Clean Water Act, Section 404 Applicants: May The Odds Be Ever In Your Favor

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COMMENT

CLEAN WATER ACT, SECTION 404
APPLICANTS: MAY THE ODDS BE EVER
IN YOUR FAVOR

JASON BAILEY*

Businesses that engage in projects requiring the disposal of dredged or fill material in waters or wetlands of the United States must apply for a permit from the U.S. Army Corps of Engineers. The permit process, regulated by section 404 of the Clean Water Act, provides the Environmental Protection Agency a distinct role to deny or restrict the use of defined areas as disposal sites when it detects unacceptable adverse effects on the environment. The EPA Administrator may exercise this power "whenever he determines." Until recently, the EPA never used its so-called "veto power" after a permit's issuance; however, the EPA did exactly that in 2011, leading to Mingo Logan Coal Co. v. EPA. Ultimately, the U.S. Court of Appeals for the District of Columbia held that the word "whenever" within section 404(c) gave the EPA the ability to use its veto power retrospectively. This Comment argues that the U.S. Court of Appeals' recent decision will have an extremely toxic effect on industries across the country. It examines the history behind section 404 and the recent federal cases: analyzing the courts' decisions, Congressional intent regarding section 404, and the harmful effects and vast uncertainty businesses across the country will

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now face. It sets forth a recommendation to Congress and the courts about how to fix the problem before it becomes detrimental to both individual industries and the U.S. economy as a whole.

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“In the business world, the rearview mirror is always clearer than the windshield.”

– Warren Buffett

INTRODUCTION

If Washington, D.C. needed to build a new bridge across the Potomac River when a current one becomes outdated, then it would need to obtain a Clean Water Act (“CWA”), section 404 permit. If Honolulu International

Airport needed to extend its runways into Mâmala Bay to accommodate larger planes, then it would also need to obtain a section 404 permit. If the United States government follows through with the Keystone XL pipeline and builds it in areas where water or wetlands exist, then it, too, would require a section 404 permit. What would have been a routine task a few years ago now involves abundant uncertainty at the behest of the Environmental Protection Agency.

Business activities such as development, water resource projects, infrastructure expansion, and mining ventures require a CWA, section 404 permit before discharging dredged or fill material into U.S. waters. Although the permit is issued by the U.S. Army Corps of Engineers (“Army Corps”), the EPA has veto power over parts of the application. For the first time, in Mingo Logan Coal Co. v. EPA (“Mingo Logan”), federal courts examined whether the EPA could use its section 404(c) power to retrospectively withdraw disposal site specifications after a permit has been issued by the Army Corps. The U.S. Court of Appeals for the District of Columbia held in Mingo Logan that the text of section 404(c) does not put a time limit on the EPA Administrator’s authority to withdraw a permit’s specification, but instead, empowers him to “prohibit, restrict or withdraw the specification ‘whenever’...” In March 2014, the Supreme Court chose not to hear the case and denied Mingo Logan Coal Co.’s petition for writ of certiorari. This case of first impression, decided forty-one years after Congress passed the CWA, will have a destructive effect on industries that rely on a CWA.
section 404 permit if the EPA is able to revoke permits whenever it chooses, including years after issuance.\textsuperscript{9} Even avid supports of the federal regulatory regime may be skeptical about the uncertainty of the EPA’s power and how it will loom over businesses and their investors.\textsuperscript{10}

This Comment argues that the court of appeals’ recent decision in Mingo Logan will have an extremely toxic effect on industries across the country, and Congress is responsible for remedying the situation before it spirals out of control. Part II discusses the background and evolution of the pertinent section of the CWA and why it has been controversial. It gives a detailed factual and procedural history of the recent cases that brought this issue to light. Part III then analyzes the plain meaning of the statute at issue and its legislative history to determine whether the Court of Appeals’ decision deviates from the legislation’s original intent and how it, nevertheless, leaves industries in a position of insecurity and instability. Part IV sets forth recommendations to Congress and to courts that will inevitably decide similar cases in the future. Finally, this Comment concludes that the U.S. Court of Appeals’ recent unprecedented ruling will have a destructive effect on a vast array of industries and that the courts and Congress should take action to provide additional guidance as to how and when the EPA can invoke its section 404(c) veto power.

I. THE ORIGIN AND EVOLUTION OF THE EPA’S SECTION 404(C) POWER

This Section supplies pertinent background information on CWA, section 404, including its original purpose. Specifically, it provides an in-depth discussion of the EPA’s veto power\textsuperscript{11} as set forth by section 404(c) of the CWA. After discussing past instances when the EPA used its power and the subsequent court battles, it addresses the recent rulings in Mingo Logan.

\textsuperscript{9} See 714 F.3d at 613 (construing the EPA’s power set forth in § 404 to be infinite and without a time limit).


\textsuperscript{11} The term “veto power” is used throughout this Comment because even though the statute describes the EPA Administrator’s authority as the ability to prohibit specifications and deny or restrict the use of those areas, \textit{id.; cf.} Am. Forest & Paper Ass’n v. EPA, 137 F.3d 291, 294 (5th Cir. 1998) (citing Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1285 (5th Cir. 1977)) (reviewing the EPA’s ability to veto a proposed permit to discharge pollutants if it concludes that the permit violates the CWA § 402 criteria protecting endangered species and holding that the EPA does not enjoy wide latitude in deciding whether to approve or reject a state’s proposed permit program because “unless the Administrator of the EPA determines that the proposed state program does not meet [the specified] requirements, he must approve the proposal”), this essentially provides the EPA with veto power over any and all disposal site specifications considered by the Army Corps. See, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 274 (2009) (‘‘We, and the parties, refer to [CWA § 404(c)] as the EPA’s power to veto a permit.’’).
Logan and why this case of first impression has the potential to inflict unnecessary risk and confusion on the business community.

