ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MINGO LOGAN COAL COMPANY,

Plaintiff-Appellee,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Case No. 10-cv-00541 (Hon. Amy Berman Jackson)

FINAL REPLY BRIEF OF DEFENDANT-APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Clean Water Act:

Regulations

Federal Register Notices

Legislative History

Miscellaneous

GLOSSARY

404(q) Memorandum	Clean Water Act Section 404(q) Memorandum of Agreement between the U.S. Environmental Protection Agency and the U.S. Department of the Army
APA	Administrative Procedure Act
Chamber	Amici The Chamber of Commerce of the United States of America, et al.
Corps	United States Army Corps of Engineers
EPA	United States Environmental Protection Agency
Final Determination	Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia
JA	Joint Appendix
Spruce permit	United States Department of the Army Permit No. 199800436-3 (Section 10: Coal River)

INTRODUCTION

Our opening brief established that § 404(c) of the Clean Water Act authorizes the United States Environmental Protection Agency (EPA) to withdraw "specifications" of sites designated in § 404(a) permits for disposal of dredged or fill material into waters of the United States. In this case, for only the third time in forty years, EPA withdrew disposal site specifications that were integrated into a § 404(a) permit—the Spruce permit. Mingo Logan Coal Company asks this Court not to examine any of the circumstances surrounding EPA's action. Instead, the company asserts that EPA can *never*, under any circumstances, exercise its express authority under § 404(c) after the United States Army Corps of Engineers (Corps) issues a permit. This Court should reject Mingo Logan's position because it is contrary to the plain text of the Clean Water Act and EPA's consistent, well-reasoned interpretation of the Act.

SUMMARY OF ARGUMENT

1. Section 404(c) authorizes EPA to withdraw specification of any defined area as a fill disposal site whenever necessary to avoid unacceptable environmental harms. Mingo Logan asserts, without

support, that the issuance of a § 404(a) permit extinguishes the specification of disposal sites, leaving no specification for EPA to withdraw under § 404(c). But the company's novel "de-specification" theory conflicts with the plain language of the Clean Water Act. Under § 404(a), permits authorize discharges only "at specified disposal sites." If specification of disposal sites did not survive permit issuance, then permittees would be unable to lawfully discharge fill material. In short, all § 404(a) permits must contain specifications of disposal sites.

Mingo Logan also relies on § 404(p) and (q), two provisions enacted after § 404(c), to argue that disposal site specifications in § 404(a) permits are revocable only by the Corps. There is no evidence, however, that a subsequent legislature intended to limit EPA's § 404(c) authority through two provisions that do not mention § 404(c) or the relationship between specifications and § 404(a) permits. And the snippet of legislative history that Mingo Logan highlights does not address EPA's § 404(c) post-permit authority either.

The Clean Water Act unambiguously authorizes EPA to withdraw specifications after a § 404(a) permit issues. But even if this Court deems the statute ambiguous, it should uphold EPA's reasonable

interpretation of § 404(c). EPA's long-held view, shared by the Corps, balances Congress' overriding goal of environmental protection with the goal of regulatory certainty. Amici contend that this Court's approval of EPA's 33-year-old interpretation of § 404(c) will suddenly and significantly harm the entire United States economy. But EPA has exercised its post-permit authority sparingly over the past four decades. And in any event, the policy preferences of amici cannot supply a basis for distorting the Clean Water Act's clear language and discarding two administrative agencies' consistent interpretation of that language.

2. EPA's interpretation of § 404(c) merits *Chevron* deference. The agency clearly articulated its interpretation in 1979 regulations and the 2011 Final Determination that withdrew disposal sites specified in the Spruce permit. Moreover, EPA necessarily adopted the same interpretation in post-permit determinations in 1981 and 1992, and the Corps has consistently agreed with EPA's view. Mingo Logan argues that EPA's interpretation is not owed *Chevron* deference because EPA and the Corps jointly implement § 404. But this Court should not deny *Chevron* deference to EPA's interpretation of § 404(c) merely because the Corps administers another aspect of the same statutory

scheme. Nor does EPA's interpretation of § 404(c) implicate the canon of constitutional avoidance, as amicus United Company asserts.

3. Mingo Logan asks this Court not to consider whether EPA's action in this case was arbitrary or capricious. We rest on our opening brief on this point, noting that Administrative Procedure Act (APA) review acts as an important check on EPA's exercise of its post-permit § 404(c) authority.

ARGUMENT

I. THE CLEAN WATER ACT AUTHORIZES EPA TO WITHDRAW SPECIFICATIONS AFTER THE CORPS ISSUES A § 404(a) PERMIT.

Section 404(c) empowers EPA to "*withdraw*[ ] . . . specification of *any* defined area . . . *whenever*" necessary to avoid unacceptable adverse environmental effects. 33 U.S.C. § 1344(c) (emphases added). Mingo Logan does not grapple with the text of that provision or Congress' clear statement of intent to "restore and maintain the . . . integrity of the Nation's waters." *Id.* § 1251(a). Instead, the company argues that § 404(c) is not implicated after a § 404(a) permit issues because the Corps "de-specifies" disposal sites when it issues a permit. But Mingo Logan's unsupported "de-specification" theory conflicts with the Clean

Water Act's plain language. The company is also incorrect in asserting that § 404(p), § 404(q), and a Senator's floor statement shed light on the question presented. EPA's longstanding interpretation of its § 404(c) authority is compelled by the statutory text, and even if not, the agency's interpretation is reasonable and should be upheld.

