No. 13-599

IN THE

Supreme Court of the United States

MINGO LOGAN COAL COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under Section 404(c) of the Clean Water Act, EPA has the sweeping authority to withdraw disposal site specifications years after the Army Corps of Engineers ("Corps") has issued a permit, thereby effectively nullifying a permit properly issued by the Corps.

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INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF devotes substantial resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. To that end, WLF routinely litigates to ensure that federal administrative agencies adhere to the rule of law. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Shinseki v. Sanders*, 556 U.S. 396 (2009); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

In addition, WLF's Legal Studies Division frequently publishes articles on a variety of regulatory issues, including issues concerning the proper limits of agency power and deference. *See, e.g.,* Arthur G. Sapper, Volks v. Secretary of Labor: *Agencies' Statutes of Limitations and a New Step in* Chevron *Deference?* (WLF Legal Backgrounder, June 8, 2012).

A recurring theme of WLF's critiques of administrative agencies is that they regularly announce new legislative rules by informal means and without abiding by the Administrative

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

Procedure Act's ("APA") notice-and-comment procedures. WLF views the Environmental Protection Agency's ("EPA") unprecedented action below as yet another attempt to enforce a new legislative rule of broad application without first complying with the rigorous procedural requirements of the APA.

For nearly 40 years after the 1972 adoption of the Clean Water Act ("CWA"), EPA never suggested that Section 404 somehow empowered the agency to veto a discharge permit's specification "at any time" and "without limitation," regardless of whether "new information" had come to light. But EPA now claims, for the first time, that it enjoys unbridled, unilateral authority to nullify another agency's duly issued permit by simply withdrawing its discharge specifications. WLF is concerned that allowing regulatory agencies to abruptly adopt new interpretations of statutes, without the protections of notice-and-comment rulemaking, significantly undercuts the predictability that has long been a hallmark of administrative law.

WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues of exceptional importance presented by the Petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes it can provide the Court with an informed perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

The CWA generally prohibits the discharge of pollutants into "navigable waters" without a permit. Section 404 of the CWA grants the Army Corps of Engineers ("Corps") the sole authority to issue permits for "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344. The Corps also enjoys the sole authority to enforce, modify, or revoke such permits. *See* 33 C.F.R. § 325.7. In considering whether to modify or revoke a permit after it has issued, the Corps must carefully consider a variety of factors, including whether any modification would "adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit," whether any "circumstances . . . have changed since the permit was issued," and whether the permittee has complied with the permit. *Id.* § 325.7(a).

Whereas the Corps enjoys primary authority in the permitting process, Congress granted the Environmental Protection Agency ("EPA") a subordinate, secondary role. To assist the Corps in its permitting function, EPA promulgates guidelines for the selection of disposal sites and provides comments to the Corps for consideration during the permitting process. *See* 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 325. Prior to the Corps' issuance of a permit, Section 404(c) of the CWA also grants EPA the limited authority to prohibit "the specification (including the withdrawal of specification) of any defined area as a disposal site" for such dredged or fill material if it determines that "the discharge of such materials into such areas will have an

unacceptable adverse effect" on the environment. *Id.* § 1344(c).

In January 2007, after nearly a decade of exhaustive environmental review by the Corps, EPA, and the State of West Virginia, Petitioner Mingo Logan Coal Company ("Mingo Logan") obtained a Section 404 permit authorizing it to discharge fill material resulting from surface mining activities into certain hollows and nearby streams in West Virginia. Pet. App. 22-27. While the permit cited the Corps' authority to modify or revoke the permit under 33 C.F.R. § 325.7, nowhere did it suggest that EPA could somehow alter the permit under Section 404(c) of the CWA. *Id.* at 27.

In September 2009, almost three years after the Corps issued Mingo Logan's Section 404 permit, EPA sent a letter to the Corps asking it to revoke the permit. Pet. App. 27-28. Finding no reason to suspend, modify, or revoke the permit (with which Mingo Logan had fully complied), the Corps refused EPA's request, stating that EPA had "no basis to take any corrective action regarding the 404 permit [the Corps] issued." *Id.* at 28; C.A. App. 937. Undeterred, EPA published a notice of its own proposed determination to retroactively withdraw the specifications of the permit's discharge sites. Pet. App. 28-29. Following a September 2010 "Recommended Determination" to withdraw the Mingo Logan permit's specifications, EPA issued its "Final Determination" to withdraw the specifications in January 2011. *Id.* at 28.