A. Clean Water Act, Section 404 and its Provision Allowing the EPA Veto Power over an Application’s Site Specifications

Section 404 of the CWA provides the required steps an entity must take before discharging dredged or fill material into the waters or wetlands of the United States. It is an umbrella statute covering many U.S. business activities. Regardless of the entity applying for a permit, each project is analyzed independently, and every industry is expected to take certain precautions to protect the environment from unnecessary harm. Dredged and fill material are treated the same for the purposes of the statute.

Section 404 regulates activities through a permit review process that addresses the application, specification, and denial or restriction of disposal sites at which an entity may discharge dredged or fill material. The Army Corps, limited by public interest and environmental criteria, reviews and issues individual permits. Although the Secretary of the Army, acting

12. See 33 U.S.C. § 1344(c) (2012) (delineating the process from application and specification of disposal sites to required public hearings and issuance from the Army Corps).

13. See Water: Discharge of Dredged or Fill Materials (404), U.S. EPA, http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/ (last visited July 2, 2014) (“Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects.”).

14. See id. (“The basic premise of the program is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation’s waters would be significantly degraded. In other words, when you apply for a permit, you must first show that steps have been taken to avoid impacts to wetlands, streams and other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts.”); see also § 1344 (granting the EPA veto power in instances when the discharge of such materials will have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas”).

15. Compare EPA PLANNING GUIDE, supra note 1, at 25 (defining “dredged material” as material that is excavated or dredged from waters in the U.S. and “fill material” as material placed in the waters of the U.S. where the material has the effect of “either replacing any portion of water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States”), with Water: Discharge of Dredged or Fill Materials (404), supra note 13 (providing additional definitions of the terms but also examples of projects that categorically fit within each).

16. See § 1344(a)–(e) (describing the discharge of dredged or fill materials permit process).

17. See id. (setting forth criteria to be taken into consideration throughout the permit application and review process); cf. EPA PLANNING GUIDE, supra note 1, at 30 (proffering that applicants must demonstrate compliance with mitigation provisions by
through the Chief of Engineers, solely handles this aspect of the permit process, subsection (c) of section 404 provides a distinct role for the EPA:

(c) The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas..., wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) “Secretary” defined. The term “Secretary” as used in this section means the Secretary of the Army, acting through the Chief of Engineers. 18

B. While the EPA has Exercised its Veto Power in the Past, it has Never Done so Retroactively After a Permit’s Issuance

The EPA has used its veto power on numerous occasions in the past, and several instances led to suits against the EPA. 19 In the latest case, Hoosier Environmental Council, a riverboat casino needed to acquire a section 404 permit to dredge material from the Ohio River bottom, excavate from the river bank, and moor piles both in the water and on the bank, among other activities, to carry out its proposed riverboat gambling project. 20 The plaintiff environmental organizations filed suit claiming that the permit’s issuance was in violation of the CWA and other statutes because neither an Environmental Impact Statement nor an adequate public interest review were conducted. 21 Although the court noted the effects of a letter from the

showing it will “avoid wetland and water impacts where practicable, minimize potential impacts to wetlands and waters, and compensate for any remaining, unavoidable impacts to wetlands or waters through activities to enhance or create wetlands and/or waters”).

18. § 1344(c)–(d) (emphasis added).
20. See Hoosier Envtl. Council, Inc., 105 F. Supp. 2d at 963 (emphasizing that the Army Corps added numerous special conditions to the permit to limit, prevent, or mitigate the environmental impacts identified in an initial environmental assessment).
21. See id. at 964 (stating that one of the plaintiff environmental groups’ mission, among others, opposed “any attempt to locate a gambling casino on the Ohio River”
EPA to the Army Corps two months after the section 404(b) permit was issued that raised the Army Corps' failure to examine the project's environmental effects, it failed to consider whether the EPA could have exercised its section 404(c) veto power after the permit was issued.22

Two other cases brought to light the controversy surrounding the EPA's veto power, but in both instances, the EPA used its authority prior to a permit's issuance.23 In *City of Alma*, the EPA obtained an injunction preventing the city from constructing a lake.24 The Army Corps notified the EPA of its intent to issue a section 404 permit, and the EPA Regional Administrator informed the Army Corps and public officials that he would begin section 404(c) proceedings, proposing to prohibit or restrict the planned dredging or fill of material at the project site.25 Although the court determined that the EPA acted within its CWA authority, the EPA acted before the Army Corps issued the final permit.26

Furthermore, in *Russo Development Corp.*, although the court did not analyze the EPA's ability to use its section 404(c) power against a permit already issued, the court did address whether the EPA could use its section 404(c) veto power in regard to an after-the-fact permit.27 The plaintiff sought a permit for an area in which filling already began, and the court determined that the regulations "unquestionably" allowed the EPA to prevent the Army Corps from issuing a permit to a landowner seeking to fill wetlands.28 Thus, the court allowed the EPA to rely on its section 404(c) veto power even after the landowner filled a portion of the land in

within their county).

22. See id. at 971–72 (discussing the cooperative tone of the EPA's letter and finding it unlikely that if the EPA knew the permit had already been granted, it would have accused the Army Corps' environmental assessment of being legally deficient).

23. See *City of Alma*, 744 F. Supp. at 1553 (recognizing that the EPA's § 404(c) proceedings took place after the Corps notified the EPA of its intent to issue a § 404 permit but before the permit was formally issued); see also *Russo Dev. Corp.*, 1990 U.S. Dist. LEXIS 15859, at *2–3 (reviewing an after-the-fact permit as legally equivalent to a new permit).

24. See *City of Alma*, 744 F. Supp. at 1567 (denying the plaintiffs' motion for lifting the injunction).

25. See id. at 1553 (providing that the Army Corps notified the EPA of its intent to issue a § 404 permit in 1988 and that the EPA issued its recommendation on October 5, 1988, prior to the permit's issuance).

