics Project v. EPA, 146 F.3d 948, 950 (D.C. Cir. 1998).

[5] 40 C.F.R. § 262.20(a) (2010).

EPA identification numbers.[6] RCRA defines hazardous waste as a subset of solid waste,[7] which is itself defined as "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material . . . ."[8] EPA's regulatory elaboration on the statutory definition of solid waste includes several types of recycled secondary materials.[9] "Spent material," defined as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing," is one such secondary material.[10] When a spent material is incorporated in products that are applied to the land or is used to manufacture such products, the spent material is being recycled and is therefore solid waste.[11]

Appellant Howmet Corporation ("Howmet") manufactures precision turbine casings.[12] As part of its manufacturing process, Howmet cleans the casings with a solution of potassium hydroxide ("KOH").[13] Howmet's practice was to ship KOH that had become too contaminated for use as a cleaning agent to Royster-Clark, Inc. ("Royster"), which used the KOH, without treating it, as an ingredient in making fertilizer.[14] Although the KOH was "corrosive" under 40 C.F.R. § 261.22 and would be subject to RCRA hazardous waste regulations if the KOH were solid waste, Howmet believed that the used KOH shipped to Royster was not solid waste because the KOH was not "spent material."[15] As a result, Howmet did not comply with RCRA's requirements for these shipments.[16] In 2003, EPA Regions 2 and 6 brought enforcement actions alleging that Howmet violated RCRA by sending used KOH — which EPA asserted was a spent material and therefore a hazardous waste — to Royster without adhering to RCRA's hazardous waste require-

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[6] 40 C.F.R. § 262.12(c).

[7] 42 U.S.C. § 6903(5).

[8] 42 U.S.C. § 6903(27).

[9] 40 C.F.R. § 261.2(c). Although the text of RCRA never explicitly includes recycling activities within the ambit of EPA's authority over solid waste, 42 U.S.C. § 6902(b) declares a national policy of reducing hazardous waste production and minimizing the harm attributable to the waste which is produced. Courts have accepted EPA's authority over recycled materials in many contexts as a corollary of Congress's intention to give EPA the power to address the waste disposal problem. *See, e.g.*, Safe Food and Fertilizer v. EPA, 350 F.3d 1263, 1268 (D.C. Cir. 2003) ("We have also held that materials destined for future recycling by another industry *may* be considered 'discarded'; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem."). However, courts have declined to extend this authority to materials immediately reused within the generating industry. *E.g.*, Am. Mining Cong. v. EPA (*AMC I*), 824 F.2d 1177, 1186 (D.C. Cir. 1987).

[10] 40 C.F.R. § 261.1(c)(1).

[11] 40 C.F.R. § 261.2(c)(1)(i).

[12] Howmet Corp. v. EPA, 656 F. Supp. 2d 167, 169 (D.D.C. 2009).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 169-70.

[16] *Id.* On other occasions, Howmet shipped used KOH to a permitted hazardous waste facility in compliance with RCRA requirements. *Id.*

ments.[17] The Administrative Law Judge ("ALJ") found Howmet liable for these violations and levied a civil penalty of $309,091.[18] Howmet appealed to EPA's Environmental Appeals Board, where it argued that the used KOH was not a spent material and that it had not received fair notice that EPA would interpret the regulations to cover the used KOH in this case.[19] Acknowledging the ambiguity of the regulatory language,[20] the Board nonetheless upheld the ALJ's order.[21]

Howmet sought review of EPA's decision in the District Court for the District of Columbia, where Judge Sullivan heard its claim that the Agency's decision classifying the used KOH as spent material was arbitrary and capricious under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[22] Notably, Howmet could not challenge either the substance of 40 C.F.R. 261.1(c)(1) or the procedure surrounding its promulgation because RCRA's judicial review provision establishes that challenges to regulations must be filed within ninety days of their issuance.[23] It could only ask the court to review EPA's application of the spent material definition to the used KOH.

