

**DIMINISHING THE FINALITY OF CLEAN WATER
ACT POLLUTANT DISCHARGE PERMITS:
*MINGO LOGAN COAL CO. v. EPA***

Synopsis: In 2007, the United States Army Corps of Engineers (USACE) issued a section 404 permit authorizing Mingo Logan Coal Company to dispose of fill material from the Spruce No. 1 Surface Mine into three streams in West Virginia. Despite reservations concerning “significant environmental impacts,” the Environmental Protection Agency (EPA) declined to pursue a subsection 404(c) objection. In 2011, the EPA withdrew the specification of the disposal site for the Spruce No. 1 Surface Mine. Mingo Logan filed an action in the United States District Court for the District of Columbia challenging the EPA’s authority to ‘revoke’ the permit. Both the EPA and Mingo Logan filed motions for summary judgment. In 2012, the district court granted summary judgment in favor of Mingo Logan, concluding that the EPA had 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 a disposal site after a permit had already been issued by the USACE under section 404(a). The EPA appealed the decision of the district court. On appeal, the District of Columbia Circuit Court of Appeals reversed the district court’s summary judgment ruling and upheld the EPA’s revocation of Mingo Logan’s section 404 discharge permit, finding that Congress had clearly spoken that the EPA had the power to revoke a USACE site specification post-permit. The EPA’s unprecedented use of its “plenary authority,” to invalidate an existing section 404 permit at any time, simply by withdrawing the specification of a disposal site, significantly decreased finality within the permitting process.

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I. INTRODUCTION

On April 29, 1970, President Richard M. Nixon's Advisory Council on Executive Organization composed the "Ash Council Memo."¹ The Memo recommended that the major federal government anti-pollution programs be merged into a new independent agency of the Executive Branch—the Environmental Protection Agency (EPA).² In its Memo to the President, the Council shared an important insight into the broad policy considerations underlying federal environmental regulation: one of the primary purposes for the establishment of the regulatory system was to find some way to balance "economic and social aspirations . . . against the finite capacity of the environment to absorb society's wastes."³ The Council further stated that "[s]ound environmental administration must reconcile divergent interests and serve the total public constituency. It must appreciate and take fully into account competing social and economic claims."⁴

These ideals—balancing the interests of competing societal, economic, and environmental concerns—have been a consistent motif throughout the following decades of environmental regulation. They have survived federal administrations from both political parties, shifting societal perspectives on environmental concerns, and seasons of both economic growth and instability. Finality of administrative decisions is a hallmark of an agency process that succeeds in fully accounting for competing societal and economic claims, while respecting the reliance on conclusive agency rulings by both industry and the environmental community.⁵

Legislative history shows that Congress did not depart from these important policy considerations when it passed the 1972 Clean Water Act (CWA).⁶ Senator Edmund Muskie of Maine, the Senate's primary proponent of the legislation, proposed that the "three essential elements" of the CWA were "[u]niformity, finality, and enforceability."⁷ The EPA applied these "three essential elements" for almost forty years during the CWA section 404 permitting process.⁸

Subsection 404(a) of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredge or fill material at disposal sites, which are specified through permits issued by the Secretary.⁹ The Administrator of the EPA, after consulting with the U.S. Army Corps of Engineers (USACE), has the power

1. Memorandum from the President's Advisory Council on Exec. Org. to the President (Apr. 29, 1970), available at <http://www2.epa.gov/aboutepa/ash-council-memo>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Brief of Chamber of Commerce, as Amici Curiae in Support of Appellee at 14-22, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013) (No. 12-5150).

6. *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012) [hereinafter *Mingo Logan*] (quoting SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, 93d Cong. (1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1973)); Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (2012) [hereinafter CWA].

7. *Id.*

8. Brief of Chamber of Commerce, *supra* note 5, at 14-16.

9. 33 U.S.C. § 1344 (2012).

to veto the Corps' disposal site specification.¹⁰ On January 13, 2011, the EPA diverged from years of common practice when it effectively revoked the section 404 discharge permit of the Mingo Logan Coal Company Inc. (Mingo Logan) for the Spruce No. 1 coal mine in West Virginia that was issued nearly three years earlier by the USACE.¹¹

This case note will examine the decision of the District of Columbia Circuit Court of Appeals to uphold the EPA's revocation of the discharge permit and will explore the plausible negative ramifications of the decision and the current remedies that have been proposed to address the adverse consequences.¹²

II. BACKGROUND

A. Mountaintop Mining at the Spruce No. 1 Mine

Mountaintop coal mining involves the removal of entire mountaintops, including vegetation, soils, and layers of rock.¹³ The removed layers of earth, or "overburden," are disposed of in nearby valleys, called "valley fills."¹⁴ Mountaintop mining occurs primarily in the eastern United States, particularly in the Appalachian states of Kentucky, West Virginia, Virginia, and Tennessee.¹⁵

According to the EPA, the Spruce No. 1 Mine of Logan County, West Virginia is "one of the largest surface mining operations ever authorized in Appalachia."¹⁶ The Mingo Logan Coal Company was authorized by the USACE to construct six valley fills, along with sedimentation ponds, in the Seng Camp, Pigeonroost, and Oldhouse Branches and tributaries to the Spruce Fork of the Little Coal River.¹⁷ These waters flow into the Coal River, eventually dumping into the Kanawha River at St. Albans, West Virginia.¹⁸

10. Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 609-10 (D.C. Cir. 2013) [hereinafter *Mingo Logan Coal Co.*].

11. *Id.* According to the EPA, the agency has used its CWA section 404(c) authority thirteen times in forty years and has reserved this authority for "cases where an activity will result in specific and severe adverse environmental effects." See also Letter from Arvin Ganesan, Deputy Assoc. Adm'r for Cong. Affairs, to Rep. Tim Bishop, at 5 (June 21, 2011), available at http://www.eenews.net/assets/2011/06/22/document_pm_06.pdf.

12. Petition for Writ of Certiorari, Mingo Logan Coal Co. v. EPA (2013) (No. 13-599); S. 830, 113th Cong. (2013); H.R. 524, 113th Cong. (2013); H.R. 1948, 113th Cong. (2013).

13. *Mid-Atlantic Mountaintop Mining*, EPA, <http://www.epa.gov/region3/mtntop> (last updated June 24, 2013). Mountaintop mining uses surface mining techniques in order to expose coal seams. According to the EPA, there are five basic steps to mountaintop mining. *Id.* First, the layers of rock and dirt above the coal are removed. *Id.* Second, the upper seams of coal are removed with spoils placed in nearby valleys. *Id.* Third, draglines excavate the lower layers of coal with spoils placed in spoil piles. *Id.* Fourth, coal excavation continues and regrading begins. Lastly, once the coal removal is complete, final regrading takes place and the area is revegetated. *Id.*; see also Joshua R. Purtle, Note, Mingo Logan Coal Co. v. EPA, 37 HARV. ENVTL. L. REV. 283, 283-84 (2012); Amy Oxley, Case Comment, *No Longer Mine: An Extensive Look at the Environmental Protection Agency's Veto of the Section 404 Permit Held by the Spruce No. 1 Mine*, 36 S. ILL. U. L.J. 139 (2012).