26. See id. at 1560 (citing 44 Fed. Reg. 58,077 (1979)) ("As noted above, the EPA stated, in the preamble to its regulations, that it would avoid initiating section 404(c) proceedings after a permit has been issued.").

27. See *Russo Dev. Corp.*, 1990 U.S. Dist. LEXIS 15859, at *2 (detailing the plaintiff's after-the-fact permit as to the remaining acreage of an area already with a permit and an additional parcel).

28. See id. at *8–9 (emphasizing the difference between vetoing an issued permit and vetoing an after-the-fact permit not issued).
question prior to seeking an after-the-fact permit. 29

The above cases provide a sense of how federal courts have handled the EPA's statutory authority in controversial situations, but never before had a court directly examined whether the EPA could use its section 404(c) power to withdraw disposal site specifications after the Army Corps lawfully issues a section 404 permit until Mingo Logan. 30

C. For the First Time in Mingo Logan Coal Co. v. EPA, a West Virginia Company Challenged the EPA's Unprecedented Decision to Retroactively Veto a Section 404 Permit

In Mingo Logan, the Army Corps issued a CWA, section 404(b) permit to Mingo Logan Coal Company in 2007, allowing it to discharge fill material from its Spruce No. 1 coal mine into nearby streams and their tributaries. 31 Before the permit was issued, the EPA commented on a preliminary draft of an Environmental Impact Statement, as well as on another draft a year later, expressing its concerns about each version and also noting the application did not include information that fully assessed potential adverse environmental impact associated with the project. 32 After working with the Army Corps, the EPA granted state certification for the individual permit in December 2005 because it determined the project would not violate state water quality standards or anti-degradation regulations. 33 Before the Army Corps issued the final permit to Mingo Logan Coal, the Director of the Office of Environmental Programs, Environmental Assessment and Innovation Division, of the EPA wrote that the EPA had no intention of seeking section 404(c) proceedings regarding the Spruce Mine project. 34

In September 2009, almost two years after the Army Corps issued the section 404 permit, the EPA sent a letter to the Office of the Army Corps,

29. See id. (noting that the original permit authorized the fill that occurred up to that point but that the after-the-fact permit had yet to be issued).

30. See Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133, 134 (D.D.C. 2012), rev'd, 714 F.3d 608 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) (articulating that the EPA's attempt to withdraw the specification of discharge sites after a permit has been issued is unprecedented in the history of the CWA).

31. See id. at 133–34 (specifying the sites as the Pigeonroost and Oldhouse Branches).

32. See id. at 135–36 (detailing the EPA's comment dates as August 2001 and August 2002, respectively).

33. Id. at 136.

34. See id. (explaining that this statement occurred via email on November 2, 2006, from William J. Hoffman, Director of the Office of Environmental Programs, Environmental Assessment and Innovation Division of the EPA, to Teresa Spagna of the Army Corps).
requesting that it suspend, revoke, or modify Mingo Logan Coal’s issued permit. Finding no grounds to suspend, revoke, or modify the permit because no new information had surfaced related to water quality impacts, the Army Corps rejected the EPA’s request. The EPA then invoked its section 404(c) veto power in January 2011, withdrawing the specification of two waterways and their tributaries as disposal sites for materials in connection with the construction of the Spruce No. 1 Surface Mine. This fundamentally rendered the permit ineffective by taking away eighty-eight percent of the total discharge area the permit authorized, and it eventually led to the dispute in Mingo Logan, which is whether the EPA still possesses its veto power after a permit has been issued.

The U.S. District Court for the District of Columbia initially granted the coal company’s Motion for Summary Judgment on multiple bases. First, the court decided that a retrospective veto power is not discussed in Section 404(c) and that an interpretation of such is contrary to the language, structure, and legislative history of section 404 as a whole. The decision asked whether the EPA could withdraw a decision it has not made. Using Chevron U.S.A., Inc. v. NRDC, Inc. and Collins v. National Transportation Safety Board in its analysis, the court concluded that de novo review was appropriate and that the EPA was not entitled to any deference.35

35. See id. at 136–37 (emphasizing that the Army Corps’ permit issued on January 22, 2007, contained an express notification that the regional Army Corps office may reevaluate its decision on the permit at any time the circumstances warranted without saying anything about the EPA’s authority to withdraw the specification of a discharge site or to modify or revoke the permit).

36. See id. at 137 (articulating that the EPA’s letter specifically asserted that “recent data and analyses had revealed downstream water quality impacts that were not adequately addressed by the permit”).

37. See id. (providing the timeline after the Army Corps rejected the EPA’s initial request as follows: “Six months later, on March 26, 2010, EPA published a notice of its proposed determination to withdraw or restrict the specification of Seng Camp Creek, Oldhouse Branch, Pigeonroost Branch, and certain of their tributaries as disposal sites for fill material. On September 24, 2010 it published a ‘Recommended Determination’ to withdraw the specification of Oldhouse Branch, Pigeonroost Branch, and certain of its tributaries. And [sic] on January 13, 2011, EPA issued its Final Determination . . . .”).

38. Id.

39. See id. at 153 (holding that the EPA exceeded its authority under the CWA when it attempted to invalidate an existing permit for disposal sites because the statute did not give the EPA the power to render a permit invalid once it had been issued by the Army Corps).

40. See id. at 139 (asserting that it would be a “stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute”).

41. See id. (focusing on the words “prohibit” and “deny” within the statute as actions that naturally take place before the end result).