Howmet again claimed that it was not liable for shipping hazardous solid waste because the used KOH did not fit within the regulatory definition of spent material and therefore was not hazardous solid waste subject to EPA's authority.[24] Howmet read the "purpose" language in the definition of spent material to allow a product to have multiple intended uses at the time it is produced. It further argued that the purpose for which the KOH was produced was to act as a concentrated source of potassium and hydroxide ions — a purpose that encompassed many potential uses.[25] Howmet claimed that both its use of KOH as a cleaning agent and Royster's later use of it as a fertilizer component fell within this original purpose, so the used KOH was

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[17] *Id.* at 170. 42 U.S.C. § 6928 authorizes EPA to assess penalties for RCRA violations.

[18] *Howmet*, 656 F. Supp. 2d at 170.

[19] Howmet Corp., 13 E.A.D. 272, 279-80 (2007).

[20] *Id.* at 295.

[21] *Id.* at 309.

[22] *Howmet*, 656 F. Supp. 2d at 169. The district court's jurisdiction derived from the general federal-question statute. 28 U.S.C. § 1331 (2006).

[23] 42 U.S.C. § 6976(a)(1) ("[A] petition for review of action of the Administrator in promulgating any regulation . . . may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation . . . [and] action of the Administrator with respect to which review could have been obtained under this subsection *shall not be subject to judicial review in civil or criminal proceedings for enforcement.*") (emphasis added). Similar restrictions appear in other environmental statutes. *See, e.g.*, Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a)(1) (2006); CERCLA, 42 U.S.C. § 9613(a) (2006); Clean Air Act, 42 U.S.C. § 7607(b) (2006). Such accelerated review provisions are valuable in providing EPA with an early, definitive resolution to contentious rulemakings. Tom J. Boer, *Does Confusion Reign at the Intersection of Environmental and Administrative Law?: Review of Interpretive Rules and Policy Statements Under Judicial Review Provisions Such as RCRA Section 7006(A)(1)*, 26 B.C. ENVTL. AFF. L. REV. 519, 521 (1999).

[24] *Howmet*, 656 F. Supp. 2d at 171.

[25] *Id.*

not a spent material. EPA's reading of "the purpose for which it was produced" focused on the initial, singular use of the material.[26] Under the Agency's interpretation, Howmet's initial use of the KOH for cleaning meant that its later use as a fertilizer input rendered the KOH spent material.

The district court applied a highly deferential standard of review, writing that it must treat an agency's interpretation of its own regulation as "controlling unless [it is] 'plainly erroneous or inconsistent with the regulation.'"[27] The court first looked to the text of the regulation and declared that the phrase "purpose for which it was produced" is ambiguous.[28] It then examined the regulatory history of the definition of spent material,[29] the regulatory framework of RCRA as a whole,[30] and EPA's consistent interpretation of the regulation[31] before concluding that "it was not arbitrary, capricious, or an abuse of discretion for the EPA to conclude that the used KOH Howmet shipped was 'spent material.'"[32] The district court granted EPA's motion for summary judgment,[33] and Howmet appealed.

III. THE D.C. CIRCUIT

The D.C. Circuit affirmed the lower court's decision. Writing for the panel, Judge Brown[34] afforded great deference to EPA's interpretation of its regulations, explaining that courts must accept agencies' views of their regulations unless they are plainly wrong.[35] The court held that the word "purpose" in 40 C.F.R. § 261.1(c)(1) was ambiguous, but concluded that EPA's interpretation was reasonable.[36] To reach this conclusion, Judge Brown drew on the regulatory history of the spent material definition and observed that both the preamble of the final 1985 rule and the Agency's comments accompanying the 1983 proposed rule connected "purpose" with a product's initial

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[26] *Id.*

[27] *Id.* at 170 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[28] *Id.* at 172.

[29] *Id.* (referring to the preamble of the 1985 regulations promulgating the current definition of spent material to conclude that "the EPA has continuously and publicly associated 'purpose' with 'initial use'") (citing 50 Fed. Reg. 614, 624 (Jan. 4, 1985)).

[30] *Id.* at 172-73 (concluding that EPA intended to regulate re-used products applied to land) (citing 40 C.F.R. § 261.2(e)).

[31] *Id.* at 173.

[32] *Id.*

[33] *Id.* at 174. The court also concluded that Howmet had sufficient notice of EPA's position based on the preamble to the 1985 rule establishing the definition of spent material, a 1986 Guidance Manual, and publically available opinion letters. *Id.* at 173-74.

[34] Chief Judge Sentelle joined Judge Brown's opinion. Judge Kavanaugh dissented.