A. EPA can withdraw "specified disposal sites" authorized in § 404(a) permits.

1. Section 404(a) permits contain specifications of disposal sites.

Mingo Logan's core argument on appeal is that § 404(a) permits do not contain any specifications of disposal sites. Mingo Logan Brief (Mingo Br.) 23, 29, 32, 34. The company contends that specifications are extinguished by the issuance of a permit, so that the permit itself no longer "specifies" any disposal sites for discharge of fill material. Mingo Logan asserts that "specification" means "the 'definition in detail' of a site that *could be* authorized as a disposal area for the discharge of dredged and fill material." Mingo Br. 34 (emphasis added). Thus, the argument goes, specifications evaporate when a permit issues because disposal sites suddenly *are*—rather than *could be*—authorized for discharge of dredged or fill material. Mingo Logan does not support its

position with any reference to the Clean Water Act, its legislative history, regulations of EPA or the Corps, or any action taken by either agency in the Act's forty-year history.

Mingo Logan's novel de-specification theory has several problems. First and foremost, it conflicts with the language of § 404, which makes clear that permits incorporate specifications. In fact, the sole purpose of § 404(a) permits is to authorize "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); *see also id.* § 1344(b) ("each such disposal site shall be specified for each such permit"). Permittees can legally dispose of fill material, but they must confine their discharges to the sites that the permit specifies. By definition, specifications are integral components of every § 404(a) permit. EPA Brief (U.S. Br.) 25-26.

Moreover, Mingo Logan's view of a "specification" as a tentative identification of a site that *could be* authorized for discharge does not comport with the statute's operation outside of the § 404(a) permitting context. As the company acknowledges, the Corps specifies disposal sites for its own use without issuing a permit under § 404. Mingo Br. 27 & n.9. Once specified, those Corps disposal sites *are*—rather than

could be—authorized for discharge of fill material, without the need for further agency action.

The company's de-specification theory does not square with the text of § 404(c) either. Under Mingo Logan's crabbed view of that provision, EPA could only "withdraw" the prospective use of "a site that *could be* authorized as a disposal area. . . ." Mingo Br. 34 (emphasis added). "Withdraw" would be a strange term for Congress to employ, however, in connection with a preliminary, abstract specification procedure that lacked immediate practical consequence.[1] The United States' reading of § 404(c) is more natural; it allows EPA to evaluate the "myriad terms and conditions" that accompany the authorization of a discharge before the agency decides whether to withdraw the use of a site for disposal of particular fill material. Mingo Br. 32.

Lastly, Mingo Logan does not dispute that at least some § 404(a) permits can specify disposal sites. Under the "carefully crafted" 404(q)

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[1] EPA and the Corps do have an "advanced identification" procedure wherein the agencies identify "[p]ossible future disposal sites" "to facilitate . . . permit application and processing." 40 C.F.R. § 230.80(a)(1), (b). EPA's regulations clarify, however, that "identification of any area as a possible future disposal site *should not be deemed to constitute . . . a specification of a disposal site*." *Id.* § 230.80(b) (emphases added).

Memorandum of Agreement between EPA and the Corps, Mingo Br. 53, the Corps can issue a § 404(a) permit on the condition that no discharge occur until EPA finishes its § 404(c) proceedings. U.S. Br. 11 & n.4. Mingo Logan does not challenge EPA's authority to withdraw specifications of disposal sites designated in those "conditional permits."[2] Mingo Br. 53. But that concedes the critical principle, and there is no statutory basis for limiting EPA's post-permit withdrawal authority to certain types of § 404(a) permits. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009).

2. In the § 404(a) context, specification occurs when a permit issues.

Lacking support for its de-specification theory, Mingo Logan focuses instead on when specification commences. But that issue is a distraction. This appeal does not turn on whether the Corps specifies disposal sites prior to or concurrently with permit issuance. In either case, the disposal sites would remain specified after the permit issued, and the specifications would consequently be subject to EPA's § 404(c)

[2] Mingo Logan suggests that EPA would have no authority to withdraw specifications in conditional permits were it not for the Corps' "concession" in the 404(q) Memorandum. Mingo Br. 53. But it is Congress, not the Corps, that endows EPA with authority to act.

withdrawal authority. The statute's plain language compels the conclusion that specifications persist after a permit issues, and Mingo Logan has offered no basis for its contrary contention.