42. See id. at 148–49 (citing Collins v. Nat’l Transp. Safety Bd., 351 F.3d 1246
On appeal, the U.S. Court of Appeals for the D.C. Circuit examined the expansive conjunction "whenever" in its plain meaning. By using the term "whenever," the court decided that Congress plainly intended to grant the EPA authority to prohibit, deny, restrict, or withdraw a specification at any time. Moreover, it discussed the usage of the word "withdrawal," stating that the word itself conveys a meaning that the EPA's power could only be exercised post-permit. Finding the District Court for the District of Columbia's argument on legislative history unpersuasive, the D.C. Circuit reversed and remanded this case of first impression back to the district court to decide the case on the second claim. The specific effects of this decision will be discussed in Part III, but its strong deviation from past precedent and sound public policy will have detrimental consequences for businesses and investors.

II. THE POWER OF ONE WORD: SECTION 404'S AMBIGUOUS USE OF "WHENEVER" IS AT THE CENTER OF THE DEBATE IN MINGO LOGAN

This Section discusses both courts' decisions and rationales in Mingo Logan. It explains how the U.S. Court of Appeals' decision ultimately leaves certain businesses at a disadvantage in the marketplace amidst an unquantifiable state of uncertainty.

A. Analyzing the Two Federal Courts' Interpretation Disparity Regarding the Word "Whenever"

This entire issue hinges on the existence and interpretation of the word

(D.C. Cir. 2003)) (noting that the CWA's regulatory regime fits squarely within the second Collins category of statutes where agencies have specialized enforcement responsibilities but their authority potentially overlaps); see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (setting forth a two-part test for courts to use when reviewing an agency's construction of a statute which it administers and stating that if a statute is silent or ambiguous with respect to the specific issue, then the question for a court is whether the agency's action was based on a permissible construction of the statute).

43. See Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 613 (D.C. Cir. 2013), cert denied, 134 S. Ct. 1540 (2014) (pulling the Oxford English Dictionary definition of "whenever" for support: "At whatever time, no matter when.").

44. See id. (referring to the language of subsection 404(c) as "unambiguous").

45. See id. (citing OXFORD ENGLISH DICTIONARY 449 (2d ed. 1989)) (defining "withdraw" as "[t]o take back or away (something that has been given, granted, allowed, possess, enjoyed, or experienced)").

46. See id. at 616 (holding that the text of § 404(c) clearly and unambiguously gave the EPA the power to act post-permit and leaving the District Court for the District of Columbia to decide whether EPA's decision to withdraw site specifications after a permit's issuance was arbitrary and capricious in violation of the Administrative Procedure Act).
“whenever” in section 404(c) of the CWA. Without the word “whenever,” the subsection reads plainly that the EPA Administrator may act during the application process to prohibit, deny, or restrict disposal sites from applications. Adding the single word “whenever” blurs the acceptable time frame in which the EPA can use its veto power. For decades, courts never dealt with the interpretation of the word “whenever” as possibly referring to a post-permit veto power because the EPA never exercised its power in this manner. Throughout the proceedings of Mingo Logan, however, the interpretation of that single word became the debate’s focal point, drawing strong opinions and public discussion from judges, scholars, and business professionals alike.

For the sake of Mingo Logan, the only interpretations of the word “whenever” that matter are those used by Judge Amy Jackson and Judge Karen Henderson of the district court and court of appeals, respectively, in their opinions. Judge Jackson examined the legislative history behind the statute and, particularly, section 404(c). In rejecting a strict dictionary definition of the word “whenever,” Jackson noted that all parties agreed that the clear intent in using “whenever” was that Congress gave the EPA the ability to veto the use of certain disposal sites at the start and during the application process, thereby blocking the issuance of those permits.

Judge Henderson of the U.S. Court of Appeals for the D.C. Circuit preferred the literal definition of the word “whenever.” Citing the Oxford English Dictionary, she defined “whenever” in Mingo Logan as “a qualifying (conditional) clause . . . ‘At whatever time, no matter when.”

47. See 33 U.S.C. § 1344(c) (2012) (“The Administrator is authorized to prohibit . . . and he is authorized to deny or restrict . . . whenever he determines . . .”).


49. See Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133, 134 (D.D.C. 2012), rev’d, 714 F.3d 608 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) (concluding that the EPA exceeded its authority under § 404(c) of the CWA “[b]ased upon a consideration of the provision in question, the language and structure of the entire statutory scheme, and the legislative history . . .”).

50. See id. at 140 (citing § 1344(a)) (“Since a permit can only be issued by the Corps for a 'specified' (note the past tense) site, the act of prohibiting a specification, or denying the use of an area for specification, eliminates the necessary foundation for the issuance of a permit.”).

51. See 714 F.3d at 613 (indicating that the formulation of the statute with the word “whenever” is reinforced by the use of the word “withdrawal”).

52. Id. (citing OXFORD ENGLISH DICTIONARY 210 (2d ed. 1989)).
To further support this interpretation of "whenever," she argued that subsection 404(c)'s authorization of a "withdrawal" further supported her interpretation because it is a term of retrospective application allowing a person or entity to take back or take away something that has been given.53

B. While Antagonistic to Public Policy, the D.C. Circuit's Interpretation Passes Constitutional Muster and Prevails

If and when the EPA is able to veto permits retrospectively lies in the existence and statutory interpretation of a single word: "whenever."54 In Chevron, the U.S. Supreme Court set out a two-step analysis for courts to use in reviewing an administrative agency's construction of a statute.55 A court must first determine whether Congress directly spoke to the precise question at issue.56 In the midst of unambiguously expressed Congressional intent, the court, as well as the agency, must give effect to it.57 If, however, Congress has not directly addressed the precise question at issue, then the court does not impose its own interpretation of the statute, but rather, the question becomes whether the agency's answer is based on a permissible construction of the statute.58