14. *Mid-Atlantic Mountaintop Mining*, *supra* note 13.

15. *Id.*

16. *Mid-Atlantic Mountaintop Mining: Spruce No. 1 Mine*, EPA, <http://www.epa.gov/region3/mtntop/spruce1.html> (last updated Sept. 1, 2011) [hereinafter *Spruce No. 1*].

17. *Id.*

18. *Spruce No. 1*, Exhibit 1.1, EPA, <http://www.epa.gov/region3/mtntop/spruce1.html> (last updated Sept. 1, 2011).

B. Sections 402 and 404 of the Clean Water Act

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), applies to mountaintop mining operations.¹⁹ The CWA was originally passed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁰ Valley fills are regulated by section 404 of the CWA while the discharge of pollutants into streams is regulated by section 402 of the CWA.²¹ In order to discharge pollutants from valley fills into streams under section 402, a National Pollutant Discharge Elimination System (NPDES) permit must be obtained, or else the discharge “will be considered illegal.”²² The CWA stipulates that “each such disposal site shall be specified for each such permit by the Secretary [of the Army].”²³ The USACE acts on behalf of the Secretary in this permitting process.²⁴

The Administrator of the EPA has veto power over the discharge site selections.²⁵ The CWA provides that the authority of the EPA Administrator consists of the power to:

[p]rohibit 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.²⁶

The statute, however, does require the Administrator consult with the Secretary before making a determination and that the Administrator “set forth in writing and make public his findings and his reasons for making any determination under this subsection.”²⁷

19. *Spruce No.1*, *supra* note 16.

20. 33 U.S.C.A. § 1251 (2012).

21. *Id.*

22. *National Pollutant Discharge Elimination System* (NPDES), EPA, http://cfpub.epa.gov/npdes/cwa.cfm?program_id=45 (last updated Dec. 17, 2012).

23. 33 U.S.C. § 1344(b) (2012).

24. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 609 (D.C. Cir. 2013).

25. *Id.*

26. 33 U.S.C. § 1344(c). This provision provides:

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.

27. *Id.*

C. Mingo Logan Coal Co. v. EPA

The EPA's "veto" power became the central issue in *Mingo Logan Coal Co. v. EPA*.²⁸ Hobet Mining, Inc., the predecessor of the Mingo Logan Coal Company, applied for a section 404 permit to discharge material from the Spruce No. 1 Mine in 1999.²⁹ Hobet's application requested to discharge material into four West Virginia streams and their tributaries.³⁰ The EPA expressed its concern in 2002, after the USACE drafted an Environmental Impact Statement (EIS).³¹ The EIS provided that the mountaintop mining at the Spruce No. 1 Mine created significant environmental impacts that could not be avoided, even with the safest possible practices.³² Despite these reservations, the EPA declined to pursue a subsection 404(c) objection.³³ The USACE issued Mingo Logan a section 404 permit on January 22, 2007, effective through December 31, 2031, authorizing Mingo Logan to dispose of material into three streams, the Pigeonroost Branch, Oldhouse Branch, and Seng Camp Creek, along with a number of their tributaries.³⁴ The permit explicitly stated that the USACE "may reevaluate its decision on the permit at any time the circumstances warrant," and that such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 C.F.R. section 325.7.³⁵ The permit did not, however, make any mention of any future EPA action.³⁶

The EPA wrote a letter to the USACE on September 3, 2009, requesting that the USACE suspend, revoke, or modify the Mingo Logan Coal Company discharge permit at the Spruce Fork No. 1 Surface Mine, based on new information that warranted reconsideration and potential downstream water quality degradation.³⁷ The USACE responded by stating that "there were 'no factors that currently compell[ed it] to consider permit suspension, modification or revocation.'"³⁸ The EPA responded with a letter stating that it intended "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 its authority under section 404(c) of the Clean Water Act and its regulations at 40 C.F.R. part 231."³⁹

28. *Mingo Logan Coal Co.*, 714 F.3d at 608.

29. *Id.* at 609-10.

30. *Id.*

31. *Mingo Logan Coal Co.*, 714 F.3d at 610 (citing Letter from EPA, Region III to Corps, Huntington Dist., at 1 (June 16, 2006)).

32. *Id.* at 610.

33. *Mingo Logan Coal Co.*, 714 F.3d at 610 (citing Email from EPA to USACE (Nov. 2, 2006)).

34. *Id.* (citing Dep't of the Army Permit No. 199800436-3 (JA 984)).

35. *Id.*; 33 C.F.R. § 325.7 (2014) ("The district engineer may reevaluate the circumstances and conditions of any permit . . . and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest.").

36. *Mingo Logan Coal Co.*, 714 F.3d at 610.

37. *Id.* at 610-11 (citing Letter from EPA, Region III to USACE, Huntington Dist., at 1 (Sept. 3, 2009)).

38. *Id.* at 611 (citing Letter from Corps, Huntington Dist. to EPA, Region III, at 2 (Sept. 30, 2009)).

39. *Id.* (citing Letter from EPA, Region III to USACE, Huntington Dist., at 1 (Oct. 16, 2009)).

A Notice of Proposed Determination was published by the EPA's Regional Director on April 2, 2010.⁴⁰ The notice requested public comments on the agency's proposal to withdraw or restrict use of the three creeks and certain tributaries authorized by the Mingo Logan permit to receive dredged or fill material.⁴¹ The Regional Director subsequently issued another Recommended Determination on September 24, 2010, limiting the withdrawal of specifications to the Pigeonroost and Oldhouse Branches and their tributaries.⁴² On January 13, 2011, the EPA adopted the Regional Director's recommendation in its Final Determination, formally withdrawing the specification of the Pigeonroost and Oldhouse Branches and their tributaries "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."⁴³ The Final Determination also prohibited the specification of the 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."⁴⁴

Mingo Logan filed its action in the United States District Court for the District of Columbia following the Proposed Determination,⁴⁵ challenging the EPA's authority "to 'revoke' the three-year-old permit."⁴⁶ Following the Final Determination, in February 2011, Mingo Logan amended its complaint to challenge the Final Determination, asserting it was "both ultra vires and arbitrary and capricious."⁴⁷ Both the EPA and Mingo Logan filed motions for summary judgment.⁴⁸ On March 23, 2012, the district court granted summary judgment in favor of Mingo Logan.⁴⁹ The court concluded that the 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)."⁵⁰ The United States filed a timely notice of appeal on behalf of the EPA.⁵¹

40. *Id.*; Proposed Determination To Prohibit, Restrict, or Deny the Specification, or the Use for Specification (Including Withdrawal of Specification) of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV, 75 Fed. Reg. 16,788 (proposed Apr. 2, 2010).

41. *Mingo Logan Coal Co.*, 714 F.3d at 611 (citing 75 Fed. Reg. 16,788).

42. *Id.* at 610.

43. *Id.* at 611 (quoting 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)).

44. *Id.* (quoting 76 Fed. Reg. at 3128).

45. *Id.* at 611; Complaint, ¶ 75, *Mingo Logan Coal Co. v. Env'tl. Protection Agency*, C.A. No. 10-00541 (D.D.C. Apr. 2, 2010)).