In any case, Mingo Logan is wrong that the Corps specifies disposal sites for use in a § 404(a) permit before the permit issues. Mingo Br. 29-32. In the § 404(a) context, specification happens at the time that the permit issues; there is no specification process distinct from the permitting process. Mingo Logan reasons that if Congress had intended for permits to specify disposal sites, the Act would direct the Corps to specify sites "in," "through," or "by" permits. Mingo Br. 29. But the prepositions that Congress did use accomplish the same purpose. Permits authorize discharges only "at" specified disposal sites, and disposal sites are specified "for" permits. 33 U.S.C. § 1344(a), (b).

Even if the text is ambiguous on that point, this Court should defer to the statutory interpretation that EPA published in 1980 after "extensive consultation with the Corps." Joint Appendix (JA) 265; *see* 40 C.F.R. § 230.2(a) ("Sites may be specified *through* . . . [t]he regulatory program of the [Corps] under section[ ] 404(a)"); *see also id.* § 231.1(a) (stating that the Corps "may grant *permits specifying*

disposal sites"); JA908 (stating that EPA can "take back a specification that the Corps has granted *through* the issuance of a . . . permit") (all emphases added). Since specification occurs when a § 404(a) permit issues, Mingo Logan's interpretation—that EPA cannot act after a permit issues—would effectively nullify § 404(c)'s reference to "withdrawal of specification."

3. EPA's § 404(c) withdrawal authority is not limited to particular specified disposal sites.

Section 404(c) authorizes EPA to withdraw specification of "*any* defined area as a disposal site." 33 U.S.C. § 1344(c) (emphasis added); *see id.* § 1344(b) ("each such disposal site shall be specified" "[s]ubject to subsection (c)"). Yet Mingo Logan contends that § 404(c) authorizes EPA to withdraw only those specifications of disposal sites that already existed in 1972. Mingo Br. 32-34. "Specification" originated as a term of art in the Clean Water Act, and the Corps could not have "specified" disposal sites within the meaning of that Act before 1972. But even if such sites did exist before 1972, Mingo Logan's argument would lead to an untenable reading of § 404(c) because that provision makes no distinction between pre-1972 and post-1972 specifications. Nor does legislative history indicate that Congress meant to limit EPA's

withdrawal authority to certain categories of specifications.[3] The statute's plain language makes every disposal site specification subject to EPA's § 404(c) withdrawal authority. U.S. Br. 26-29.

B. Sections 404(p) and (q) do not silently narrow EPA's authority under § 404(c).

Mingo Logan contends that § 404(p) reflects a limitation on EPA's § 404(c) authority because § 404(p) does not address what happens after a post-permit withdrawal of specification.[4] Mingo Br. 37-40. The company reasons that the 95th Congress "surely would have addressed this scenario explicitly" in § 404(p) if the 92d Congress had given EPA

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[3] Mingo Logan cites Senator Allen Ellender's floor statement regarding preexisting disposal areas. Mingo Br. 33 n.13 (citing Senate Debate on S. 2770, 117 Cong. Rec. 38,797, 38,853-54 (Nov. 2, 1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973) (LEGIS. HIST.), at 1386). That statement is irrelevant, however, because Sen. Ellender was introducing an unsuccessful amendment that would not have given EPA any oversight over the specification of disposal sites. *See* 117 Cong. Rec. at 38,853-57, 2 LEGIS. HIST. 1386-93.

[4] Mingo Logan suggests that an EPA post-permit action creates "confusion over what the permit authorizes." Mingo Br. 40. But the company is not confused—the parties agree that "EPA's action, if upheld, would nullify roughly 88 percent of the total discharge area authorized by the [Spruce] Permit." JA80; U.S. Br. 43-44. Indeed, if the Final Determination were not self-implementing, Mingo Logan would not have suffered any injury-in-fact that would give the company standing to challenge EPA's action.

authority in § 404(c) to withdraw specifications after a permit issued. Mingo Br. 39. Mingo Logan's argument is unpersuasive, however, because it relies on the silence of a subsequent legislature to support a narrower reading of § 404(c) than the text can bear. U.S. Br. 33-35. Section 404(p) has no relevant legislative history, and its text provides only that compliance with a permit "shall be deemed compliance" for purposes of certain Clean Water Act provisions, not including § 404(c). 33 U.S.C. § 1344(p); *see* U.S. Br. 34-35. The fact that § 404(p) does not address post-permit withdrawals of specifications means that § 404(p) has nothing to say about post-permit withdrawals of specifications.

Mingo Logan also contends that § 404(q) creates a "patent conflict" with EPA's post-permit § 404(c) authority. Mingo Br. 41. Not so. U.S. Br. 36. Specifically, the company argues that it would be "meaningless" for the Corps to promptly issue a § 404(a) permit if the authorized discharges could later be restricted. Mingo Br. 41. As Mingo Logan concedes, however, discharges under § 404(a) permits are always subject to continuing oversight from both EPA and the Corps. Mingo Br. 40; *see* 33 U.S.C. § 1364(a); 33 C.F.R. § 325.7; JA986. That

oversight does not render the permits meaningless, and neither does EPA's § 404(c) authority.