Claiming that EPA lacked statutory authority under the CWA to retroactively withdraw the

permit's specifications, Mingo Logan sought declaratory relief in the U.S. District Court for the District of Columbia. Pet App. 20. Noting that EPA's "attempt to withdraw the specifications of discharge sites after a permit has been issued is unprecedented in the history of the [CWA]," *id.* at 20-21, the court granted summary judgment in favor of Mingo Logan. At step one of its *Chevron* analysis, the court held that EPA's purported authority to withdraw site specifications, *post hoc*, effectively revoking the Corps' duly-issued permit was wholly inconsistent with the text, structure, and legislative history of the CWA. *Id.* at 32. Finding that EPA had exceeded its authority under Section 404 when it attempted to invalidate an existing permit by withdrawing that permit's specifications, the court explained that EPA's interpretation would also fail step two of this Court's *Chevron* analysis because it "sow[s] a lack of certainty into a system that was expressly intended to provide finality." *Id.* at 62. The district court emphasized that since Congress enacted the CWA in 1972, EPA had "never before invoked its Section 404(c) powers to review a permit that had been previously duly issued by the Corps." *Id.* at 58-59.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed, concluding that EPA enjoyed "a broad veto power extending beyond the permit issuance." Pet. App. 10. Because Section 404(c) authorizes EPA to withdraw a specification "whenever" it finds an "unacceptable adverse effect," the appeals court determined that EPA may nullify an existing permit at any time. *Id.* Focusing solely on Section 404(c) rather than considering Section 404 as a whole, the panel held that CWA grants EPA the "authority to

prohibit/deny/restrict/withdraw a specification at *any* time." *Id.* at 10-14. The appeals court remanded for the district court's consideration Mingo Logan's separate claim that EPA's permit revocation was arbitrary and capricious. *Id.* at 17. The district court stayed further proceedings in the case pending this Court's consideration of the Petition.

SUMMARY OF ARGUMENT

WLF agrees with Petitioner that nothing in the text, structure, or legislative history of the CWA grants EPA the sweeping power it claims here for the first time. As the district court rightly noted, EPA's attempt to withdraw its specifications of discharge sites *after* the Corps has issued a permit is "unprecedented in the history of the [CWA]." The appeals court's determination that Congress, by enacting the CWA, intended to grant EPA unilateral authority to revoke discharge specifications even for existing permits—at *any* time and *without regard* to the permit holder's compliance history or legitimate reliance interests—is deeply troubling. Granting any administrative agency such unbridled discretion is not only an invitation to abuse, it is the very antithesis of modern administrative law. As the Petition persuasively demonstrates, it is highly unlikely that Congress ever intended such a result.

Yet even if EPA's interpretation of the CWA were somehow plausible, its failure to adopt that interpretation in compliance with the APA precludes it from asserting that interpretation for the first time in this case. Indeed, EPA adopted its current interpretation of the CWA during the course of this litigation. That litigating position is wholly

inconsistent with the agency's previous actions over the past several decades, as EPA had never asserted such post hoc veto authority until now. Under such circumstances, the APA requires EPA to engage in notice-and-comment rulemaking before it can adopt an entirely new statutory interpretation. EPA has never engaged in such rulemaking, nor has it provided stakeholders adequate opportunity to comment on the ramifications of EPA's startling new interpretation. The APA demands both.

Moreover, allowing regulatory agencies to adopt new, expansive interpretations of statutes, without the protections of notice-and-comment rulemaking, significantly undercuts the interests of predictability and finality—two chief goals of administrative law. If administrative agencies such as EPA come to believe that the APA's rulemaking procedures are too cumbersome or inconvenient to follow, and are instead allowed to disrupt stakeholders' settled expectations under the pretense of reinterpreting existing law, then an important safeguard for our representative system of government will be lost, and the rule of law will be undermined.