46. *Mingo Logan Coal Co.*, 714 F.3d at 611.

47. *Id.* (citing Amended Complaint, *Mingo Logan Coal*, No. 10-00541 (D.D.C. Feb. 28, 2011)).

48. *Id.*

49. *Id.* at 611-12 (citing *Mingo Logan*).

50. *Id.* at 611 (quoting *Mingo Logan*, 850 F. Supp. 2d at 134).

51. *Id.*

D. District Court for the District of Columbia's Analysis

The United States District Court for the District of Columbia reached a different conclusion than the Court of Appeals regarding the Mingo Logan Coal Company permit.⁵² The court found “that [the] 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.”⁵³ Like the circuit court, the district court applied the *Chevron* two-step analysis to the EPA’s interpretation of section 404(c) of the CWA.⁵⁴ Also like the circuit court, the district court believed that that analysis hinged on the first step of the *Chevron* test because Congress spoke clearly regarding the EPA’s power under CWA section 404(c).⁵⁵

1. Chevron Step One

Unlike the court of appeals, the district court held that the first step of the *Chevron* analysis revealed that Congress did not grant the EPA the authority to revoke the site specifications post-permit.⁵⁶ In its application of the first step, the district court believed that precedent requires a court to use the “traditional tools of statutory construction” to determine whether or not Congress unambiguously articulated its intent.⁵⁷ The court referenced the *Bell Atlantic Telephone Cos. v. Federal Communications Commission* case to define which of these tools of construction should, in fact, be used in its examination.⁵⁸ According to *Bell Atlantic*, these tools include the examination of a “statute’s text, structure, purpose, and legislative history.”⁵⁹ The district court found that the post-permit revocation power claimed by the EPA is contrary to the statute’s language, structure, and legislative history when viewing the statute as a whole.⁶⁰

First, the court concluded that the statutory language of section 404 itself “[did] not clearly grant EPA the authority to exercise a post-permit veto.”⁶¹ The court found that the statute clearly vests full authority to the USACE to issue permits for any discharge into navigable waters.⁶² Permits, as provided by section 404(a), are to be issued for disposal sites, which are to be specified by the Secretary of the Army.⁶³ According to the court, however, the statute does grant EPA an opportunity to prohibit a specification if it concludes that the discharge would cause intolerable environmental impacts.⁶⁴ The statute provides that “[t]he Administrator is authorized to prohibit the specification (including the withdrawal

52. *Mingo Logan*, 850 F. Supp. 2d at 133; *see also* Purtle, *supra* note 13.

53. *Mingo Logan*, 850 F. Supp. 2d at 153.

54. *Id.* at 138.

55. *Id.*

56. *Id.* at 139.

57. *Id.* at 138; *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 943 n.9 (1984)).

58. *Mingo Logan*, 850 F. Supp. 2d at 138-39.

59. *Id.*; *Bell Atl. Tel. Cos. v. Fed. Comm’n Comm’n*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

60. *Mingo Logan*, 850 F. Supp. 2d at 139.

61. *Id.*

62. *Id.*

63. *Id.*; 33 U.S.C. §§ 1344(a)-(b).

64. *Mingo Logan*, 850 F. Supp. 2d at 139.

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 . . . such area will have an unacceptable adverse effect.”⁶⁵ This provision, as agreed to by both parties in the case, gave the 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.”⁶⁶ However, the parentheses within section 404(c) are what made the statutory provision unclear to the court.⁶⁷

The court found that the parentheses were poorly written, making it very difficult to understand what they modify. Analyzing the language in the context of the statute as a whole, the court questioned what it meant that “[t]he Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area.”⁶⁸ One possible interpretation recognized by the court is that the EPA can prohibit a specification and can also prohibit the withdrawal of a specification by the USACE.⁶⁹ The court did not find this interpretation persuasive, because they questioned why Congress would give EPA the right to stop the USACE from withdrawing a specification.⁷⁰

Another interpretation the court considered is that the statute authorizes the EPA to prohibit a site specification, which includes the power to withdraw a specification.⁷¹ While the court admitted that this was a possible interpretation, it also acknowledged that it lacked support from legislative history and would have been poorly expressed by Congress, if it was in fact their intent.⁷² The court actually found it more persuasive that this interpretation did not fit within the delegations of authority that Congress expressed throughout the remainder of the statute.⁷³ Both parties in the dispute agreed that the EPA does not “specify” under its authority in section 404; the USACE has the exclusive authority to specify sites for disposal.⁷⁴ The EPA is authorized only “to prohibit or decline to prohibit” the USACE from specifying a site.⁷⁵ It is difficult to explain how the EPA could actually “withdraw” a decision it has not made and, in fact, cannot make under its statutory authority.⁷⁶

The court next looked at the use of the word “whenever,” which was critical to the argument presented by the EPA and was found to be persuasive by the court of appeals. Section 404 states that the EPA Administrator is “authorized to deny or restrict the use of any defined area for specification . . . *whenever* he determines,

65. 33 U.S.C. § 1344(c).

66. *Mingo Logan*, 850 F. Supp. 2d at 140.

67. *Id.*

68. *Id.* at 140; 33 U.S.C. § 1344(c).

69. *Mingo Logan*, 850 F. Supp. 2d at 140.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Mingo Logan*, 850 F. Supp. 2d at 140.

75. *Id.*; 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]. . . .” “The Administrator [of the EPA] is authorized to prohibit the specification. . . .” 33 U.S.C. § 1344(c).

76. *Mingo Logan*, 850 F. Supp. 2d at 140.

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.”⁷⁷ The EPA argued that the use of the word “whenever” means the Administrator can withdraw a specification whenever desired, at any time.⁷⁸

It is first important to note, however, that this argument rests on the notion that the EPA has the power to withdraw a specification under the authority of section 404.⁷⁹ Secondly, the court determined that the statute clearly does state that the EPA can remove its approval at any time.⁸⁰ However, the court concluded that this approval is limited to only a prohibition of specification, meaning “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.’”⁸¹ The court found this interpretation to be the most natural reading, with “whenever” simply acting as a conjunction that makes the assessment of an unacceptable environmental effect the predicate of the Administrator’s action to veto the specification.⁸² Yet, even if “whenever” indicates that the EPA has the authority to withdraw a specification at any time, as the EPA and the court of appeals argue, the statute still does not expressly confer authority to undermine an already existing *permit*.⁸³ The court reasoned that “whatever section 404(c) means, it only talks about prohibiting, restricting, or withdrawing a specification, and it does not give the EPA any role in connection with permits.”⁸⁴ The court also concluded that since Congress used both terms throughout the statute, “it must be assumed that Congress understood the difference between the two terms and that its choices have meaning.”⁸⁵ While the EPA denied the validity of the argument by claiming that it did not withdraw a *permit*, it instead claimed to only have made a withdrawal of a *specification*.⁸⁶ The court, however, found this argument “entirely disingenuous,” because the EPA had also argued that its action effectively invalidated Mingo Logan’s permit.⁸⁷ Thus, the court determined that the statute did not grant EPA the authority to withdraw a site specification at any time, and was at best ambiguous when considering only the language of the statute itself.⁸⁸

In step one of the *Chevron* test, a court may consider the “statutory structure as a whole, and the legislation’s purpose and history,” along with the language of

77. 33 U.S.C. § 1344(c) (emphasis added).

