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

REPLY BRIEF FOR PETITIONER

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EPA claims sweeping authority to nullify a permit issued years earlier by another agency, with no consideration of the permit holder's reliance interests and without any need to base its veto on new information. EPA's unprecedented action far exceeds its carefully circumscribed role under section 404 of the Clean Water Act ("CWA"), and threatens to chill billions of dollars of public and private investment in critical sectors of the economy.

EPA's brief focuses on snippets of statutory language in isolation while overlooking the statutory scheme as whole. EPA's power to "prohibit the specification (including the withdrawal of specification)" of an area as a disposal site "whenever" it chooses cannot outlive the specifications themselves, which no longer exist once the Corps issues a discharge permit. Those permits are central to the CWA, and Congress would have spoken with far greater clarity had it intended to grant EPA—the subsidiary regulator—the extraordinary power to nullify actions taken by the lead regulator, the Corps. And it is no accident that the agency that actually possesses the authority to revoke permits—the Corps—has an authority that is narrowly circumscribed to protect reliance interests. The absence of comparable statutory or regulatory limits on the sweeping authority claimed by EPA is a sure sign that the authority does not exist.

EPA's plea for *Chevron* deference fails. When a statute is administered by multiple agencies, a *single* agency's interpretation is not entitled to deference—especially when the subsidiary agency seeks to

aggrandize its power at the expense of the lead agency. Indeed, the Corps expressly declined to modify Mingo Logan's permit and *opposed* EPA's attempts to veto it.

The effect of EPA's asserted nullification authority cannot be overstated, as section 404 permits are a prerequisite to hundreds of billions of dollars of investments each year. Mingo Logan's petition is supported by a remarkably diverse array of *amici*, including 27 States, cities, counties, local governments, water agencies, and groups representing nearly every profitable segment of the economy. Simply put, the American economy depends on Corps permits and depends on those permits actually giving permission to undertake costly investments. A permit subject to the post-hoc uncircumscribed veto of a subsidiary agency is a permit in name only.

That is why EPA's assurance that it will use its claimed veto power sparingly rings hollow. The mere *threat* of a post-permit veto will fundamentally change the cost-benefit calculus for projects that require section 404 permits. And in rationally designing a permit process on which billions of dollars in investments rely, the last thing Congress would do is give a subsidiary agency an uncabined post-hoc veto authority. Rather, the rational course is what Congress actually did: placing the revocation authority in the hands of the permitting authority, and limiting the revocation authority to narrow circumstances that respect reliance interests. That precisely describes the Corps' authority. EPA's effort to find a broader and less-circumscribed revocation

authority in section 404(c) threatens the stability of the permitting regime and the broad range of investments that rely on those permits. It is a question of paramount national importance that plainly warrants this Court's review.

I. EPA's Claimed Post-Permit Veto Power Exceeds Its Statutory Mandate And Is Entitled To No Deference.

A. EPA has no response to Mingo Logan's lead argument: that Congress would not have *sub silentio* granted EPA authority to nullify a permit issued years earlier by another agency. Pet.11-15; Chamber of Commerce Br. 8-14. Discharge permits are central to the CWA, and Congress made clear that the Corps—not EPA—has the lead role in issuing permits and ensuring compliance. 33 U.S.C. § 1344(a), (s). EPA nonetheless claims authority to effectively revoke Corps-issued permits based on section 404(c), a provision that does not once use the word "permit." *Id.* § 1344(c). If that counterintuitive interpretation is correct, then Congress has hidden an extremely large elephant in a very small mousehole.

EPA's brief focuses on cherry-picked words in isolation rather than the statutory scheme as a whole. In particular, EPA claims (Opp.11-13) that the words "whenever" and "withdrawal" in section 404(c) grant EPA unlimited authority to withdraw a specification even after a permit has issued. But even EPA would have to concede that its authority to withdraw specifications cannot outlast the specifications themselves. And the broader structure of the CWA makes clear that the specifications cease

to exist once the permit issues. *During the permitting process*, the Corps "specifies" proposed disposal sites, and EPA may "withdraw" those specifications if they would result in unacceptable environmental impacts. 33 U.S.C. § 1344(b), (c). But once a permit has issued, the specifications are superseded by the permit itself. Pet.15-18. Nowhere does the CWA refer to specifications in issued permits. To the contrary, permits have conditions and limitations but not specifications. For example, section 404(s) provides remedies for a "violation of any condition or limitation set forth in a permit," 33 U.S.C. § 1344(s); there is no remedy for a violation of "specifications." And Mingo Logan's 15-page permit is wholly bereft of "specifications." C.A.App.984-98.