When determining whether a statute is silent or ambiguous on the agency's interpretation in question, courts should use traditional tools of statutory construction, including the statutory language and legislative history.59 Congress is not silent, but instead ambiguous, about when the EPA can use its veto power in this case; therefore, the statute and its text can be analyzed one of two ways.60 Based on canons of construction, it can be evaluated strictly by looking at the language itself, or it can be analyzed

53. Id. (citing OXFORD ENGLISH DICTIONARY 449 (2d ed. 1989)).
54. See § 1344(c).
55. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that the EPA's decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" was based on a reasonable construction of the statutory term "stationary source").
56. See id. at 842–43, 844 (citing Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380 (1984) et al.) (supporting the notion that the Court has long recognized the considerable weight that should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer).
57. See id.
58. See id.
59. See Anderson v. U.S. Dep't of Labor, 422 F.3d 1155, 1180 (10th Cir. 2005) (citing Chevron, 467 U.S. at 843) (noting that this method helps determine whether Congress had intent on the precise question at issue).
60. See Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 614–15, cert. denied, 134 S. Ct. 1540 (2014) (finding none of Mingo Logan Coal Co.'s arguments persuasive regarding the ambiguity of the statute's language).
substantively based on the presumptions, values, and intent of Congress at the time of the statute’s passage.  

Typically, a court will assume that the legislature uses words in their ordinary sense. By ordinary, courts look toward how an “ordinary” or “reasonable” reader would interpret it while bearing in mind that the ordinary meaning should be distinguished from a literal meaning, strict construction, or narrow understanding of the word. For example, the majority in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon used a textual construction analysis in finding three reasons for concluding that the Secretary of the Interior’s interpretation of the word “harm” within the Endangered Species Act was reasonable.

Substantive canons look toward the presumptions that Congress intended to incorporate into statutes rather than the plain meaning of the text; however, presumptions will generally not trump a contrary statutory text, legislative history, or purpose. In NLRB v. Catholic Bishop of Chicago, the Supreme Court decided whether Congress intended the NLRB to have jurisdiction over teachers in church-operated schools. In holding that it did not, the court recognized that Congress provided no clear expression of an interpretation to include teachers in church-operated schools, and it placed weight on the presumption that Congress would not intend for a

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61. See, e.g., New York v. U.S. Dep’t of Health & Human Servs. Admin. for Children & Families, 556 F.3d 90, 97 (2d Cir. 2009) (quoting Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586 (2004)) (“Only if we determine that Congress has not directly addressed the ‘precise question at issue’ will we turn to canons of construction and, if that is unsuccessful, to legislative history ‘to see if those “interpretative clues” permit us to identify Congress’s clear intent.’”).

62. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 849–50 (4th ed. 2007) (explaining that judges may consult dictionaries, but they will often just rely on their linguistic experience or intuition to decide the most reasonable meaning of the words, given the context in which they are being used and applied).

63. See id. (suggesting that the interpretation starts with the “prototypical” meaning of statutory words or the core idea associated with the word or phrase).

64. See Babbitt v. Sweet Home Chapter of Cmty’s. for a Greater Or., 515 U.S. 687, 697–703 (1995) (concluding that Congress did not unambiguously manifest its intent to adopt the plaintiff’s view and that the Secretary of Interior’s interpretation was reasonable).

65. See ESKRIDGE, ET AL., supra note 62, at 883 (citing Astoria Fed. Sav. & Loan Assoc. v. Solimino, 501 U.S. 104, 108 (1991)) (stating that a presumption or rule of thumb can be treated as a starting point for discussion, a tiebreaker at the end of discussion, or just a balancing factor).

66. See NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 491 (1979) (raising the additional question that if the Act does in fact authorize such jurisdiction, it must be determined whether its exercise violates the guarantees of the Religion Clauses of the First Amendment).
statute to violate the Constitution. The Court, therefore, declined to construe the Act in a way that could require the Court to resolve difficult and sensitive First Amendment questions.

In observing the plain, textual meaning of the word "whenever" within the context of section 404, a definite intention or interpretation is not obvious. "Whenever" usually carries with it a connotation of "at any time; on whatever occasion" while emphasizing a lack of restriction. The word does have limitations, however, that are apparent and important in its everyday usage. For example, when someone tells their neighbor to "come over whenever," they do not literally mean "at any time." An understanding exists that the neighbor should not visit during unreasonable hours or when the home is empty. Did Congress also assume similar limitations in its use of the word "whenever?" Is it reasonable to "deny or restrict" the use of certain sites after the application process is over and a permit has been formally issued? The textual construction is not absolutely clear. In an instance like this, where the language of a statute is susceptible to more than one reasonable construction, courts should review the legislative history of the measure to ascertain its meaning.

The legislative history of section 404 does not provide enough insight on Congress' intention of the word "whenever" to overcome the burden needed to interpret the word differently than its narrower, ordinary meaning.

67. See id. at 504 ("There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.").

68. See id. at 507 (affirming the decision of the 7th Circuit).

69. See Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 613 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) (believing that this lack of restriction is why the Congress intentionally included the word "whenever" within that part of the statute).

70. Cf. Richard A. Epstein, Plain Meaning in Context: Can Law Survive Its Own Language?, 6 N.Y.U. J.L. & LIBERTY 359, 366 (2011) ("First, the consequences matter; these words are often designed to structure the social and legal relations between two or more persons or groups, with the result that any small error can lead to a large amount of injustice or inefficiency. Second, error correction is not just a matter of asking the correct question or backspacing on a word processor. The words in question are not generated by a single person who can alter and change them at will, so their costs of correction are far greater than before.").

71. See, e.g., Nelson v. Pearson Ford Co., 112 Cal. Rptr. 3d 607, 626 (Dist. Ct. App. 2010) (citing Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539 (Cal. 1999)) (analyzing the Automobile Sales Finance Act, legislation enacted to increase protection for the unsophisticated motor vehicle consumer and provide additional incentives to dealers to comply with the law).