EPA also argues that its new interpretation is entitled to *Chevron* deference. Not so. Deference is unwarranted here because the agency's new interpretation was not the product of any sort of rigorous administrative proceeding. EPA did not place any party on notice during the permitting process that the agency retained unilateral, *post hoc* veto power over a permit duly issued by the Corps; it did not amend any implementing regulations; and it did not solicit comments about its novel

interpretation of the CWA. At most, EPA's litigating position is entitled to respect only to the extent that it is persuasive. For all the reasons stated in the Petition, however, EPA's interpretation is not persuasive.

REASONS FOR GRANTING THE PETITION

The Petition presents issues of exceptional importance not only to the coal industry, but to all regulated industries and public improvement agencies throughout the country. At issue is whether a regulatory agency may radically reinterpret a congressional statute, decades after enactment, so as to grant itself sweeping, uncabined power and authority, without first complying with the rulemaking procedures of the APA. This case offers the Court an excellent vehicle to clarify the outer limits of agency deference and to rein in administrative overreach.

The interests of fairness, predictability, and stare decisis were all injured in this case. WLF joins Petitioner in urging this Court to grant the petition for writ of certiorari.

I. EPA SHOULD NOT BE ALLOWED TO FLOUT THE VITALLY IMPORTANT PROTECTIONS OF THE APA

A. EPA Cannot Create A New Legislative Rule Without First Providing Notice And An Opportunity for Comment

Viewing Section 404(c) in isolation, the appeals court incorrectly concluded that because EPA is authorized to withdraw a specification

"whenever" it finds an "unacceptable adverse effect," EPA may nullify an existing permit at *any* time, including after the permit issues. *See* Pet. App. 10-14. But this Court has repeatedly warned against basing statutory construction on isolated words within the statute. *See, e.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) ("The definition of words in isolation . . . is not necessarily controlling in statutory construction."). As this Court has emphasized, proper interpretation of statutory words or phrases "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.* at 486. As the Petition carefully demonstrates, *see* Pet. 10-22, when one considers the entire statutory text, as well as the purpose and context of the CWA, it is readily apparent that Congress did not intend to provide EPA with *post hoc* veto power over duly issued permits. Indeed, the very fact that EPA initially asked *the Corps* to revoke Mingo Logan's permit, rather than unilaterally vetoing the permit on its own, belies EPA's own interpretation of the CWA.

Yet even if EPA's latest interpretation of the CWA were plausible, the agency has never promulgated a rule giving that interpretation the force of law through notice-and-comment rulemaking. Under the APA, 5 U.S.C. § 500 *et seq*., an agency may not create a new rule of general applicability without first providing notice to and inviting comment from all affected stakeholders. Here, EPA's attempt to unilaterally reinterpret Section 404 of the CWA unquestionably qualifies as a legislative rule change because it seeks to drastically expand the agency's statutory authority

and because it dramatically affects the legal rights and responsibilities of permit holders and other CWA stakeholders. That is, EPA's interpretation is an "agency statement" of "general applicability and future effect" designed to "implement, interpret, or prescribe law or policy" under 5 U.S.C. § 551(4). Such substantive or legislative rules are intended to "create new law," binding on both the public and the agency, "in what amounts to a legislative act." *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000).

The only place EPA has ever previously suggested it had the authority to withdraw specifications from an existing permit is in a *preamble* to regulations issued back in 1979. *See* 44 Fed. Reg. 58,076, 58,077 (Oct. 9, 1979). Back then, EPA claimed the ability to withdraw specifications only in light of "substantial new information . . . first brought to the Agency's attention after [permit] issuance." *Id*. But that interpretation is not the sweeping power EPA now claims here. Indeed, EPA now disavows any "new information" requirement and claims that it may simply "veto a specification at any time" and "without limitation." Pet. App. 59-60. That litigating position is wholly inconsistent with the agency's previous actions over the past several decades. EPA offers no explanation for abandoning its previous position, and none is available. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that "unexplained inconsistency" is a "reason for holding an interpretation to be an arbitrary and capricious change from agency practice").