Thus, even if words like "whenever" and "withdrawal" give EPA a power to withdraw specifications, it is a power to take action before the Corps issues a permit.[1] After the permit issues, it is the detailed and circumscribed regulatory provisions that govern the Corps' power to revoke permits that hold sway. That interpretation gives effect to every word in the statute without creating an anomalous administrative structure that would produce Corps

[1] Other provisions of the CWA further confirm that "whenever" must draw meaning from its context and does not mean "at any time with no qualifications." Joy Global Br. 8-15 (documenting that when used elsewhere in the CWA, "whenever" does not exempt agency from statutes of limitation).

permits that depend entirely on the permittee remaining in EPA's good graces.[2]

EPA cites no legislative history supporting its interpretation of section 404(c). And it dismisses the legislative history cited by Mingo Logan as "ambiguous." But Senator Edmund Muskie, the chief sponsor of the 1972 CWA amendments, unequivocally stated that EPA's role was to assess the environmental impact of a proposed discharge "*prior to the issuance of any permit*." 118 Cong. Rec. 33,692, 33,699 (1972) (emphasis added). EPA now discounts this legislative history as "a single Senator's floor statement," but the Attorney General more contemporaneously described the Muskie statement as the "best summar[y]" of EPA's responsibilities, *see* 43 Op. Att'y Gen. 197, 199-200 (1979), and this Court has repeatedly relied on that statement, *see* U.S. Conf. of Mayors Br. 13 (citing examples).

B. EPA's novel interpretation of section 404(c) is not entitled to *Chevron* deference. Even if there were some statutory ambiguity, EPA's interpretation—which allows it to displace the Corps' lead role and upend permittees' substantial reliance interests—is unreasonable and must be rejected at *Chevron* step two. Pet.App.57.

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[2] EPA contends (Opp.12) that Mingo Logan conceded that specifications continue to exist post-permit, but counsel merely recognized that EPA can withdraw specifications for "conditional permits" that are "expressly conditioned upon resolution of EPA's 404(c) objection." C.A.Tr.29. Mingo Logan's permit is not "conditional" upon further EPA actions.

In all events, this Court should not defer to EPA's attempt to aggrandize its power at the expense of the Corps. When multiple agencies are responsible for administering a statute, a *single* agency's interpretation is not entitled to deference—especially when a subsidiary agency seeks to usurp authority that Congress vested in the lead agency. Pet.23. EPA is flatly wrong to suggest (Opp.6, 15) that the Corps agreed with EPA's actions. The Corps *refused* to modify or revoke Mingo Logan's permit, concluding that no new information justified revocation. C.A.App.949-52. And the Corps' subsequent decision to join EPA's litigation papers before the D.C. Circuit is not the kind of "relatively formal administrative procedure" that triggers *Chevron* deference. *United States v. Mead*, 533 U.S. 218, 230 (2001). Indeed, one would expect the executive to speak with one voice in litigation, just as one would expect the executive to speak with one voice when it issues a permit. The outlier when it comes to having a unitary executive is a Corps-issued permit subject to after-the-fact gutting by EPA.

EPA's ever-shifting position about the scope of section 404(c) is likewise fatal to its plea for deference. The agency has discarded its 1979 interpretation—under which it could withdraw specifications post-permit only based on "substantial new information," 44 Fed. Reg. 58,076, 58,077 (1979)—in favor of a breathtaking power to nullify existing permits "without limitation," Pet.App.60. That new position was announced for the first time in litigation—at oral argument, no less. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). And EPA has neither adequately acknowledged nor

explained its change of position. *FCC v. Fox*, 556 U.S. 502, 515 (2009).