78. *Mingo Logan*, 850 F. Supp. 2d at 141.

79. *Id.*

80. *Id.* at 140-41.

81. *Id.* (quoting 33 U.S.C. § 1344(c)) (emphasis added).

82. *Id.*

83. *Mingo Logan*, 850 F. Supp. 2d at 140-41.

84. *Id.*

85. *Id.*; *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.”).

86. *Mingo Logan*, 850 F. Supp. 2d at 141; EPA’s Reply Mem. in Support of its Mot. for Summ. Judgment, at 9.

87. *Mingo Logan*, 850 F. Supp. 2d at 142 (citing Transcript at 45-47 (Nov. 30, 2011)).

88. *Id.*

the statute in dispute.⁸⁹ The district court ultimately concluded that the legislative history and statute as a whole conflicted with the EPA's claim of authority to revoke site specifications post-permit.⁹⁰

The district court found nothing in the legislative history of section 404 of the CWA that indicated Congress had the intent to confer the Administrator of the EPA with the authority to revoke permits.⁹¹ The court also determined that the EPA's argument, which was later adopted by the court of appeals, conflicted with what Congress actually expressed about how it intended the regulatory scheme to be administered.⁹² The court came to this conclusion by starting its analysis with an examination of the statements of Senator Edmund Muskie of Maine, who "was the Senator who played the most significant role in the passage of the legislation."⁹³ Senator Muskie stated on the Senate Floor, during his submittal of the conference report on the Federal Water Pollution Control Act Amendments of 1972, 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 Should the Administrator so determine, no permit may [sic] issue."⁹⁴ This statement, according to the district court, supported the notion that Congress did not intend to give EPA the power to revoke a specification after the issuance of a permit since Muskie's statement expressly provided that the Administrator's determination would come "prior to the issuance of any permit to dispose of spoil."⁹⁵

While Senator Muskie emphatically stressed that the fundamental purpose of the bill was the restoration and protection of the nation's waters, he also reminded his colleagues of the "three essential elements" of the legislation: "[u]niformity, finality, and enforceability."⁹⁶ Since the primary sponsor of the CWA in the United States Senate believed that of all the possible elements, finality should be amongst the most important in the regulatory system, the court found the comments particularly "instructive" and "inconsistent with what Congress had in mind."⁹⁷ Decreasing finality within the permitting process by allowing the EPA to revoke a specification for a site after the USACE has already issued the permit goes against the foundational principles that were established by the congressional

89. *Id.*; *Bell Atl. Tel. Cos. v. Fed. Comm'n Comm'n*, 131 F.3d 1044, 1047 (D.C. Cir. 1997); *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.

90. *Mingo Logan*, 850 F. Supp. 2d at 142.

91. *Id.* at 147.

92. *Id.*

93. *Id.* at 144-45.

94. *Id.*; Senate Consideration of the Report of the Conference Committee, S. 2770, 93d Cong. (Oct. 4, 1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1973).

95. *Mingo Logan*, 850 F. Supp. 2d at 145.

96. *Id.* at 145 (citing 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 161, 162, 164).

97. *Id.*

authors of the CWA, as well as the legislative history regarding the specific language in section 404 itself.⁹⁸

The court further concluded that EPA's interpretation was inconsistent with the clear scheme of shared responsibility "carefully established" in the reconciliation process of the House and Senate versions of the legislation in Conference Committee.⁹⁹ The record showed that the compromise between the House and Senate bills gave the Administrator of the EPA three clear responsibilities and authorities under section 404:

First, the Administrator has both responsibility and authority for failure to obtain a [s]ection 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.¹⁰⁰

According to the court, this statement indicated that the compromise between houses "insisted upon the primacy of the Corps when dealing with dredged material" and expressly stated that the veto authority of the EPA would be exercised prior to issuance of the permit.¹⁰¹ Thus, the court concluded that the legislative history did not indicate that Congress had any intent to confer the Administrator of the EPA with the authority to revoke permits once issued, and also determined that the EPA's argument conflicted with the express Congressional intent regarding the administration of the regulation.¹⁰²

In addition to the legislative history, the district court concluded that the statutory construction as a whole conflicted with the argument of the EPA.¹⁰³ According to the court, the permit is the core of CWA regulation.¹⁰⁴ The CWA

98. *Id.*

99. *Id.* at 145-46.

100. *Mingo Logan*, 850 F. Supp. 2d at 145 (citing 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177) (emphasis added).

101. *Id.* at 146. Senator Muskie further stated in the Conference Committee report that the committee "did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed" but that "the Administrator . . . should have a veto over the selection of the site for dredged spoil disposal." *Id.* Muskie reasoned that the Administrator's decision would not be:

[D]uplicative 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.

1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177.

102. *Mingo Logan*, 850 F. Supp. 2d at 147.

103. *Id.* at 142.

104. *Id.*

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 [s]ection 402 permit has been issued, the permittee's obligation to

provides that discharges made without permits are unlawful, but those made with a permit are lawful.¹⁰⁵ According to the court, the EPA's interpretation could not be squared with the statutory scheme set out in the CWA, especially considering the difficulty in explaining how the EPA's retroactive veto of the specification of disposal sites would actually affect an existing permit to discharge.¹⁰⁶ In response to the court's inquiry of how the retroactive veto would affect Mingo Logan's existing permit, the EPA responded that it would possibly be appropriate to modify the permit or that the cancellation of the permit would possibly be "self-implementing."¹⁰⁷ The court responded by contending that the argument that a permit would evaporate at the EPA's direction goes against the exclusive permitting authority given to the USACE in section 404(a) and the legal protections that Congress stated the permit would provide under section 404(p).¹⁰⁸ The court also found that the EPA's interpretation was inconsistent with section 404(q), which required the EPA and the USACE 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."¹⁰⁹

The EPA's claim that the statute essentially provides that a permit is never final is completely inconsistent with "Congress's clear desire to limit duplication and delay so that commerce would not be disrupted more than necessary."¹¹⁰ According to the court's reasoning, there would be no point in demanding the speedy granting of permits if the permits would never be final and could be thrown out at any time.¹¹¹

The court found that Congress clearly expressed that the EPA lacked the authority to withdraw site specifications after a CWA section 404 permit had been issued due to the provision's plain language, the statute as a whole, and the

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.

Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, 1007-08 (D. Idaho 1992).

105. *Mingo Logan*, 850 F. Supp. 2d at 142-43; 33 U.S.C. § 1344(p); Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987).

106. *Mingo Logan*, 850 F. Supp. 2d at 143-44. The EPA's:

[c]ounsel'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).

Id. at 144.

107. *Id.*

108. *Id.*

109. 33 U.S.C. § 1344(q).

110. *Mingo Logan*, 850 F. Supp. 2d at 133, 144.