C. Legislative history does not create ambiguity in § 404(c).

Mingo Logan relies on the same piece of legislative history as the district court: Senator Muskie's passing reference to EPA acting under § 404(c) before a permit issues.[5] Mingo Br. 42-45. But the Senator's statement about pre-permit § 404(c) action does not imply a prohibition on post-permit § 404(c) action. U.S. Br. 38. Mingo Logan suggests that the floor statement is more persuasive in light of the dearth of legislative history dealing specifically with EPA's § 404(c) post-permit withdrawal authority. Mingo Br. 43-45. It is well-settled, however,

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[5] Mingo Logan also cites EPA Administrator William Ruckelshaus' hearing testimony regarding the importance of a "cut-off point regarding any possible review of newly issued permits." Mingo Br. 41 n.18 (quoting Administration Testimony: Hearings on H.R. 11896, H. Comm. on Public Works (Dec. 7, 1972) (Ruckelshaus Testimony), at 307, *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973) (LEGIS. HIST.), at 1205). But the Administrator's statement had nothing to do with § 404, much less EPA's § 404(c) authority. His testimony referred to EPA's preference that when the agency revoked a State permit program under § 402 of the Clean Water Act, 33 U.S.C. § 1342, EPA would have the ability to review any State permits issued within the previous 90 days to ensure their compliance with the Act. *See* Ruckelshaus Testimony 286-87, 2 LEGIS. HIST. 1184-85.

that silence in legislative history does not justify departing from statutory language that is otherwise clear. *See Avco Corp. v. U.S. DOJ*, 884 F.2d 621, 625 (D.C. Cir. 1989). The language of § 404(c) confers broad withdrawal authority on EPA, and a brief remark of one Senator—even if it were directly on point—is not sufficient to clear the "high bar" for "constricting the otherwise broad application of a statute indicated by its text." *NRDC v. E.P.A.*, 489 F.3d 1250, 1259 (D.C. Cir. 2007) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (Roberts, J.)).

If any legislative history is relevant to this case, it is the House and Senate compromise in § 404 of the Clean Water Act that gave EPA final oversight authority to protect waters of the United States from harmful pollution. U.S. Br. 6. Mingo Logan's narrow reading of § 404(c) would upset the balance that Congress struck when it made the Corps the permitting authority and EPA the "environmental conscience" of § 404. 44 Fed. Reg. 58,076, 58,081 (Oct. 9, 1979).

D. EPA's interpretation reasonably reconciles Congress' principal aim of environmental protection with the goal of regulatory certainty.

Section 404(c) unambiguously authorizes EPA to withdraw specifications after a § 404(a) permit issues. U.S. Br. 24-39. But even if this Court deems the statute ambiguous, it should defer to EPA's interpretation of its § 404(c) authority. Amici The Chamber of Commerce of the United States of America, et al. (Chamber), rely on an extra-record article prepared for litigation to contend that EPA's § 404(c) post-permit withdrawal authority "threaten[s] significant harm throughout nearly every sector of the U.S. economy." Chamber Brief 22. The Chamber's argument ignores Congressional intent, runs counter to the experience of the last forty years, and is irrelevant to the *Chevron* step two inquiry in any event.

Like Mingo Logan, the Chamber fails to recognize that absolute certainty for polluters was not the motivating goal behind the Clean Water Act. Rather, Congress' overriding goal was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by "eliminati[ng]" "the discharge of pollutants." 33 U.S.C. § 1251(a). Thus, it is "hardly farfetched" for Congress to have intended

EPA's § 404(c) withdrawal authority to apply to "any" specification of a disposal site, whether or not a § 404(a) permit has issued. *New York v. E.P.A.*, 443 F.3d 880, 886 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

The Chamber's view is also belied by the historical record. U.S. Br. 44. EPA has repeatedly and openly adopted the statutory interpretation advanced here since 1979, yet in that period the agency has acted only three times to withdraw specifications of disposal sites in § 404(a) permits. The Chamber does not explain how this Court's approval of EPA's well-established interpretation of § 404(c) will dramatically alter the regulatory landscape.

In any event, the Chamber's policy disagreement with EPA does not and cannot justify rejecting the agency's longstanding, reasonable interpretation of a federal statute that it is charged with administering. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984). EPA recognizes that "where possible it is much preferable to exercise this authority before the Corps or [authorized] state has issued a permit." 44 Fed. Reg. at 58,077. And EPA can never use its § 404(c) authority to retroactively invalidate a past discharge authorized by a permit. *Id.*

But on rare occasions, "it may be necessary to act after [permit] issuance in order to carry out EPA's responsibilities under the Clean Water Act." *Id.* In those instances, EPA notifies the public of its proposed determination, solicits public comment, holds a public hearing upon request, and publishes its final determination in the Federal Register. *See* 40 C.F.R. pt. 231; U.S. Br. 7, 48. EPA's discretion is always constrained by § 404(c)'s requirement to make an adverse-effect determination and the APA's mandate "that an agency's exercise of its statutory authority be reasonable and reasonably explained." *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012).