In any event, notwithstanding its blatant inconsistency, EPA cannot rely on non-binding

prefatory remarks found in a 1979 regulatory preamble to impose a new statutory interpretation of the CWA for the first time in this litigation. Rather, a statutory interpretation that effectuates a change in the substance of a rule requires more rigorous procedural steps. The APA "requires an agency to provide an opportunity for notice and comment before substantially altering a well-established regulatory interpretation." *Shell Offshore Inc., v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). Where, as here, an agency unveils a novel statutory interpretation that "produce[s] other significant effects on private interests," that agency may proceed only by satisfying the requirements of notice-and-comment rulemaking. *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 238-39 (D.C. Cir. 1992).

In short, because EPA has never engaged in notice-and-comment rulemaking nor provided stakeholders adequate opportunity to weigh in on the ramifications of EPA's new interpretation of the CWA, EPA's new legislative rule is "procedurally invalid." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation."). For that reason alone, certiorari is warranted.

B. Allowing EPA To Unilaterally Rewrite Its Own Authority Under Section 404 Of The CWA Undermines Important Reliance Interests

Like all regulated industries, the coal industry structures its affairs in reliance on the assumption that regulatory agencies will not arbitrarily and without explanation abandon their long-held interpretative views of fixed statutory language. WLF is troubled by the enormous upheaval that EPA's new interpretation of the CWA will undoubtedly have on the legitimate reliance interests of affected stakeholders.

This Court's review is especially warranted in light of EPA's abrupt, contradictory interpretation of the CWA, which creates an unfair surprise for those who have come to rely on EPA's earlier understanding and practice of Section 404 for nearly 40 years. Discharge permits are fundamental to the CWA's entire regulatory scheme. Because compliance with a Section 404 permit affords dischargers a safe harbor from most enforcement actions, 33 U.S.C. § 1344(p), permit holders are assured that they will not be affected by intervening changes in regulations for the duration of their permits and need not re-litigate whether their permits are strict enough. "In general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the [EPA] during the term of the permits." 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984). Thus, as the district court aptly noted, it is "unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality." Pet. App. 62.

Ultimately, however, this case presents issues that are much broader than the fate of a single coal

company and its efforts to prevent EPA from unilaterally rewriting Section 404 of the CWA. Following the passage of the APA, the sustained effort of administrative law has been to "continuously narro[w] the category of actions considered to be so discretionary as to be exempted from review." Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489 n.11 (1983). As the size of the administrative state continues to grow, it is more important than ever that agencies play by the rules, especially the rule of finality, and that stakeholders continue to have a meaningful opportunity to participate in the operation of their government. Courts have criticized the increasing use of agency-created legislative rules whereby "[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations." *Appalachian Power Co.*, 208 F.3d at 1020. The protections afforded through the APA's notice-and-comment requirement are a vital part of the effort to provide certainty, predictability, and stability to administrative law.

The APA plays an important role in safeguarding citizens' settled expectations until the agency provides those citizens with appropriate notice of any proposed rule changes and a meaningful opportunity to comment. Congress, acting through the APA, has sought to guard against arbitrary and capricious regulation by requiring that an agency's modification of its prior statutory interpretations may be accomplished only pursuant to the APA's rigorous procedures. Those procedures ensure that administrative agencies will be bound not only by the laws adopted by Congress but also by

the requirements of reasoned decision-making. In the context of the CWA, such interests cannot be advanced if EPA is given free rein to nullify, at any time and for any reason, a discharge permit duly issued years earlier by the Corps.

But if administrative agencies come to believe that the APA's rulemaking procedures are too cumbersome or inconvenient to follow (as EPA evidently has decided here), and are instead allowed to disrupt settled expectations under the pretense of merely "reinterpreting" existing law, then a vitally important safeguard of our representative system of government will be lost, and the rule of law will be eroded. Just as "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all," *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012), so too the APA's notice-and-comment requirement repudiates any suggestion that administrative convenience trumps all. By granting discretionary review, this Court can help ensure that agencies play by rules that are sufficiently "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

II. EPA'S INTERPRETATION OF SECTION 404 LACKS THE FORCE OF LAW AND IS THUS UNDESERVING OF *CHEVRON* DEFERENCE

Petitioner articulates three very good reasons why EPA's interpretation is wholly undeserving of *Chevron* deference. *See* Pet. 22-24. First, as the

district court rightly found, EPA's plea for deference fails step one of the *Chevron* inquiry because Section 404 is not ambiguous, and where "the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Further, because Section 404 is jointly administered by two agencies, EPA and the Corps, no single agency's interpretation is entitled to *Chevron* deference. *Sallah v. Christopher,* 85 F.3d 689, 691-92 (D.C. Cir. 1996). Finally, EPA's latest interpretation of Section 404 is not the product of the "relatively formal administrative procedure" that is required to trigger *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). WLF writes separately to elaborate on this third and final reason.