[35] Howmet Corp. v. EPA, 614 F.3d 544, 549 (D.C. Cir. 2010) (quoting Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995)). *General Electric* is part of a well-established line of cases in the D.C. Circuit springing from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which articulated the principle of deference to agency regulatory interpretations. *See, e.g.*, Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1395 (D.C. Cir. 1991).

[36] *Howmet*, 614 F.3d at 550.

use.[37] The court also evaluated EPA's reading of the regulation against RCRA's overall policy objective of minimizing the threat posed by hazardous waste.[38] In addition, the court pointed to other EPA regulations indicating the Agency intended to regulate waste reused in manufacturing products to be applied to the land, as the KOH was in this case.[39] The majority also rejected Howmet's fair notice argument, noting that EPA had published a guidance manual in 1986 containing the disputed interpretation and announced its availability in the Federal Register.[40]

Judge Kavanaugh, in dissent, argued that EPA's interpretation of the purpose language of 40 C.F.R. § 261.1(c)(1) is consistent neither with the plain language of the regulation nor with RCRA's statutory requirements. He credited Howmet's argument that "the first use that is made of a material after the material is produced simply cannot define or change the purpose for which the material was previously produced" and concluded that the regulatory language clearly ruled out EPA's interpretation.[41] Judge Kavanaugh then went on to say that even if the language of the regulation were ambiguous, he would still have rejected EPA's position as unreasonable and thus ineligible for deference.[42]

Judge Kavanaugh looked beyond the sources the majority used and evaluated the meaning of the regulation in light of RCRA's statutory definition of solid waste as "discarded material."[43] He stated plainly that EPA's interpretation of the rule conflicts with the discard requirement, as the used KOH is "far from being disposed of . . . [but is] being used as anticipated,"[44] and cited the circuit's prior decision in *American Mining Congress v. EPA* to argue for the proposition that "discarded material" should be given its ordinary meaning.[45] In Judge Kavanaugh's opinion, this incompatibility was powerful evidence that EPA's interpretation of § 261.1(c)(1) was

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[37] *Id.* at 551-52 (citing Hazardous Waste Mgmt. Sys., 48 Fed. Reg. 14,472, 14,488 (proposed Apr. 4, 1983) and Hazardous Waste Mgmt. Sys.: Definition of Solid Waste, 50 Fed. Reg. 614, 624 (Jan. 4, 1985)).

[38] *Id.* at 552 (citing 42 U.S.C. § 6902(b)). The majority also adduced legislative history to argue that Congress acknowledged that recycled materials are nonetheless hazardous wastes. *Id.* (quoting 1984 U.S.C.C.A.N. 5576, 5605). *But see* Am. Mining Cong. v. EPA (*AMC I*), 824 F.2d 1177, 1191 (D.C. Cir. 1987) (arguing this language is "ambiguous at best" because it refers to EPA authority over recycled material to the extent that it is hazardous waste, which renders the passage circular).

[39] *Howmet*, 614 F.3d at 553 (citing 40 C.F.R. § 261.2(e)).

[40] *Id.* at 554.

[41] *Id.* at 555 (quoting Reply Brief of Appellant at 5, *Howmet*, 614 F.3d 544 (No. 09-5360), 2010 WL 1684909, at *5). He also notes that the regulations provide that "purpose" in § 261.1(c)(1) includes multiple purposes. *Id.* (citing 40 C.F.R. § 260.3(b) ("Words in the singular include the plural.")).

[42] *Id.* at 555-56 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 555 (citing Am. Mining Cong. v. EPA (*AMC I*), 824 F.2d 1177, 1184-85 (D.C. Cir. 1987)).

erroneous.[46] Judge Kavanaugh did not address the merits of Howmet's fair notice claim.

The opinions in *Howmet*, particularly Judge Kavanaugh's dissent, implicate a crucial unresolved question of administrative law: when must courts defer to an agency's interpretation of a previously promulgated regulation? The Supreme Court established a principle of substantial deference in *Bowles v. Seminole Rock & Sand Co.*[47] and reiterated that standard in *Auer v. Robbins*.[48] The *Howmet* decision illustrates how extending *Seminole Rock* deference to situations in which challenges to the regulation itself are barred can result in regulatory interpretations that, while reasonable in light of the language of the Agency's rule, nonetheless run afoul of the limits imposed in the authorizing statute. The approach Judge Kavanaugh implicitly adopted utilizes the text of the organic statute as an input to the range of permissible reasonable interpretations of the regulation. The dissent's application of *Seminole Rock* deference is superior to the interpretive mode the *Howmet* majority employs because it does not cede the ultimate power to articulate the permissible bounds of agency authority under the statute to the agency.