EPA's reading of § 404(c), coupled with the great restraint that the agency has shown in exercising its authority under that provision, reasonably reconciles Congress' principal legislative objective with the secondary goal of regulatory certainty. U.S. Br. 42-45. This Court should therefore uphold the agency's longstanding interpretation of the statute.[6]

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[6] Even if this Court concludes that EPA's interpretation of § 404(c) might condone an unauthorized exercise of authority in another case, it should still sustain EPA's action here, which was based in significant part on new site-specific and scientific information. U.S. Br. 16, 58-59. *(cont'd)*

II. EPA HAS REPEATEDLY AND CONSISTENTLY INTERPRETED § 404(c) IN DECISIONMAKING PROCEDURES WORTHY OF *CHEVRON* DEFERENCE.

A. EPA's interpretation is evident in regulations and final determinations that carry the force of law.

EPA's interpretation of its § 404(c) authority—as expressed in regulations and three post-permit determinations—is owed *Chevron* deference. U.S. Br. 46-50. Mingo Logan contends that EPA's regulations and Final Determination do not supply an interpretation to which this Court can defer, and that the agency's post-permit withdrawal of specifications in the Spruce permit was unprecedented. Mingo Logan is wrong on both counts.

This Court's decision in *E.R. Squibb & Sons, Inc. v. Bowen*, 870 F.2d 678 (D.C. Cir. 1989), is illustrative. There, this Court declined to find an agency's statutory interpretation permissible writ large, but went on to hold, at *Chevron* step two, that the interpretation was nevertheless reasonable as applied to that particular case. *Id.* at 684, 686. The district court erred in this case when it prematurely truncated the *Chevron* analysis in order to avoid issues that might also arise in the course of arbitrary-and-capricious review. JA206 n.15; Mingo Br. 56 n.25; *see Shays v. F.E.C.*, 528 F.3d 914, 924-25 (D.C. Cir. 2008) (noting overlap between two inquiries).

1. This Court owes *Chevron* deference to EPA's regulations and Final Determination.

Mingo Logan asserts that EPA has never articulated a deference-worthy interpretation of § 404(c). Mingo Br. 55-56. To the contrary, the agency has done so on several occasions. First, EPA's 1979 regulations explicitly envision post-permit § 404(c) action. U.S. Br. 7-8, 47. The regulations repeatedly refer to the "permit holder," 40 C.F.R. §§ 231.3(d)(2), 231.4(b), and EPA devotes an entire regulation to describing an emergency withdrawal procedure used after a permit has issued, *id.* § 231.7.

The preamble to EPA's regulations further explains the agency's statutory interpretation. U.S. Br. 8-9. Mingo Logan argues that this Court cannot consider any of the statutory analysis in the regulatory preamble because EPA does not view one of the statements in the preamble as a binding interpretation of § 404(c). Mingo Br. 47, 55. Specifically, the agency stated that:

> EPA agrees with the suggestion that it would be *inappropriate* to use § 404(c) after issuance of a permit where the matters at issue were reviewed by EPA without objections during the permit proceeding, or where the matters at issue were resolved to EPA's satisfaction during the permit proceeding, unless substantial new information is first brought to the Agency's attention after issuance.

44 Fed. Reg. at 58,077 (emphasis added). EPA has adhered to that sensible policy since 1979; if the agency were to change its practice, it would need to explain why. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). But the sentence in question does not interpret § 404(c). *Compare* 44 Fed. Reg. at 58,077 ("*Under the statutory scheme*, 404(c) can only be used to *prevent* discharges.") (first emphasis added). Instead, EPA's statement reflects the agency's "choice" of when it is appropriate to exercise § 404(c) authority. *Id.*

EPA's view, explained at length in the preamble, is that neither § 404(c) nor the agency's implementing regulations restrict EPA's authority to withdraw specifications of disposal sites after a § 404(a) permit issues. 44 Fed. Reg. at 58,077 ("The statute . . . allows EPA to act after the Corps has issued a permit."); *id.* ("[T]he regulations do not restrict EPA's right to act after a permit has been issued."). EPA seeks deference to the interpretation of § 404(c) reflected in its regulations, and the preamble is informative insofar as it elaborates on the statutory interpretation underlying those regulations. *See Howmet Corp. v. E.P.A.*, 614 F.3d 544, 550-52 (D.C. Cir. 2010).

Mingo Logan only briefly addresses EPA's request for *Chevron* deference to the statutory interpretation set forth in the Final Determination itself. U.S. Br. 48. The company's tack is to deny that EPA interpreted § 404(c) to allow post-permit action when the agency took a § 404(c) post-permit action. Mingo Br. 55. But this Court defers to statutory interpretations that are necessarily presupposed by an agency's action. *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992); *George E. Warren Corp. v. U.S. E.P.A.*, 159 F.3d 626, 624-25 (D.C. Cir. 1998). Moreover, EPA set forth its interpretation of § 404(c) in the Final Determination, JA814, and thoroughly explained the basis for that interpretation in a response to a public comment appended to the decision document, JA908-09. The agency's well-reasoned explanation in 2011 echoed the discussion in the 1979 regulatory preamble.