72. See 1972 U.S.C.C.A.N. vol. 2, 3815–20. (providing Congressional and administrative history for permits and licenses addressed by the CWA but not offering
and Administrative News with respect to section 404, certain pieces of the CWA’s legislative history exist that may help shed light on what exactly Congress meant by giving the EPA the power to deny or restrict disposal site specifications “whenever.”

When Congress first enacted the CWA, it recognized that a massive percentage of coal reserves in the United States can only be extracted by underground mining methods, and so it was vital to national interests to ensure the existence of an expanding and economically healthy underground coal mining industry. Is it possible Congress can simultaneously insure an expanding and economically healthy industry if the EPA can use its veto power months or years after the Army Corps issues a section 404 permit?

Additionally, Senator Edmund Muskie played the most significant role in the legislation’s passage, and he made it clear during a speech to his Senatorial colleagues that a limitation applies to the EPA’s section 404(c) power. He stated, during consideration of the bill, that the EPA had to determine that the disposal material would not adversely affect municipal water supplies “prior to the issuance of any permit.” Should the Administrator so determine, then the Army Corps could not issue a permit. Senator Muskie made it apparent in his speech that the EPA may only deny a permit based on site specifications before it is issued by the Army Corps. Later in those same comments, however, Muskie said that the legislation’s drafters tried to write Congress’ intent into the CWA as clearly as possible so that the final evaluation of the bill would not be left to legislative history. Why, then, did Congress use the word “whenever”

any information in regards to § 404).


74. Compare 30 U.S.C. § 1201(b) (1977) (“The Congress finds and declares that . . . coal mining operations presently contribute significantly to the Nation’s energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation’s coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry . . . .”), with § 1201(j) (noting also that “surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner” (emphasis added)).

75. § 1201(b).


77. Id.

78. See id.

79. Id.
when that seems contrary to Muskie’s earlier statement? A court will subjectively determine how much weight to afford a single Senator’s comments such as those made by Muskie.80

Additional history regarding the CWA section at issue exists to further aid the analysis. During a public comment period regarding section 404 of the CWA, the EPA publicly stated that it should not invoke its veto power after a permit is issued except in very rare occurrences.81 On top of the above legislative history, the EPA signed a Memorandum of Agreement with the Department of the Army regarding the EPA’s section 404(c) power.82 Each time the veto power is mentioned in the agreement, supporting language indicates the power is to be used before a permit is issued.83 The agreement’s language supports the notion that the EPA’s authority is to be used prior to a permit’s issuance.84 Thus, although some legislative history exists, the available information is questionable at best as to whether it supports a precise Congressional interpretation and intention of the word “whenever.”85

If the text or the legislative history does not provide the court with the


81. See Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 196 (proposed Oct. 9, 1979) (to be codified at 40 C.F.R. pt. 231) (“[I]t 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.” (emphasis added)).


83. See id. (“[T]he District Engineer will provide EPA a copy of the Statement of Findings/Record of Decision prepared in support of a permit decision after the [Assistant Secretary of the Army for Civil Works’] review. The permit shall not be issued during a period of 10 calendar days after such notice unless it contains a condition that no activity may take place pursuant to the permit until such 10th day, or if the EPA has initiated a Section 404(c) proceeding during such 10 day period, until the Section 404(c) proceeding is concluded and subject to the final determination in such a proceeding.”).

84. See id. (indicating that absent exigent circumstances, retrospectively invoking § 404(c) would be inappropriate).

85. Cf. Lockhart v. United States, 546 U.S. 142, 146 (2005) (quoting Union Bank v. Wolas, 502 U.S. 151, 158 (1991)) (“The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”).
necessary interpretation, then under *Chevron* the second question for the court is whether the agency's interpretation is based on a permissible construction of the statute. The EPA argued in *Mingo Logan* that section 404(c) grants it unlimited power to modify or revoke a permit that the Army Corps lawfully issues. The district court was not persuaded, even if considerable deference was given to the EPA's interpretation.

The EPA specifically addressed the concept of taking no action post-permit during Mingo Logan Coal's permit application process. When the EPA issued state certification for Mingo Logan Coal's individual permit, it stated via an email from William Hoffman, Director of the Office of Environmental Programs, Environmental Assessment and Innovation Division, of the EPA, to Teresa Spagna of the Army Corps, that the EPA had no intention of taking its concerns any further from a section 404 standpoint. Hoffman sent that email one year before the Army Corps issued Mingo Logan Coal its final permit and five years before the EPA invoked its veto power to retrospectively revoke certain disposal sites.

The permit issued to Mingo Logan Coal contained an express notification that the Huntington District Office of the Army Corps had the right to reevaluate its decision at any time circumstances warranted. In 2009, almost two years after the Army Corps issued the section 404 permit, the EPA sent a letter to the Huntington District Office recommending that the Army Corps use its discretionary authority to suspend, revoke, or modify Mingo Logan Coal's permit. The Army Corps rejected the EPA's

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86. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If... the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.").

87. *See Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 139 (D.D.C. 2012), rev'd, 714 F.3d 608, 614 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) ("[T]he EPA is permitted to withdraw its assent to a disposal site at any time, even if the agency did not exercise its authority to prohibit or deny the specification at the outset, and a permit has already been issued.").

88. *See id.* (reasoning that the EPA's "reading does not exactly leap off the page").

89. *See id.* at 136 (referring to William Hoffman's email to Teresa Spagna).

90. *See id.* (citing Administrative Record 23085) (emphasizing that the EPA intended to work alongside the Army Corps throughout the application process rather than invoke § 404(c)'s veto power).

91. *See id.* at 136–37 (explaining that the original email was sent November 2, 2006; the permit was delivered on January 22, 2007; and the EPA's Final Determination to "withdraw the... disposal site[s]" was issued January 13, 2011).