111. *Id.*

legislative history of section 404's enactment.¹¹² However, due to its acknowledgement of some ambiguities within the CWA scheme, the district court continued their analysis by moving to the second step of the *Chevron* analysis.¹¹³

2. Chevron Step Two & Choice of Deference

While the district court concluded that Mingo Logan would be successful at the first step of the *Chevron* analysis, it continued its examination of the case under the second step of *Chevron*.¹¹⁴ The court ultimately found that the EPA's interpretation was not reasonable and did not survive scrutiny under the second step of the *Chevron* test.¹¹⁵ The analysis began with a determination of what level of deference was due to the EPA's interpretation of section 404 of the CWA.¹¹⁶

An agency's interpretation of a statute it administers is usually given "substantial deference," being upheld by a court as long as it is "reasonable."¹¹⁷ However, the court reasoned that determining how much deference should be applied is more difficult when more than a single agency is delegated with the task of administering the statute.¹¹⁸ In *Collins v. National Transportation Safety Board*, three different shared enforcement schemes were outlined by the D.C. Circuit Court of Appeals.¹¹⁹ Under *Collins*, courts must review *de novo* questions involving generic statutes like the APA.¹²⁰ Where agencies have overlapping but specialized enforcement responsibilities, a court might also have to engage in *de novo* review.¹²¹ Where expert agencies have mutually exclusive authority over distinct sets of regulated persons, *Chevron* deference applies.¹²² Since the court determined in the *Chevron* step one analysis that the administration of section 404 was entrusted to both the EPA and the USACE, the court found that regulation fell within the second category, where the two or more agencies share overlapping but specialized enforcement responsibilities.¹²³ Thus, while the court could have concluded that *de novo* review was required, the court instead followed *Collins*, giving some level of deference to the EPA because of its expertise.¹²⁴

According to *Collins*, if *Chevron* deference is not called for, *Skidmore* deference, or "respect," could be applied.¹²⁵ The court in *Collins* defined *Skidmore* deference as "obviously less than *Chevron*," but not a trivial "boost."¹²⁶

112. *Id.* at 148.

113. *Id.* at 151-52.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; *Serono Labs., Inc.*, 158 F.3d at 1320.

118. *Mingo Logan*, 850 F. Supp. 2d at 148.

119. *Id.*; *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246 (D.C. Cir. 2003).

120. *Mingo Logan*, 850 F. Supp. 2d at 148; *Collins*, 351 F.3d at 1246.

121. *Mingo Logan*, 850 F. Supp. 2d at 148-149; *Collins*, 351 F.3d at 1246.

122. *Mingo Logan*, 850 F. Supp. 2d at 149; *Collins*, 351 F.3d at 1246.

123. *Mingo Logan*, 850 F. Supp. 2d at 149.

124. *Id.* at 149-50; *Collins*, 351 F.3d at 1253-54.

125. *Mingo Logan*, 850 F. Supp. 2d at 150; *Collins*, 351 F.3d at 1253-54.

126. *Collins*, 351 F.3d at 1253-54.

Even with this deference, however, the district court concluded that the EPA's interpretation was unreasonable.¹²⁷

The first reason given by the district court as to why the EPA's interpretation was unreasonable was that it was "illogical and impractical."¹²⁸ The court found it irrational for the EPA to claim that it was not revoking a permit—which it did not have the statutory authority to do—and instead claim to only be withdrawing a specification, yet at the same time claim that the withdrawal essentially revoked the permit.¹²⁹ The court wrote, "[t]o explain how this would be accomplished in the absence of any statutory provision or even any regulation that details the effect that [the] EPA's belated action would have on an existing permit, [the] EPA resorts to magical thinking."¹³⁰

Finally, the court found it unreasonable to introduce any unwarranted amount of uncertainty into the regulatory process.¹³¹ According to the court, industry relies heavily on finality, and eliminating the conclusiveness of the permits would cause a significant negative economic impact.¹³² In addition, the EPA itself has acknowledged the importance of finality and that section 404 vests final authority in the USACE.¹³³ In fact, the Memorandum of Agreement (MOA) between the EPA and the Department of the Army begins by stating that, "[t]he Army Corps of Engineers is solely responsible for making final permit decisions pursuant to [s]ection 10, [s]ection 404(a), and [s]ection 102, including final determinations of compliance with the Corps permit regulations [and] the [s]ection 404(b)(1) [g]uidelines. . . ."¹³⁴

The district court concluded that "[i]f there [was] any set of rules that should be subject to deference it would be those embodied in the MOA" since the MOA was created under Congress' specific direction that the two agencies work together to establish procedures to implement section 404 and "minimize unnecessary delay."¹³⁵ The court found it very persuasive that the MOA said nothing about the EPA post-permit vetoes, and that it referenced USACE regulations that provide the EPA with recourse to petition the USACE to withdraw or modify permits but remain completely silent concerning post-permit vetoes by the EPA.¹³⁶ In sum, the district court concluded that the EPA exceeded its authority under CWA section 404(c) by attempting to withdraw the site specification and revoke Mingo Logan's permit to discharge fill.¹³⁷

127. *Mingo Logan*, 850 F. Supp. 2d at 150.

128. *Id.* at 152.

129. *Id.*

130. *Id.*

131. *Id.*

132. Brief of Amicus Curiae The National Stone, Sand and Gravel Association in Support of Pl. Mingo Logan Coal Co., Inc. at 5–13 (No. 51); Brief of Amici Curiae the Chamber of Commerce of the United States et al. in Support of Pl. at 7–14 (No. 50).

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

134. *Id.* at 152; Clean Water Act Section 404(q); Memorandum of Agreement, <http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm> (last visited Oct. 1, 2014).

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

136. *Id.* at 153; 33 C.F.R. pts. 320–30.

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

E. The D.C. Circuit Court of Appeal's Holding and Rationale

In April 2013, a three-judge panel for the District of Columbia Circuit Court of Appeals heard the EPA's appeal of the district court's decision granting summary judgment to Mingo Logan.¹³⁸ The court reversed the summary judgment ruling and upheld the EPA's revocation of Mingo Logan's section 404 discharge permit.¹³⁹

The circuit court in *Mingo Logan* reversed the district court's holding that the EPA lacked the authority to withdraw disposal site specifications post-permit issuance.¹⁴⁰ The holding hinged on the court's interpretation of section 404(c) of the CWA.¹⁴¹ The circuit court applied the two-step *Chevron* analysis to the EPA's interpretation of the CWA section 404(c) permitting process.¹⁴² The analysis derived from *Chevron* applies a deferential standard to an agency's interpretation of a statute entrusted to its own administration.¹⁴³ When applying the standard, the first step of the *Chevron* test asks "whether Congress has directly spoken to the precise question at issue."¹⁴⁴ If Congress has spoken directly, then a court "must give effect to the unambiguously expressed intent of Congress."¹⁴⁵ However, if a "statute is silent or ambiguous with respect to the specific issue," the court must then apply the second step of *Chevron*, which requires the court to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."¹⁴⁶

The circuit court found that subsection 404(c) could be analyzed under *Chevron* step one, because, as it reasoned, "the language unambiguously expresses the intent of the Congress."¹⁴⁷ The congressional intent found in the language of section 404 "vests the Corps, rather than [the] EPA, with the authority to issue permits to discharge fill and dredged material into navigable waters and to specify the disposal sites therefor."¹⁴⁸ In addition, the court found that although the USACE was vested with the authority to issue permits, Congress granted the EPA "a broad environmental 'backstop' authority" over the Secretary of the Army's discharge site selection.¹⁴⁹ This authority is defined in section 404(c) of the CWA, which states that the Administrator of the EPA has the authority to prohibit, deny,

138. Lisa A. Kirschner, *EPA's Clean Water Act Section 404 Veto Authority*, 28 NAT. RES. & ENV'T, at 54, 55, Fall 2013.

139. *Mingo Logan Coal Co.*, 714 F.3d at 616.