IV. THE *SEMINOLE ROCK* APPROACH TO AGENCY REGULATORY INTERPRETATIONS

Before examining the implications of *Howmet* in more depth, a brief background on courts' general approach to agency regulatory interpretations is necessary. The Supreme Court established in *Seminole Rock* that courts must defer to administrative agencies' interpretations of their own regulations.[49] In *Seminole Rock*, the Office of Price Administration ("OPA") had attempted to enjoin a business from selling crushed stone at a price above the OPA's relevant Maximum Price Regulation, which provided that such stone should be sold at prices not exceeding the highest price the seller charged for delivery of the same class of product during March 1942.[50] The quarry claimed that this provision should be interpreted so that the maximum price was set by the highest price at which the stone was *sold* and delivered to a customer in March, while OPA argued that the date of the sale was immaterial and that only delivery need have occurred in the relevant month.[51]

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[46] *Id.* ("[T]here is good reason the 1985 regulations did not go as far as EPA now wants to. Doing so would violate the text of RCRA . . . .").

[47] 325 U.S. 410, 414 (1945).

[48] 519 U.S. 452, 461 (1997).

[49] *See Seminole Rock*, 325 U.S. at 414. This deferential principle is known as both *Seminole Rock* deference and *Auer* deference. The *Auer* deference formulation is derived from Auer v. Robbins, 519 U.S. 452 (1997), and is commonly used. *See, e.g.*, Christensen v. Harris Cnty, 529 U.S. 576, 588 (2000). For consistency, this article uses *Seminole Rock* when referring to this form of deference.

[50] *Seminole Rock*, 325 U.S. 410, 414 (citing 7 Fed. Reg. 7968-69).

[51] *Id.* at 415.

The Supreme Court held that in deciding which interpretation should prevail, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[52] The *Seminole Rock* standard, while highly deferential to agencies' interpretations, does not give an agency *carte blanche* to adopt a position at odds with the plain language of the regulation. Courts should only look to the agency's construction of the rule "if the meaning of the words used is in doubt."[53] Despite the expansions of the administrative state and the changes in administrative law that have transpired since its announcement,[54] *Seminole Rock* deference has survived, without substantial modification, to the present.[55]

The *Seminole Rock* Court treated its holding as self-evident, and in subsequent decisions the Supreme Court seemed to regard it as a matter of common sense.[56] Defenses of *Seminole Rock* deference have commonly offered justifications paralleling the oft-proffered rationales for *Chevron* statutory deference:[57] (1) agencies are more accountable than courts and so should be able to make policy decisions to fill in gaps in a regulatory framework, and (2) agencies have technical expertise that likely renders their interpretations superior to courts' on policy grounds.[58] Another argument for *Seminole Rock* deference, inapplicable to *Chevron*, is that promulgating agencies are best situated to know the intended purpose of the regulations because of their historical familiarity with the circumstances surrounding the rules' issuance.[59]

The approach to agency regulatory interpretations under *Seminole Rock* is quite similar to the framework of deference to agency statutory interpreta-

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[52] *Id.* at 414.

[53] *Id. See also Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").

[54] *Seminole Rock* predates the 1946 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

[55] Courts routinely give *Seminole Rock* deference to agency regulatory interpretations. *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1037 (D.C. Cir. 2008).

[56] *See* Udall v. Tallman, 380 U.S. 1, 16 (1965) (observing that deference to agency statutory interpretation is particularly due to contemporaneous constructions of the enforcing agency and holding that when an agency interpretational issue arises under a regulation rather than a statute, "deference is even more clearly" necessary); Scott H. Angstreich, *Shoring up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 92–93 (2000).

[57] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), provides that a court reviewing an agency's construction of a statute it administers must engage in a two-step inquiry. The court must first ask whether Congress has directly spoken to the question at issue, and if Congress has not, the court must uphold the agency's interpretation of the statute if it is a reasonable one. *See id.* at 842-45.