Lastly, Mingo Logan states that a § 404(c) determination does not involve "the kind of careful reasoning through years of rulemaking that justified deference in *Chevron*." Mingo Br. 55. The Final Determination merits full *Chevron* deference, however, because it reflects EPA's "considered judgment made pursuant to congressionally delegated

lawmaking power," and it has "binding legal effect" on EPA, the Corps, and Mingo Logan. *F.E.C. v. Nat'l Rifle Ass'n*, 254 F.3d 173, 186 (D.C. Cir. 2001); *see* U.S. Br. 48.

2. EPA has exercised its § 404(c) post-permit withdrawal authority three times.

Mingo Logan contends that EPA's post-permit withdrawal of specifications in the Spruce permit was unprecedented. Mingo Br. 3, 22, 57. To the contrary, EPA has acted on two other occasions to withdraw specification of disposal sites authorized under existing § 404(a) permits. U.S. Br. 9-11. Mingo Logan mischaracterizes the circumstances surrounding those two actions.

In 1981, EPA withdrew specification of a disposal site designated under a § 404(a) permit. U.S. Br. 9-10. Mingo Logan asserts that EPA's 1981 action was not "post-permit" because the permittee—the City of North Miami, Florida—had also proposed an expansion of the same disposal site in a new permit application. Mingo Br. 57 n.26 (quoting JA205 n.14). But the city's pending permit application did not render its existing permit obsolete. At the time of EPA's action, the permittee was using the site to dispose of solid waste, i.e., garbage, and the agency concluded that further authorized discharges would have

unacceptable adverse environmental effects.[7] Given the severe environmental consequences that flowed from the extant specification of those waters, EPA's Administrator concluded that "[w]hile ideally, I would prefer to use 404(c) before a permit has been issued . . ., I have the authority to, and it is sometimes necessary to, act after issuance in order to carry out my responsibilities under the Clean Water Act. This is such a case." JA258; *see also* JA249-50.

EPA again withdrew specification of fill disposal sites post-permit in 1992. U.S. Br. 10-11. In that instance, EPA originally acted under § 404(c) before the Corps issued a permit. 54 Fed. Reg. 33,608 (Aug. 15, 1989). But that was not the end of the matter. A federal district court invalidated EPA's § 404(c) action and ordered the Corps to issue a permit for the disposal sites in question. *James City County, Va. v. U.S. E.P.A.*, 758 F. Supp. 348, 353 (E.D. Va. 1990). EPA appealed but did not seek a stay of the court's order, and the Corps issued a § 404(a) permit. The Fourth Circuit ordered a remand of EPA's § 404(c)

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[7] EPA's action did not withdraw specification of the site for all purposes; the agency allowed "clean fill" to be deposited in those areas already covered with garbage. JA254. In other words, EPA withdrew specification of the site for only one of the site's previously authorized "uses." JA249-54; *see* U.S. Br. 5 n.1.

determination to the agency, but the court of appeals did not invalidate or suspend the newly-issued § 404(a) permit. *James City County, Va. v. U.S. E.P.A.*, 955 F.2d 254, 261 (4th Cir. 1992) (*James City II*).[8] On remand, and against the backdrop of the existing permit, EPA again withdrew specification of the same disposal sites. *See James City County, Va. v. E.P.A.*, 12 F.3d 1330, 1332 (4th Cir. 1993). EPA's remand determination was unquestionably a post-permit § 404(c) determination.

EPA's two previous post-permit determinations are relevant to this appeal for three reasons. First, every post-permit determination is the product of a formal decisionmaking process that merits *Chevron* deference. *See supra*, at 21-22; U.S. Br. 48. Second, EPA's actions

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[8] Mingo Logan asserts that the Fourth Circuit did not hold in *James City II* that EPA can act under § 404(c) after a permit issues. Mingo Br. 45-46. The court of appeals in that case was presented with a district court judgment vacating EPA's § 404(c) determination and ordering the Corps to issue a § 404(a) permit. The Fourth Circuit remanded the § 404(c) decision to the agency for reconsideration, but it left the permit in place. *James City II*, 955 F.2d at 261. The question of EPA's post-permit authority was an issue squarely before the court, which pointedly stated that "[s]ection 404(c) of the statute authorizes the EPA to veto a Corps' decision to issue a permit . . . ." *Id.* at 257. The Fourth Circuit's remand depended on the court's view that EPA could act under § 404(c) after the judicially-mandated issuance of a § 404(a) permit. U.S. Br. 40-41.

demonstrate consistency in the agency's statutory interpretation of § 404(c), which heightens the deference otherwise owed to that interpretation. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