140. *Id.*

141. *Id.* at 612.

142. *Id.*

143. *Id.* (citing *Chevron*, 467 U.S. at 837).

144. *Id.*; *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 431 (D.C. Cir. 2013) (quoting *Chevron*, 467 U.S. at 842-43).

145. *Natural Res. Def. Council*, 706 F.3d at 431 (quoting *Chevron*, 467 U.S. at 842-43).

146. *Id.*

147. *Id.* at 612.

148. *Id.* (citing 33 U.S.C. §§ 1344(a)-(b)); see also 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, 118th 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").

149. *Mingo Logan Coal Co.*, 714 F.3d at 613.

or restrict the specification of a defined area as a disposal site, whenever he or she determines that a discharge of materials into the area will have an “unacceptable adverse effect” on the environment.¹⁵⁰

Relying on its statutory interpretation of section 404(c), the circuit court found Congress had clearly spoken that the EPA has the power to revoke a USACE site specification post-permit.¹⁵¹ The court stated section 404(c) “expressly empowers [the EPA] to prohibit, restrict or withdraw the specification ‘whenever’ [the Administrator] makes a determination that the statutory ‘unacceptable adverse effect’ will result,” and does not impose any “temporal limit on the Administrator’s authority to withdraw the Corps’ specification.”¹⁵² In reaching this conclusion, the circuit court found the use of the “expansive” conjunction “whenever” to be significant.¹⁵³ The court reasoned that Congress made its intent clear, through the use of “whenever,” to grant the Administrator of the EPA the authority to prohibit, deny, restrict, or withdraw a specification at any time, even beyond the time that a permit is issued.¹⁵⁴

In addition, the court found that section 404(c) authorization of a “withdrawal” further supported the idea that Congress intended the veto power to extend beyond the time of issuance. The EPA argued that “withdrawal” is “a term of retrospective application.”¹⁵⁵ Thus, according to the court, a withdrawal can only be done post-permit, especially since the USACE will often specify final disposal sites in an actual permit.¹⁵⁶ According to the court, Mingo Logan’s interpretation of the statute would exclude the EPA’s right to withdraw a specification and render the parenthetical “withdrawal” language in the statute “superfluous,” which is to be avoided.¹⁵⁷ The court supported this conclusion by referencing *Corley v. United States*, which stated that a statute should be interpreted to give effect to all of its provisions so that no part of the statute will be void.¹⁵⁸ Thus, a reading of section 404(c) that would eliminate the EPA’s right to withdraw a specification post-permit should be avoided according to the court, because it would render the section inoperative.¹⁵⁹

150. 33 U.S.C. § 1344(c).

151. *Mingo Logan Coal Co.*, 714 F.3d at 612-13 (citing 33 U.S.C. § 1344(c)).

152. *Id.* at 613.

153. *Id.*

154. *Id.* The court cited the Oxford English Dictionary, defining “whenever,” used in “a qualifying (conditional) clause,” as: “At whatever time, no matter when.” *Id.* at 613 (citing OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

155. *Id.* at 613 (citing Appellant Brief at 27). The court cited the Oxford English Dictionary which defined “withdraw” as “[t]o take back or away (something that has been given, granted, allowed, possessed, enjoyed, or experienced).” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

156. *Id.* at 613-14.

157. *Id.* at 614.

158. *Id.* at 613-14; *see also* *Corley v. United States*, 556 U.S. 303, 314 (2009).

159. *Mingo Logan Coal Co.*, 714 F.3d at 613-14.

III. ANALYSIS

A. *Consequences to Industry & Consumers*

Prior to arguments before the D.C. Circuit Court of Appeals, industry groups submitted *amicus* briefs in support of appellee Mingo Logan.¹⁶⁰ These groups represented a wide scope of the American economy, ranging “from agriculture to manufacturing, from road builders to home builders, and virtually everything in between.”¹⁶¹ The diverse collection of entities that submitted briefs are alone a great example of many businesses and industries that regularly “depend on [s]ection 404 permits, and on a consistent, predictable process for obtaining them.”¹⁶²

Collectively, *amici* expressed their grave concern that if the “EPA can at any time unilaterally modify or vacate [s]ection 404 permits issued by the Corps of Engineers, it will put project proponents in an ‘untenable position,’ and will call into serious question the reliability of a permitting scheme that undermines hundreds of billions of dollars of U.S. investments.”¹⁶³ Looking at the holistic policy rationales of the modern environmental regulatory scheme, any interpretation of the CWA which undermines permit finality is unreasonable.¹⁶⁴

According to *amici*, the USACE permits thousands of projects under section 404 every year.¹⁶⁵ These projects not only include coal and mining enterprises but also contain ventures in construction, transportation, agriculture, and manufacturing.¹⁶⁶ The industry contributors called the section 404 permitting process “painstakingly detailed in the Code of Federal Regulations” and “well-established in practice.”¹⁶⁷ Ultimately, this allows investors to be able to reasonably plan for permitting costs.¹⁶⁸ Within capital intensive trades, such as the energy industry, investment is often directly correlated to government stability and predictability.¹⁶⁹ The financial future of many projects within the energy field depends on the approval of some government entity, often via a permit or a license.¹⁷⁰ Having a predictable and well-established regulatory process allows investors to calculate and predict costs for compliance, thus ultimately giving a more accurate picture of a particular project’s potential profit yields and market risks.¹⁷¹

In *Mingo Logan*, the EPA exercised its newly found “plenary authority” to invalidate an existing section 404 permit at any time by withdrawing the

160. Brief of Amici Curiae in Support of Appellee, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013) (No. 12-5150).

161. *Id.* at 3.

162. *Id.*

163. *Id.* at 2.

164. *Id.*

165. *Id.* at 1.

166. Brief of Amici Curiae in Support of Appellee, *supra* note 160, at 1.

167. *Id.*

168. *Id.*

169. Huseyin Gulen & Mihai Ion, *Policy Uncertainty and Corporate Investment* (Apr. 4, 2013), available at http://www.stanford.edu/group/SITE/SITE_2013/2013_segment_2/2013_segment_2_papers/gulen.pdf.