In *Chevron,* this Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Brand X Internet Servs.*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 865-66). All agency interpretations, however, are not entitled to deference. In *Mead*, the Court clarified that an agency's interpretation qualifies for deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

Underlying *Mead*'s restriction on the reach of *Chevron* is that a court may defer to an agency's

interpretation of an ambiguous statute only when it is clear that Congress has granted the agency "the authority to promulgate binding legal rules." *Brand X Internet Servs.*, 545 U.S. at 980-81; *see also Mead*, 533 U.S. at 230-31 & n.11. The procedures that Congress instructs an agency to use provide one indication that such a delegation has in fact occurred. As *Mead* emphasized, "[i]t is fair to assume generally that Congress contemplates administrative action with effect of law when it provides for a relatively formal administrative procedure." 533 U.S. at 230.

Importantly, even an agency exercising its delegated interpretive authority must nevertheless do so through administrative procedures designed to produce rules with the force of law. In *Mead*, for example, this Court observed that the Customs Service had a "general rulemaking power" by which it could make regulations with the force of law. *Id.* at 232. But the interpretations contained in agency rulings promulgated outside that power were *not* entitled to deference. The Court found it "difficult . . . to see in the agency practice itself any indication that [the agency] ever set out with lawmaking pretense in mind" when it announced the interpretations. *Id.* at 233. The Court emphasized that those interpretations were not themselves subject to the rigors of notice and comment, were of limited precedential value, and were issued with little deliberation. *Id.* at 233-34. In other words, administrative interpretations have the force of law (*i.e*, are entitled to deference) only when they reflect "the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

Although a court may draw some inferences about the fairness and deliberation with which an agency has rendered an interpretation—and, thereby, that interpretation's authority—from the procedures the agency employed, this Court has repeatedly emphasized that the inquiry does not end there. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587. Here, EPA's obscure claim to greater Section 404 authority, buried in the *preamble* to its 1979 regulations, also falls into this category of pronouncements that are unworthy of deference. *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) ("Under this standard, the FDA's 2006 preamble does not merit deference."). And EPA's litigating position in this case is even less deserving of deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

Instead, such informal interpretations are merely "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the "power to persuade." 323 U.S. 134, 140 (1944). Although "the presence or absence of notice-and-comment rulemaking" is not in itself "dispositive," what matters at a bare minimum is "the careful consideration the [a]gency has given the question." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). To be eligible for deference, then, the agency at least must have engaged in a rigorous analysis of the relevant law and must give precedential effect to those determinations. *Pesquera Mares Australes, Ltda. v.*

United States, 266 F.3d 1372, 1380 (Fed. Cir. 2001).

For example, in *Wyeth v. Levine*, this Court considered whether to accord deference to FDA's interpretation of the scope of its own preemption authority. 555 U.S. at 576-581. Even though FDA provided for a notice of proposed rulemaking, it chose not to seek comment on the scope of permissible preemption. *See id.* at 577. When FDA ultimately promulgated a final rule that "articulated a sweeping position on the [FDA's] preemptive effect in the regulatory preamble," the Court refused to give that preamble deference in light of FDA's "procedural failure," which made the agency's interpretive pronouncements "inherently suspect." *Id.* The same result should obtain here.

EPA altogether failed to adopt its new interpretation of the CWA through procedures "reasonably suggesting that Congress ever thought of [such pronouncements] as deserving the deference claimed for them here." *Mead*, 533 U.S. at 231. EPA never put the world on notice that it was planning to enforce such a radically expansive interpretation of its authority under Section 404, never amended its implementing regulations, and never solicited comments about its novel interpretation of the CWA. To accord *Chevron* deference under these circumstances would be to invite all agencies to circumvent APA protections such as notice-and comment rulemaking simply by imposing new interpretations and substantive requirements on all affected stakeholders. Simply put, the scope of *Chevron* deference cannot be permitted to reach so far.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

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