[58] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629-30 (1996) (citing Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991) and Martin v. Occupational Safety & Health Review Comm'n, 449 U.S. 144, 151 (1991)); Angstreich, *supra* note 56, at 98.

[59] Manning, *supra* note 58, at 630-31 (citing *Martin*, 449 U.S. at 152-53); Angstreich, *supra* note 56, at 98-99.

tions announced in *Chevron*.[60] Although *Seminole Rock* is formally a one-step rather than two-step inquiry (according deference to the agency's position so long as it is not plainly erroneous or inconsistent with the regulation), this formulation effectively combines both steps of *Chevron* deference analysis into one.[61] The "plainly erroneous" *Seminole Rock* standard may be more deferential than the reasonableness analysis in *Chevron* Step 2.[62] More significant, *Seminole Rock* deference applies to a far broader range of materials than *Chevron*. *Seminole Rock* deference applies to any agency position reflecting "the agency's fair and considered judgment."[63] In contrast, *Chevron* deference is limited to contexts in which "Congress would expect the agency to be able to speak with the force of law," chiefly rulemaking and formal adjudication.[64]

One particularly salient criticism of the *Seminole Rock* doctrine is that it creates an incentive for an agency to frame an ambiguous rule and subsequently to "interpret" the rule in a non-obvious way to create policy without going through APA-mandated procedure.[65] Under the highly deferential *Seminole Rock* standard, such an interpretation is unlikely to be struck down as inconsistent with the regulation. The resulting ambiguous rule creates great uncertainty for regulated parties, and the agency's capacity to make policy by interpretation rather than engaging in another rulemaking limits such parties' ability to participate in shaping agency policy through the comment process.[66]

V. *SEMINOLE ROCK* WHEN CHALLENGES TO THE REGULATION ARE TIME-BARRED

Howmet illustrates how this criticism of *Seminole Rock* deference takes on added urgency in the RCRA context. Under RCRA, challenges to EPA rulemakings are barred after ninety days have passed from the new rule's

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[60] *See* Manning, *supra* note 58, at 627.

[61] *See* Angstreich, *supra* note 56, at 70-71. Of course, it is also possible to formulate the Chevron two-step inquiry as a single step. Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 600 (2009).

[62] *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4-5 (1996) (characterizing *Seminole Rock* standard as "indulgent if not downright abject standard of deference"). *But see* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 358-59 (1989) (upholding agency regulatory interpretation where "not unreasonable"); Angstreich, *supra* note 56, at 70 (arguing that courts review agency regulatory interpretations "under a standard nearly identical to that at *Chevron* step two" in practice, despite the standards' differing linguistic formulations).

[63] Auer v. Robbins, 519 U.S. 452, 462 (1997) (deferring to a position urged in agency *amicus* brief).

[64] United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[65] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting); Anthony, *supra* note 62, at 11-12; Manning, *supra* note 58, at 655.

[66] Professor Manning argues that this facilitates regulatory capture; an agency can interpret an ambiguous regulation in a way that benefits a special interests rather than going through a comparatively higher-profile rulemaking. Manning, *supra* note 58, at 678.

promulgation.[67] By the time EPA announced what § 261.1(c)(1) actually meant when it defined "spent material" by "the purpose for which it was produced," the ninety-day statutory limit on judicial review of the regulation itself had lapsed. The spent material definition was promulgated on January 4, 1985,[68] but EPA announced its focus on initial use in a guidance manual published over a year later, in July 1986.[69] As a result, Howmet never had the opportunity to challenge EPA's interpretation of § 261.1(c)(1) as inconsistent with the statutory definition of discarded material. It could have challenged the rule itself as inconsistent with RCRA's definition of discarded material before the statutory deadline, but Howmet could not have known that EPA would interpret the rule to apply to its disposal of used KOH fifteen years later.[70] In its challenge to EPA's enforcement action, Howmet could only argue that the Agency's reading of the rule was inconsistent with the text. The generous standard of *Seminole Rock* deference renders that task quite difficult, as the majority's decision in *Howmet* shows. In sum, RCRA's time-bar provision and *Seminole Rock* deference combined to allow EPA to set forth an ambiguous rule, advance an interpretation of the rule which at least arguably conflicted with the statutory limits on EPA's authority, and receive great deference from the court.