Third, EPA's post-permit determinations illustrate the varied, albeit rare, circumstances in which the agency appropriately exercises its § 404(c) authority after a permit issues. In 1981, EPA used § 404(c) to stop the unexpected disposal of a particularly noxious fill material—garbage—into a valuable aquatic ecosystem. In 1992, EPA used § 404(c) to withdraw specifications in a § 404(a) permit that a court had ordered the Corps to issue notwithstanding EPA's objection. And in 2011, EPA used § 404(c) to withdraw certain Spruce permit specifications in the face of significant new scientific and site-specific information. The statutory interpretation advanced by Mingo Logan—and adopted by the district court—would prevent EPA from acting in any of those instances, even if the agency "ha[d] reason to believe that a discharge under the permit present[ed] an imminent danger of irreparable harm to municipal water supplies, shellfish beds and fishery areas . . ., wildlife, or recreational areas . . . ." 40 C.F.R. § 231.7. Mingo Logan's interpretation cannot be reconciled with the open-ended

language of § 404(c) or Congress' primary intent in the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

B. The Corps' role in § 404 does not diminish the deference owed to EPA's interpretation of § 404(c).

The district court did not accord *Chevron* deference to EPA's interpretation of § 404(c). The court reasoned that (1) § 404(c) requires EPA to consult with the Corps; (2) the two agencies disagreed here about the propriety of discharging fill material into some of the Spruce permit disposal sites; and (3) the two agencies jointly administer § 404 as a whole. JA202-03 & n.11. None of those reasons justify denying *Chevron* deference to EPA's statutory interpretation. U.S. Br. 50-55. In this Court, Mingo Logan argues only that the agencies' joint administration of § 404 counsels against *Chevron* deference. Mingo Br. 49-51. The company's argument is unpersuasive.

Mingo Logan relies on *Salleh v. Christopher*, 85 F.3d 689 (D.C. Cir. 1996), but that case is distinguishable. U.S. Br. 55 & nn.18-20. In *Salleh*, this Court premised its decision not to defer on an express disagreement between two executive branch entities—the Department of State and the Foreign Service Grievance Board. *Salleh*, 85 F.3d at

691-92. This Court refused to defer to either body's statutory interpretation "insofar as they assert conflicting interpretations." *Id.* at 692; *see id.* at 691 ("Where, as here, . . . two executive branch entities . . . claim conflicting administrative authority, it would be inappropriate to defer to either's statutory interpretation as to the issue of basic authority."). *Salleh* distinguished *Molineaux v. United States*, 12 F.3d 264 (D.C. Cir. 1994), where this Court deferred to the Secretary of State's statutory interpretation when "the Secretary and the [Foreign Service Grievance] Board [we]re essentially in agreement as to the statute's meaning," *id.* at 267. Here, as in *Molineaux* (but not *Salleh*), EPA and the Corps are in agreement as to § 404(c)'s meaning.

Salleh is also distinguishable for another reason. In that case, this Court refused to accord *Chevron* deference to an agency's interpretation of a statutory provision that would have directly restricted the authority of another executive branch entity. But in this case, EPA's interpretation of the scope of § 404(c) does not derogate from the Corps' authority under the Clean Water Act. The agencies agree that the Corps not only issues § 404(a) permits, but may also modify, suspend, or revoke them.

In this Court, Mingo Logan abandons its contention that the Corps and EPA disagree as to the latter's statutory authority.[9] Instead, the company argues that the Corps has not interpreted § 404(c) in a sufficiently formal and "reasoned" manner. Mingo Br. 51-53. But the United States does not submit that the Corps' interpretation of § 404(c) merits *Chevron* deference; we contend only that all of the evidence indicates longstanding agreement between the two agencies on the question of statutory interpretation at issue in this case. U.S. Br. 52-53. The Corps' agreement heightens the deference owed to EPA's statutory interpretation, regardless of the formality and rigor of the Corps' own interpretation. *See Public Citizen v. Foreman*, 631 F.2d 969, 975-76 & n.14 (D.C. Cir. 1980) (finding it "highly significant" that

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[9] Mingo Logan suggests that the two agencies disagree regarding the relevant criteria for modification, suspension, or revocation of a permit. Mingo Br. 38 n.15, 50-51, 53. The company is incorrect. The agencies agree that the Corps must use the criteria set forth in the Corps' regulations when modifying, suspending, or revoking a permit, *see* 33 C.F.R. § 325.7(a), and that EPA must use the criteria set forth in EPA's regulations when making a § 404(c) determination, *see* 40 C.F.R. pt. 231. The differences between the agencies' criteria simply reflect the different roles that Congress assigned to EPA and the Corps in assessing discharges of fill material into waters of the United States. U.S. Br. 59 n.21.

administering agency's statutory interpretation was echoed by head of another agency in congressional testimony).

In sum, the Corps' important role in § 404 does not diminish the deference owed to EPA's interpretation of § 404(c). Instead, the Corps' agreement with EPA's interpretation is cause for even greater deference.