EPA's attempt to revoke an existing permit is unprecedented. Pet.App.20-21. EPA itself conceded in a 2009 letter to the Corps that it "has never before used its section 404(c) authority to review a previously permitted project since Congress enacted the Clean Water Act in 1972." C.A.Supp.App.2. EPA now claims (Opp.5 & n.1) that it has vetoed existing permits twice before, but those cases do not remotely justify EPA's actions here. In *North Miami Landfill*, the Corps approved a permit to discharge clean fill to build a recreation facility. 45 Fed. Reg. 51,275 (1980). The following year, the city applied for a *new* permit, disclosing that it was actually using the site as a garbage dump, in violation of the original permit. 45 Fed. Reg. 59,630 (1980). In response, EPA prohibited disposal of additional solid waste. 46 Fed. Reg. 10,203 (1981). Here, by contrast, there is no allegation that petitioner has violated the conditions of the existing permit and petitioner does not seek a new, expanded permit.

James City County is no more helpful to EPA. In that case, the Corps announced its intent to approve a permit in July 1988 *but did not actually issue it*. *James City County v. EPA*, 955 F. 2d 254, 256 (4th Cir. 1992). EPA prohibited discharges into the disposal site the following year, which "estopped" the Corps from "granting … the permit." 758 F. Supp. 348, 350 (E.D. Va. 1990). *James City County* is thus a routine example of EPA's undisputed power to

withdraw a specification *before* the Corps issues a permit.[3]

Nor have other courts "reached the same conclusion" as the D.C. Circuit, as EPA contends (Opp.19). *City of Alma v. United States*, 744 F. Supp. 1546, 1559 (S.D. Ga. 1990), involved a pre-permit veto, and its discussion of post-permit withdrawal is therefore dicta. And *Hoosier Environmental Council v. Corps of Engineers*, 105 F. Supp. 2d 953 (S.D. Ind. 2000), is even farther afield. In that case, EPA commented on a permit after issuance but did not purport to withdraw a specification. *Id.* at 971. No veto was wielded, pre- or post-permit.

Finally, *Chevron* deference is not warranted because EPA's novel interpretation of section 404(c) raises grave retroactivity and takings problems.[4] *See Edward J. DeBartolo v. Florida Building Trades*, 485 U.S. 568 (1988) (*Chevron* inapplicable where agency interpretation raised serious constitutional concerns). That EPA is not claiming the power to "invalidate any previous discharges" does nothing to "ameliorate[]" (Opp.18) the serious retroactivity

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[3] EPA also invoked section 404(c) in *James City County* in 1992, but that was simply a renewal of its 1989 pre-permit veto on remand from the Fourth Circuit.

[4] Petitioner did not "forfeit[]" these concerns (Opp.18). Retroactivity and takings are not freestanding *claims*; they are additional *theories* showing why EPA enjoys no deference and its interpretation is untenable. *Kamen v. Kemper,* 500 U.S. 90, 99 (1991) (if "issue or claim is properly before the court," the court "retains the independent power to identify and apply the proper construction of governing law").

concerns. Permit holders make massive investments in reliance on their permits, yet EPA claims authority to make those investments "worthless" with the stroke of a pen. *Bowen*, 488 U.S. at 220 (Scalia, J., concurring). Petitioner also welcomes EPA's assurance (Opp.18) that just compensation will be available when a post-permit veto works a taking, but that is a reason to *reject* EPA's expansive reading of section 404(c). Nothing in section 404(c), which does not mention permits, remotely suggests that Congress authorized a compensable taking. A "narrowing construction" is needed to "prevent[] executive encroachment on Congress's … 'power of the purse.'" *Bell Atlantic v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

II. The Scope Of Section 404(c) Is A Question Of Paramount National Importance.

Section 404 permits are prerequisites to massive amounts of economic activity by both public and private entities. As *amici* explain in painstaking detail, section 404 permits are needed for countless types of projects across a broad array of industries, including: residential and commercial construction; water supply and management; farming and ranching; energy exploration, production, and distribution; manufacturing; mining; transportation; power generation; and many others. Mingo Logan's petition is supported by groups representing nearly every segment of the private sector, a bipartisan coalition of 27 States, and associations of cities, counties, local governments, and water agencies.