170. Brief of Amici Curiae in Support of Appellee, *supra* note 160.

171. Gulen & Ion, *supra* note 169.

specification of a disposal site.¹⁷² According to those in the industry who contributed comments to the *amicus* briefs in support of Mingo Logan, the EPA introduced a heightened level of uncertainty into investment forecasting for the countless projects that require section 404 permits due to the loss of finality within the process.¹⁷³ Industry, especially within the energy fields, expects this uncertainty to result in lower investment, which “will not only directly harm the vast array of industries whose operations require [s]ection 404 permits, but will also result in less growth in numerous other sectors of the economy, since projects that require a [s]ection 404 permit frequently provide substantial downstream economic benefits.”¹⁷⁴ Many of the larger industries directly affected by the section 404 permitting process make up a large percentage of the United States economy. Mining alone comprises 2.6% of the United States’ value added Gross Domestic Product (GDP), while manufacturing contributes 12.5% and construction makes up 3.6% of GDP.¹⁷⁵ Thus, the economic impact of the ruling and the removal of “finality” in the permit process have the potential to be felt throughout the U.S. markets.¹⁷⁶

B. Policymaker Reaction to Mingo Logan

Industry, however, is not the only group to take notice of the potential harmful effects of the decision of the court of appeals in *Mingo Logan*. Policymakers from both sides of the aisle have expressed concerns over the lack of finality caused by the EPA’s ability to revoke site-specifications after a permit has already been issued.¹⁷⁷ The most prominent concern expressed by lawmakers is that the loss of finality caused by *Mingo Logan* will create both microeconomic and macroeconomic negative impacts.¹⁷⁸

Following the original decision by the District Court for the District of Columbia in *Mingo Logan*, Republican Congressman Harold Rogers of Kentucky, Chairman of the House Appropriations Committee, issued a statement assessing the consequences of the EPA’s actions, concluding that “retroactively repealing legal permits has created total uncertainty for miners and mine families In the last three years, dozens of mine permits have been held up in regulatory limbo, coal jobs scrapped, and miners given pink slips”¹⁷⁹ Representative Rogers continued, claiming that the “mining operation [at the Spruce Mine] provides 250 miners with long-term employment opportunities, and creates 300 more indirect

172. Brief of Amici Curiae in Support of Appellee, *supra* note 160, at 1.

173. *Id.* at 1-2.

174. *Id.* at 2.

175. *Gross-Domestic-Product (GDP) by Industry Data*, BUREAU OF ECONOMIC ANALYSIS, http://www.bea.gov/industry/gdpyind_data.htm (last visited Apr. 18, 2014).

176. Brief of Amici Curiae in Support of Appellee, *supra* note 160, at 2.

177. Press Release, Congressman Hal Rogers, Rogers Response to Mingo Logan Coal v. EPA Court Decision (Mar. 23, 2012) [hereinafter Rogers Response] <http://halrogers.house.gov/news/documentsingle.aspx?DocumentID=287009>; Press Release, Senator Joe Manchin, EPA’s Unprecedented and Irresponsible Decision Jeopardizes our Economic Recovery and Jobs (Jan. 13, 2011) [hereinafter Manchin Press Release] <http://www.manchin.senate.gov/public/index.cfm/2011/1/release-b0478bdd-435b-4ef1-917a-5bcf3ab7a556>.

178. See, e.g., Rogers Response; Manchin Press Release, *supra* note 177.

179. Rogers Response, *supra* note 177.

jobs throughout the community” and that “[r]evoking this permit [will eliminate] a \$250 million investment in a county with uncharacteristically high unemployment.”¹⁸⁰ Congressman Rogers represents Kentucky’s fifth Congressional District, whose borders extend to the state line of West Virginia—the heart of coal mining country.¹⁸¹ His comments reflect the concern that even one post-permit revocation of a site-specification at the Spruce mine would have a significantly detrimental impact on the local and regional economy.¹⁸²

Other policymakers have also expressed concerns that *Mingo Logan* could have negative economic consequences affecting the national economy.¹⁸³ Following the EPA’s actions to revoke the site specification at the Spruce mine, Democratic Senator Joe Manchin of West Virginia issued a press release to comment on the EPA’s decision.¹⁸⁴ Senator Manchin stated that “[w]hile the EPA decision hurts West Virginia today, it has negative ramifications for every state in our nation [I]t will have a chilling effect on investments and our economic recovery.”¹⁸⁵ Manchin went further and stated that the “EPA [was] jeopardizing thousands of jobs and essentially sending a message to every business and industry that the federal government has no intention of honoring past promises and that no investment is safe. That message [would] destroy not only our jobs, but our way of life.”¹⁸⁶ While it is often difficult to predict how much public policy concerns will affect the future of a particular legal precedent, these two statements from federal lawmakers alone signify a legitimate policy concern regarding the D.C. Court of Appeals’ decision in *Mingo Logan* to allow the EPA to revoke site specifications after a permit has already been issued.¹⁸⁷

C. Empirical Evidence Concerning Regulatory Finality

Lawmakers are not simply supported by political ideology or economic philosophy; new empirical evidence supports the notion that uncertainty in government action can result in fewer investments.¹⁸⁸ A 2013 study, conducted by Dr. Mihai Ion and Professor Huseyin Gulen of Purdue University’s Krannert Graduate School of Management, produced empirical evidence of “a persistent negative relationship between policy uncertainty and investment.”¹⁸⁹ The study found that just a single standard deviation increase in policy uncertainty resulted in a decrease in quarterly investments by approximately 6.3% in relation to the average investment rate of the sample.¹⁹⁰

For perspective, the recent recession and financial crisis, primarily between 2007 and 2009, resulted in a three standard deviation increase in the policy

180. *Id.*

181. *Id.*

182. *Id.*; OFFICE OF REPRESENTATIVE HAL ROGERS, <http://halrogers.house.gov/district/map.htm> (last visited Oct. 1, 2014).

183. Manchin Press Release, *supra* note 177.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*; Rogers Response, *supra* note 177.

188. Gulen & Ion, *supra* note 169.

189. *Id.*

190. *Id.*

uncertainty index.¹⁹¹ Thus, the authors' analysis indicated, using the same estimates reached in their experiments, that the increase in policy uncertainty occurring between 2007 and 2009 may have resulted in as much as two thirds of the 32% drop in capital investments that occurred during that volatile period.¹⁹²

In the present case, the uncertainty created by EPA's post-permit revocation of the site-specification was a concern of the court in *Mingo Logan*, as well as those industry voices who expressed their support for the appellee in their *amicus* briefs.¹⁹³ The Purdue study gives some empirical support to industry's concern that in future projects, uncertainty resulting from the EPA's expanded authority under the CWA permitting process will result in an overall decrease in investment of capital.¹⁹⁴ Thus, this issue raises a legitimate public policy debate regarding the D.C. Circuit Court of Appeal's decision to allow the EPA to revoke site specifications post-permit.¹⁹⁵

D. Continued Litigation

Following the D.C. Circuit Court's decision, Mingo Logan filed an application with the Chief Justice of the United States Supreme Court on September 19, 2013, to extend the time to file a petition for a writ of certiorari from October 23, 2013 to November 13, 2013.¹⁹⁶ On September 20, 2013, the Chief Justice granted the application, extending the time to file until November 13, 2013.¹⁹⁷ Mingo Logan filed its petition for a writ of certiorari with the Supreme Court on November 13, 2013.¹⁹⁸ The Court gave consent to the filing of *amicus curiae* briefs in support of either party or of neither party.¹⁹⁹ Thus far, briefs have been filed by twenty-seven states, including West Virginia, along with non-profit groups, industry associations, and trade groups.²⁰⁰ The Supreme Court has ordered to extend the amount of time to file the Court's response twice.²⁰¹ The Supreme Court's last order extended its time to respond to February 14, 2014.²⁰² On March 5, the briefs were distributed for conference on March 21, 2014.²⁰³

191. *Id.*

192. *Id.*

193. Brief of Amici Curiae in Support of Appellee, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013) (No. 12-5150).