92. *See id.* at 137 (implying that the permit did not mention the EPA's ability to withdraw the specification of a disposal site or to modify or revoke the permit after its issuance).

93. *See id.* (stating that the letter was sent on September 3, 2009); *see also* 33 C.F.R. § 325.7(c)–(d) (2013) ("The district engineer may suspend a permit after
request, finding no grounds to do so.  

Contract law provides one potential basis for the illegality of the EPA's ability to revoke permits after issuance as it did in Mingo Logan Coal's case. The section 404 permit to mine at Spruce No. 1 was the result of a contract under which Mingo Logan Coal had a reasonable expectation that it would be able to dispose of material for the permit's duration. Mingo Logan Coal's acceptance of the permit was based on the EPA's statements that expressed intent not to exercise § 404(c) power retrospectively. On multiple occasions, noted above, the EPA indicated its intention to exercise section 404(c) power only prior to a permit's issuance by the Army Corps. The Fifth Amendment's "takings clause" provides a second potential basis for the illegality of retrospectively vetoing section 404 permits. By revoking disposal sites post-issuance, the EPA deprives the business enterprise of the entire economic value of the land, and the business deserves, at the least, just compensation.

As stated in various cases since Chevron, in construing a statute, the court should consider the history and consistent purpose of the legislation and discover the policy of the legislature as disclosed by the course of the legislation and not the agency or third parties after its passage. Although preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefore, and order the permittee to stop those activities previously authorized by the suspended permit. Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it.

94. See 850 F. Supp. 2d at 137 (disagreeing with the EPA's assertion that recent data and analyses had revealed downstream water quality impacts that were not adequately addressed by the permit).
95. See, e.g., GREGORY KLAAS, CONTRACT LAW IN THE USA 63–87 (2010) (defining contract formation as offer, acceptance, consideration, and intent to create legal relations).
96. See 850 F. Supp. 2d at 136 (email from Mr. Hoffman to Teresa Spagna). See generally Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 196 (proposed Oct. 9, 1979) (to be codified at 40 C.F.R. pt. 231); Memorandum of Agreement Between the EPA and the Dep't of the Army, supra note 82.
97. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
98. But see Lost Tree Vill. Corp. v. United States, 707 F.3d 1286, 1290–92 (Fed. Cir. 2013) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)) (finding that the plaintiff's § 404 permit met the only exception to compensation for such categorical takings: "where the regulations prohibit a use that was not part of the landowner's title to being with; that is, a limitation that inhere in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership").
the Court of Appeal's decision in *Mingo Logan* at first seems to be inconsistent with how the EPA has historically portrayed its authority, the correct interpretation can be found in the legislative process. According to *Chevron*,100 the textual meaning of the statute along with the legislative history is the deciding factor, and based on those two canons, there is simply not enough information to deem the EPA's interpretation of the statute unreasonable after providing due deference.101

The next Section of this Comment delves into the risk, uncertainty, and negative outcomes that accompany affirming the EPA's interpretation of its section 404(c) power, but based on the above analysis, the U.S. Court of Appeals appears to have correctly analyzed the EPA's authority strictly under *Chevron*. The court failed, however, by not addressing that the EPA's interpretation of its power, as explained in the next Section, will lead to an absurd result that businesses and investors will inevitably find disconcerting. When this is the case, the courts have a duty to consider common sense and public welfare.102

C. The D.C. Circuit's Interpretation Nonetheless will have a Deleterious Effect on Businesses Across the United States because of the Vast Uncertainty and Risk they now Face

At the micro level, the EPA's decision to withdraw two of Mingo Logan Coal's disposal sites and their tributaries from its permit was detrimental.103

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101. See id. at 844 (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .”).

102. See, e.g., Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) (Powell, J., dissenting) (“In my view § 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the 'absurd result' — in the words of the District Court — of this case. If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.”).

103. See *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 137 (D.D.C. 2012), rev'd, 714 F.3d 608, 614 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) (acknowledging that the EPA seized "eighty-eight percent of the total discharge area authorized by the permit").
If Mingo Logan Coal was able to predict the outcome of this case, it could have applied for after-the-fact permits at other locations,\(^\text{104}\) cut back on human capital or other expenses, or simply begun to minimize its production numbers. The unpredictability of the EPA’s move left Mingo Logan Coal with its metaphorical hands tied tightly behind its back. The Spruce No. 1 Mine was one of the Appalachian Mountains’ largest surface mining operations ever.\(^\text{105}\) Recognizing that the EPA’s decision would force Mingo Logan Coal and other companies to cut production and lay off employees at an incredibly damaging rate, leading to financial difficulty, members of Congress immediately responded with legislation that would prevent the EPA from vetoing section 404 permits after the permits have been issued by the Army Corps.\(^\text{106}\)

At a macro level, thousands of companies in the U.S., including those companies’ investors, might now find themselves in Mingo Logan Coal’s position. Not only do they now face an unthinkable amount of complication to every investment and business decision, but also, they face one of an unquantifiable type.\(^\text{107}\)

In *Risk, Uncertainty, and Profit*, economist Frank Knight thoroughly discusses the difference between risk and uncertainty.\(^\text{108}\) Put simply, risk involves outcomes delimited by a known probability distribution, while uncertainty means that the probability distribution of outcomes is unknown.\(^\text{109}\) When Alan Greenspan chaired the Federal Reserve Board, he

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104. *See, e.g.*, Russo Dev. Corp. v. Reilly, No. 87-3916, 1990 U.S. Dist. LEXIS 15859, *6–7* (D.N.J. Mar. 16, 1990) (citing 33 U.S.C. § 1344(p) (2012)) (recognizing that once a party obtains an after-the-fact permit from the Army Corps of Engineers, the EPA cannot commence an enforcement action and stating that “[i]f EPA cannot proceed under its authority under Section 404(c), then [it] is absolutely precluded from seeking restoration or mitigation to halt or offset the adverse effects of the discharge”).