C. EPA's interpretation of § 404(c) does not implicate the canon of constitutional avoidance.

Amicus United Company contends that EPA is not owed *Chevron* deference because the agency's interpretation of § 404(c) creates "an identifiable class of cases in which application of [the] statute will necessarily constitute a taking" under the Fifth Amendment. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 & n.5 (1985); United Company Brief (United Br.) 9. This Court should not consider an argument never raised by Mingo Logan. *See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). In any event, United Company's argument fails because EPA's interpretation does not give rise to an identifiable class of cases where an uncompensated taking will necessarily occur.

The canon of constitutional avoidance is not implicated merely because an agency's interpretation might generate ad hoc, regulatory

takings claims. *See Bldg. Owners & Mgrs. Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 99 (D.C. Cir. 2001) (*BOMAI*).[10] At most, EPA's interpretation of § 404(c) would give rise to claims for compensable, case-specific regulatory takings (something we do not concede). Thus, the constitutional avoidance canon does not apply here, and *Chevron* deference does.

In regulatory takings cases, courts engage in "ad hoc, factual inquiries" that consider the economic impact of the government's action on the property owner's "parcel as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 130-31 (1978). Assessing economic impact based on the value of the claimant's parcel as a whole—as opposed to just the regulated portion or regulated use of the property—limits compensation to those claimants who suffer severe economic deprivation. *See Concrete Pipe & Prods., Inc. v. Constr.*

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[10] The United States disagrees with this Court's holding in *Bell Atlantic Telephone Cos. v. F.C.C.*, 24 F.3d 1441, 1446 (D.C. Cir. 1994), that an agency's statutory interpretation does not receive *Chevron* deference if it would give rise to an identifiable class of *per se*, physical takings. *See BOMAI*, 254 F.3d at 100-03 (Randolph, J., concurring) (critiquing *Bell Atlantic*'s holding). In any event, this Court has made clear that *Bell Atlantic* does not apply in the ad hoc, regulatory takings context. *See id.* at 96-100 (Rogers, J.).

Laborers Pension Trust, 508 U.S. 602, 643-45 (1993). If a permittee brought a takings claim stemming from a post-permit § 404(c) determination, a court would compare the loss in value of the regulated property due to EPA's action with the overall value of the permittee's entire property. Just compensation would be available only where the § 404(c) determination was "so onerous [for the permittee] that its effect [wa]s tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

United Company argues that neither the *Penn Central* test nor the parcel-as-a-whole rule applies where the federal government expressly authorizes a particular use of private property and later prohibits that use. But the company relies on cases where the specific right revoked—the power to exclude others—was such an "essential stick[ ] in the bundle of rights that are commonly characterized as property" that a *per se* taking occurred. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *see also Lingle*, 544 U.S. at 539. Those cases did not hold that a regulatory taking necessarily ensues no matter what kind of use the government had authorized. EPA's withdrawal of specification

here—which only bars Mingo Logan from discharging particular volumes of particular types of fill material into particular streams—does not constitute the same sort of regulatory interference as forcing an owner to open private property to the public. *Cf. Kaiser Aetna*, 444 U.S. at 179-80. The other cases on which United Company relies are inapposite because they invoke the now-defunct theory that the government action giving rise to a takings claim must substantially advance a legitimate state interest. United Br. 6; *see Lingle*, 544 U.S. at 540-45 (rejecting "substantially advance" theory for regulatory taking claim).

In sum, the "relatively insignificant takings implications" (if any) of EPA's statutory interpretation do not trigger the constitutional avoidance canon. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 712 (D.C. Cir. 2008). EPA has exercised its post-permit withdrawal authority only 3 times in 40 years, and no one has ever brought a takings claim stemming from a § 404(c) action. Moreover, any bona fide § 404(c) regulatory taking would be compensable and therefore constitutional. *Chevron* deference applies to EPA's interpretation of

§ 404(c) because there is no serious doubt as to that provision's constitutionality.

III. EPA'S ACTION IN THIS CASE WAS NOT ARBITRARY OR CAPRICIOUS.

Our opening brief established that EPA's Final Determination was well-reasoned and thorough, and that it should be upheld under the APA standard of review. U.S. Br. 56-59. Rather than press its APA claim on appeal, Mingo Logan asks this Court to remand for the district court to consider that issue in the first instance. Mingo Br. 57. The company's abbreviated discussion of alleged deficiencies in the Final Determination is devoid of references to the administrative record, statutes, regulations, and case law. Mingo Br. 57-59. In short, Mingo Logan has opted not to present any alternative ground in support of the judgment, and amicus West Virginia cannot carry the company's water. Even if this Court does not consider Mingo Logan's arbitrary-and-capricious claim, however, it should bear in mind that APA review acts as a check on EPA's post-permit authority under § 404(c). *See Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 492, 488-95 (2004).

CONCLUSION

For the foregoing reasons, and for the reasons expressed in our opening brief, this Court should reverse the district court's judgment and uphold EPA's Final Determination. In the alternative, this Court should remand for the district court to consider whether EPA's action was arbitrary or capricious.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,911 words.

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October 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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