194. Gulen & Ion, *supra* note 169.

195. Brief of Amici Curiae in Support of Appellee, *supra* note 160.

196. Petition for Writ of Certiorari, *Mingo Logan Coal Co. v. EPA* (2013) (No. 13A286).

197. Petition for Writ of Certiorari, *Mingo Logan Coal Co. v. EPA* (2013), (No. 13-599) available at <http://www.bancroftpllc.com/wp-content/uploads/2013/11/2013-11-13-Mingo-Logan-cert-petition-MASTER.pdf>.

198. *Id.* Briefs were filed by the Pacific Legal Foundation, the National Stone, Sand, and Gravel Association, the United States Conference of Mayors, the American Petroleum Institute, Joy Global Inc., the National Mining Association, the Washington Legal Foundation, the National Association of Home Builders, the Resource Development Council for Alaska, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, the National Council of Coal Lessors, and West Virginia, along with twenty-six other states.

199. *Id.*

200. *Id.*

201. *Id.*

202. Petition for Writ of Certiorari, *supra* note 197.

203. *Id.*

However, on March 24, 2014, the Supreme Court denied Mingo Logan's petition for a writ of certiorari.²⁰⁴

Following the denial of the petition for writ of certiorari, the United States District Court for the District of Columbia heard the *Mingo Logan* case, on remand from the court of appeals, to consider Mingo Logan's remaining APA claims and cross-motions for summary judgment with those remaining issues now ripe for review.²⁰⁵ Mingo Logan claimed that the EPA's determination that the Section 404 permit for the Spruce No. 1 Mine would cause "unacceptable adverse effects" to the environment was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," violating the standard set in section 706 of the APA.²⁰⁶ The district court found that the EPA's decision to revoke the specification of the Pigeonroost and Oldhouse Branches as disposal sites for fill or dredged material was "reasonable, supported by the record, and based on considerations within EPA's purview."²⁰⁷ The court granted the EPA's motion for summary judgment and denied Mingo Logan's motion for summary judgment.²⁰⁸

E. Legislative Remedies

Congress has also responded to the D.C. Circuit Court's decision in *Mingo Logan*.²⁰⁹ The EPA Fair Play Act was introduced into the United States Senate in April 2013 by Democratic Senator Joe Manchin of West Virginia and a bipartisan group of senators to prevent the EPA from retroactively vetoing those CWA section 404 permits issued by the USACE.²¹⁰ In February 2013, a very similar bill was introduced into the United States House of Representatives by Republican Congressman David McKinley of West Virginia.²¹¹ A bipartisan group of representatives also introduced the Clean Water Cooperative Federalism Act in May 2013, which would essentially limit the EPA's authority to veto CWA section 404 permits issued by the USACE by requiring the EPA to veto in concurrence with the state.²¹²

IV. CONCLUSION

The decision by the circuit court in *Mingo Logan* allowing the EPA to extend its authority by upholding its veto of a site specification after the permit had

204. *Id.*

205. *Mingo Logan Coal Co. v. EPA*, No. 10-0541 (D.D.C. Sept. 30, 2014).

206. *Id.* at 7; 5 U.S.C. § 706(2)(A).

207. *Mingo Logan* No. 10-0541, *supra* note 205, at 24.

208. *Id.*

209. Kirschner, *supra* note 138, at 54-55.

210. S. 830, 113th Cong. (2013). Co-sponsors included: Sen. Lisa Murkowski (R-AK), Sen. John D. Rockefeller IV (D-WV), Sen. John Hoeven, (R-ND), Sen. Mary. L Landrieu, (D-LA), Sen. Rob Portman (R-OH), & Sen. David Vitter (R-LA). *Id.*

211. H.R. 524, 113th Cong. (2013). Co-sponsors included: Rep. Marsha Blackburn (TN-7), Rep. Larry Bucshon (IN-8), Rep. Shelley Moore Capito (WV-2), Rep. Jeff Duncan (SC-3), Rep. Bob Gibbs (OH-7), Rep. H. Morgan Griffith (VA-9), Rep. Tim Huelskamp (KS-1), Rep. Bill Johnson (OH-6), Rep. John Kline (MN-2), Rep. Nick J. Rahall II (WV-3), & Rep. Don Young (AK). *Id.*

212. H.R. 1948, 113th Cong. (2013). The sponsor of the bill was Rep. John L. Mica (FL-7), and the co-sponsors of the bill were Rep. Nick J. Rahall II (WV-3) and Rep. Bob Gibbs (OH-7). *Id.*

already been issued by the USACE fundamentally reduces finality within the mining discharge permitting process. Despite a plethora of differing views about the environmental regulatory state—as represented throughout the legal community, government bureaucracies, corporate industries, and the American electorate—finality in agency decision-making has traditionally been a mutual goal.²¹³ However, after a careful examination of the EPA's founding and a study of the legislative history of the CWA, it is evident that finality has not only been a shared objective, but was in fact established as one of the pillars of the regulatory process.²¹⁴ Prior to *Mingo Logan*, this pillar has remained upright for almost half a century.²¹⁵

Reducing finality—a key component of the administrative system—could not only undermine the legitimacy of the permitting process, but could potentially discourage investment in capital-intensive industries that affect every consumer, both directly and indirectly.²¹⁶ Those industries directly affected by section 404 permitting, such as those represented within the energy field, comprise a substantial portion of the United States economy.²¹⁷ Thus, the effects of the EPA's action would not merely threaten corporate profits, but could, more importantly, harm potential job growth in a slow, post-recession economic recovery and increase the cost of energy to the average consumer through diminishing investments in mining and other energy-related projects.²¹⁸ This potential economic harm could translate into a substantial impact on the quality of life of everyday Americans—one of the very things that the American environmental regulatory system was initially designed to protect. Now, only time will be the judge of how courts, legislatures, and industry react to this significant decision.

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213. 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 162 (1973)).

214. See generally *Mingo Logan*, 850 F. Supp. 2d 133 (D.D.C. 2012).

215. *Id.*

216. Brief of Amici Curiae in Support of Appellee, *supra* note 5; Oxley, *supra* note 13. Oxley concluded:

Several economic factors exist that could be considered when the EPA determines whether to veto an already issued permit. The economic factors present will vary depending on the project type and scale. One factor that should always be considered is the permit holder's expenses made in reliance on the permit. These expenses include any funds already invested in the project that cannot be recovered without having a valid permit. Other factors that may also be considered depending on the nature of the project include the potential impact the project would have had on the local economy as well as any expenses the local government incurred in bringing the project to the area.

Oxley, *supra* note 13, at 137.

217. BUREAU OF ECONOMIC ANALYSIS, *supra* note 175.

218. Brief of Amici Curiae in Support of Appellee, *supra* note 5; Gulen & Ion, *supra* note 169; Rogers Response, *supra* note 177; Manchin Press Release, *supra* note 177.

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