EPA nonetheless attempts to downplay the importance of its claimed post-permit veto power,

arguing (Opp.16) that there is "no reason to suppose" it will use this power frequently. That wholly misses the point, and is antithetical to the very nature of a permit. Even if EPA exercises its newfound power sparingly, the *perpetual threat* of a post-permit veto will chill investment and upend the cost-benefit calculus for projects that depend on section 404 permits.

EPA's "trust us" response also ignores that the whole point of a permit is to provide a clear authorization to undertake costly investments under circumstances where simply relying on the sound discretion of government officials is not enough. That is why a Corps permit is revocable only under narrow circumstances and protects the permittee even against subsequent changes in the law. Pet.26-29. EPA's claimed power to render the permit—and the massive investments that rely on the permit—worthless after the fact is incompatible with this careful permitting regime no matter how often this post hoc power is exercised. The problem with EPA's claimed authority as both a practical and jurisprudential matter is, like the sword of Damocles, that it hangs, not that it falls.

Given the huge amounts at stake and the long time horizons for many projects, *see*, *e.g.*, States Br. 6-14; Nat'l Ass'n of Home Builders Br. 4-12, even a small risk of EPA revocation will have a significant impact on a project's cost-benefit calculus. Pet.29-32. Moreover, opponents of high-profile projects will surely take advantage of the new rule by lobbying EPA to veto disfavored projects. This will introduce yet another element of uncertainty as permit holders

are forced to speculate whether their existing permits comport with EPA's current political leanings and policy goals.

EPA is also flatly wrong to suggest (Opp.16-17) that there is little marginal threat to reasonable investment-backed expectations because permittees already run the risk of the Corps revoking a permit. That ignores the fundamental difference between the Corps' limited and circumscribed revocation authority and EPA's uncabined "trust us" approach. The former provides the precise protections one would expect from a limited revocation authority that is fully compatible with the nature of a permitting program and concerns of finality and reliance. *See* 33 C.F.R. § 325.7(a). The latter is wholly uncabined. Pet.App.60. The difference is fundamental. It is the difference between Rule 60(b) and a standardless authority to wipe out final judgments. The former is compatible with the rule of law; the latter is not. *See Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).

The difference between the Corps' approach and EPA's approach is hardly theoretical. In *this case*, the Corps concluded under its longstanding regulations that modification of Mingo Logan's permit was not warranted because the company was "currently in compliance" with its permit and all of the purportedly new information was already addressed during the permitting process. C.A.App.949-52. EPA, in contrast, issued a 166-page Final Determination that gave no consideration whatsoever to the millions of dollars that Mingo Logan invested in reliance on its permit, all of which would be for naught if EPA's attempted "veto" is

allowed to stand. Pet.32-34. EPA strains credulity to suggest (Opp.17) that its claimed post-permit veto power will not "add any meaningful increment of uncertainty" above and beyond the Corps' authority over existing permits.

III. This Court Should Not Await Further Proceedings Before The District Court.

Finally, EPA contends (Opp.20-21) that the petition should be denied because Mingo Logan may still challenge EPA's nullification of its permit as arbitrary and capricious under the Administrative Procedure Act. But arbitrary-and-capricious review assumes some statutory authority to act against which the arbitrariness of the agency's action can be measured. Arbitrary-and-capricious review when the agency is acting *ultra vires* and exercising a power that is fundamentally incompatible with the statutory regime is a non-sequitur. That is why the District Court quite correctly addressed the statutory question first. That issue is plainly presented here and there is no reason to task the lower courts with the fool's errand of addressing whether EPA reasonably exercised a power that does not exist.

EPA's wait-for-a-remand suggestion also ignores the huge chilling effect that EPA's assertion of an extraordinary post-hoc veto is having on investment right now. The virtually unprecedented array of cert-stage *amici* were all aware that the decision below permitted the possibility of an arbitrary-and-capricious challenge on remand. And they all decided that the immediate threat to hundreds of billions of dollars of investment required immediate action. Certainly, the possibility that EPA's post-hoc

veto will be deemed arbitrary and undone years after the fact is cold comfort for businesses and governments trying to arrange financing today.

In short, the decision below poses an immediate threat to countless projects. The issue is squarely presented and tremendously important, and plainly warrants this Court's review now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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