The majority's approach enables this evasion. By failing to consider whether EPA's regulatory interpretation can exist alongside RCRA's statutory definition of solid waste, the court allowed EPA to slip the fetters Congress imposed on its regulatory authority. The majority reads the range of permissible interpretations of the regulation as restricted only by the language and intentions of the regulating agency. Such a vision of *Seminole Rock* deference effectively ignores statutory limits on the agency's interpretation of its own regulation.

Under ordinary circumstances, an agency's choice of rules under the statute is confined to a reasonable range under *Chevron*,[71] but when, as here, review of the rule itself is time-barred, the weakness in the majority's scheme becomes quite apparent. The following example is illustrative. First, Congress passes an ambiguous statutory provision with a range of reasonable meanings from points 1 to 3. Second, EPA engages in a rulemaking

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[67] 42 U.S.C. § 6976(a)(1) (2006).

[68] Definition of Solid Waste, 50 Fed. Reg. 614 (Jan. 4, 1985).

[69] Notice of Availability, 51 Fed. Reg. 26,892 (July 28, 1986).

[70] EPA cited Howmet for violations occurring between March 1999 and October 2000. Howmet Corp., 13 E.A.D. 272, 278-79 (2007). Howmet has existed since 1926 and been engaged in the manufacture of precision metal equipment since 1965, *Howmet Professorship of Mechanical Engineering*, WORCHESTER POLYTECHNIC INSTITUTE, http://www.wpi.edu/Campus/Faculty/Awards/Professorship/howmetprofship.html (last updated Feb. 27, 2008) (on file with the Harvard Law School Library), but the record does not disclose when it began using KOH to clean its parts or selling used KOH for use in fertilizer. Certainly many parties currently engaged in recycling spent material either were not doing so in 1985 or did not exist at that time and so would not have had an opportunity to challenge the rules' compliance with RCRA.

[71] *See* 467 U.S. at 845.

and writes an ambiguous rule that could be interpreted as meaning between points 2 and 4. At this step, EPA's rule will not be struck down as inconsistent with the statute.[72] Third, after review of the rule itself is no longer possible, EPA announces an interpretation of the rule that fixes its meaning at point 4. Because this interpretation of the rule comports with a reasonable reading of its text, a court following the majority's approach to *Seminole Rock* would not hold that the Agency's position is inconsistent with the regulation. This model of *Seminole Rock* is unproblematic when an agency's interpretation of the rule can be challenged as inconsistent with the statute, as Angstreich points out in his defense of the doctrine,[73] but it essentially cedes lawmaking authority to the agency when review of agency rulemaking is time-barred.

Judge Kavanaugh's dissent points toward an alternative analytical approach to the super-charged EPA interpretive authority facilitated by the majority. By construing the Agency's interpretation of its rule in light of the statutory limitations imposed by RCRA's definition of solid waste, Judge Kavanaugh may have been adopting an analytic approach that partially collapses the second step into the third step in the above example. While he does not review the rule itself for compliance with the statute, his opinion may be understood as using the range of permissible statutory readings under *Chevron* as a limit to the range of permissible agency readings of the regulation.[74] This approach prevents EPA from adopting an interpretation of the regulation that is impermissible under the statute, thereby usurping Congress's authority to delineate the bounds of RCRA. It restricts EPA's range of permissible interpretations of the rule in the example above to points 2 and 3.[75]

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[72] Although a court could choose to announce in dicta that the rule could only mean positions 2 or 3, such a statement would not be necessary to the decision and might well not be made. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005) (holding that a lower court should have given *Chevron* deference to an agency statutory interpretation because a prior decision had stated only that a different interpretation was an acceptable reading of the statute, not that it was the only permissible one).

[73] Angstreich, *supra* note 56, at 132 (arguing that *Seminole Rock* is an essential complement to *Chevron* deference because "the entity that controls the meaning of the regulation also has effective control over the meaning of the statute. Therefore, unless agencies' formal interpretations of such regulations receive *Seminole Rock* deference, the distribution of interpretive authority contemplated by *Chevron* will be altered, with much of that authority returned to the courts.").

[74] The dissent does not explicitly call for reviewing courts to use a *Chevron*-style range of reasonable meanings of the statute to aid in interpreting the regulation where the statute is ambiguous, but such an approach would be consistent with Angstreich's argument that *Seminole Rock* should be used as a compliment to *Chevron*. *See id.*

[75] While Judge Kavanaugh correctly noted that the *AMC I* decision counseled courts to rely on the ordinary meaning of the word "discarded," *Howmet*, 614 F.3d at 555 (citing Am. Mining Cong. v. EPA (*AMC I*), 824 F.2d 1177, 1184-85 (D.C. Cir. 1987)), subsequent decisions have substantially cabined this holding. *See* Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1056 (D.C. Cir. 2000); Am. Mining Cong. v. EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (emphasizing that *AMC I* only addressed material destined for reuse as part of a continuous industrial process by the generating industry). In *Safe Food and Fertilizer v. EPA*, the

Such a solution to the problems posed by the majority's approach leaves the core principle of *Seminole Rock* intact. Courts will continue to give the wide deference prescribed by *Seminole Rock* to any of a range of EPA regulatory interpretations that lie within the statutory limits. To refer to the example above, EPA retains the ultimate choice of whether to interpret the rule to mean point 2 or point 3. So long as the agency chooses a position that comports with a reasonable reading of the statute, *Seminole Rock* means that the court will defer.[76]

This modified view of *Seminole Rock* is likewise compatible with the RCRA time-bar provision. Section 6967(a)(1) is not intended to prevent reviewing courts from pronouncing on the validity of EPA's regulatory interpretations after the ninety-day window. It bars only challenges to the regulations themselves. The majority opinion in *Howmet* did not cede absolute authority over the meaning of the regulations to EPA. It reviewed EPA's interpretation for consistency with the language and purpose of the regulation, albeit under a deferential standard.[77] While Judge Kavanaugh used the statute as an additional source of insight into the meaning of the regulation, a court applying this method of interpretation would not have overturned the rule itself.[78] Even when there is no interpretation of the regulation that would be consistent with the statute, the time-bar provision indicates Congress has determined that courts are not to disturb the rule itself. This approach to *Seminole Rock* honors that determination.

In summary, RCRA's judicial review provision prevents parties from challenging established EPA rules, but EPA remains free to interpret ambiguities in these rules. The *Howmet* majority reviewed EPA's interpretation of the spent material regulation without considering the statutory limits on the agency's authority, empowering EPA to adopt an interpretation of the rule that arguably exceeded these limits. In order to preserve Congress's ability to bind EPA, courts must be able to consider statutory limits on EPA regulatory authority even after the judicial review period for rulemaking has

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court held that the language of the statute did not compel EPA to classify certain fertilizer inputs as discarded solid wastes and employed *Chevron* deference in holding for the agency. 350 F.3d 1263, 1268-69 (D.C. Cir. 2003). This suggests that EPA's interpretation in *Howmet* accords with an interpretation of RCRA's discard language that is permissible under *Chevron*.

[76] The so-called "anti-parroting" canon evinces an analogous concern for statutory supremacy. *Cf.* Gonzales v. Oregon, 546 U.S. 243, 257-58 (2006) (refusing to accord deference to an agency's interpretation of a regulation that merely parrots the language of the statute).

[77] *Howmet*, 614 F.3d at 549-53.

[78] This interpretive strategy resembles the "Charming Betsy" canon, in which courts read ambiguous statutes so as to avoid meanings that would conflict with international law. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *see also* F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). Despite this presumption, however, a U.S. court may not overturn a statute because it conflicts with international law. *See* Guaylupo-Moya v. Gonzales, 423 F.3d 121, 136 (2d Cir. 2005). Similarly, while the statute can affect the construction of an ambiguous regulation, a court bound by § 6967(a)(1) cannot overrule the rule as inconsistent with the statute.

lapsed. Judge Kavanaugh, in dissent, correctly used the statutory language as an input to the *Seminole Rock* review of EPA's regulatory interpretation. Future courts should employ this approach when reviewing regulatory interpretations under RCRA and other statutes with similar judicial review provisions. This interpretive mode continues to give an agency broad deference to choose its preferred reading of the rule but prevents the agency from adopting a meaning that is inconsistent with a reasonable reading of the underlying statute.