107. *See* Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901, 916–17 (2011) (noting that even though the precautionary principle attempts to provide for a safety net against uncertainty, “government intervention creates risks of its own, [which] are also uncertain and present unforeseen risks to health and environment,” thereby turning the precautionary principle against itself).

108. *See generally* FRANK KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* 367 (1921) (explaining that while risk presents itself when a company faces possibilities whose odds are discernible, uncertainty, on the other hand, deals with possibilities whose odds are unknown, or where “the possible outcomes themselves are a matter of speculation”).

stated that reducing uncertainty, deemed Knightian uncertainty, was one of his primary objectives with regard to the overall marketplace. Knightian uncertainty, because of its unpredictability, can cause both high inflation rates and stock market crashes, and too much can have profound effects on economic development, as it stifles investment and generates unnecessary losses. Professor Dru Stevenson noted that uncertainty is a trait businesses attempt to avoid, and the possible consequences of uncertainty are often negative. Knight, Greenspan, and Stevenson would likely agree that allowing the EPA to retrospectively veto section 404 site specifications introduces a dangerous amount of uncertainty into the marketplace that will cause investors to take their resources out of industries that are regulated by section 404 of the CWA.

Businesses today have enough uncertainty and risk to consider; an unpredictable regulatory framework is an unnecessary, additional burden. Industries must consider where they stand in the midst of a globalized market that relies heavily on cutting-edge technology and political divisions. At a time when businesses need to be able to rely on

type of uncertainty one is dealing with in real time, and it may be best to think of a continuum ranging from well-defined risks to the truly unknown.

10. See id. at 37–40 ("In pursuing a risk-management approach to policy, we must confront the fact that only a limited number of risks can be quantified with any confidence. And even these risks are generally quantifiable only if we accept the assumption that the future will, at least in some important respects, resemble the past. Policy-makers often have to act, or choose not to act, even though we may not fully understand the full range of possible outcomes, let alone each possible outcome's likelihood. As a result, risk management often involves significant judgment as we evaluate the risks of different events and the probability that our actions will alter those risks.").

11. See id. at 38 ("When confronted with uncertainty, especially Knightian uncertainty, human beings invariably attempt to disengage from medium- to long-term commitments in favor of safety and liquidity.").

12. See Dru Stevenson, Special Solicitude for State Standing: Massachusetts v. EPA, 112 PENN ST. L. REV. 1, 66 (2007) ("People are intuitively averse to uncertainty, even more than they are averse to risk. They will steer their resources away from it when possible. The possibility of sudden, radical moves by any governmental branch introduces genuine uncertainty into many facets of society.").

13. See generally Knight, supra note 108; Greenspan, supra note 109; Stevenson, supra note 112.


government and its agencies to provide them with a sense of stability and foundation upon which to build, they are left in the dark, adding regulatory distrust to their list of uncertainties when making all business-related decisions.\textsuperscript{116}

Professor Rebecca Bratspies recognized this problem and offered a solution; one that, although readily applied, may not be able to fix the unpredictability left by the U.S. Court of Appeals' decision in \textit{Mingo Logan}.\textsuperscript{117} She describes the risks and uncertainties that already exist in today's business world, and she explains how the growing distrust between business and government unproductively taints an otherwise stable relationship.\textsuperscript{118} Regulatory uncertainty both erodes the public's trust and alienates citizens from decision-making institutions, like the EPA.\textsuperscript{119} To regain social resiliency, institutions must make decisions amidst uncertainty to create a more inclusive and transparent regulatory scheme. Without definitive decision-making, however, businesses and citizens begin to distrust those institutions that are meant to help them. This distrust is detrimental to regulatory value in the present and in the future.\textsuperscript{120}

For industries and agencies where an amicable relationship is possible, Bratspies offers a simple yet underrated solution: trust.\textsuperscript{121} She explains that trust is a crucial resource for responding to uncertainty and lays out the ideal version of that trust narrative in a mutual understanding between the Food and Drug Administration ("FDA") and those who take medicines that could be deadly but are monitored closely by the FDA.\textsuperscript{122} As it applies to road. The dysfunction in Washington has created a fog, and when driving in the fog, you have to slow down.").

\textsuperscript{116.} See \textit{id.} (providing examples of both small and large businesses that are strongly affected by decisions in Washington); \textit{cf.} \\textit{Engau \\& Hoffman, supra} note 114, at 43 ("[I]ncreasing international regulation for trade, social, and natural environmental purposes exposes firms to continuous uncertainty, so that, more than ever, coping with this uncertainty constituted a fundamental challenge for them.").


\textsuperscript{118.} See \textit{id.} at 577 (noting that "[n]ot only are particular regulatory decisions woven together from strands of uncertainty, but so, too, are the scope and direction of the regulatory endeavor itself").

\textsuperscript{119.} See \textit{id.}

\textsuperscript{120.} See \textit{id.} ("Loss of trust undermines regulatory effectiveness and diminishes society's overall capacity to persevere and even thrive in the face of multiple, unpredictable risks.").

\textsuperscript{121.} See \textit{id.} at 584 ("A reservoir of social trust helps societies remain stable even as administrators make decisions against this overwhelming net of uncertainty.").

\textsuperscript{122.} See \textit{id.} ("The [FDA]'s perceived rigor creates a mantle of trustworthiness that can vouch for the conduct of third parties, thereby facilitating desirable social outcomes. Social trust can thus stabilize ambiguous situations by increasing society's ability to tolerate uncertainty.").
CWA, section 404, Bratspies’ solution of regulatory trust is invoked every time the EPA makes a decision not to interfere in a business’ permit in spite of some conditions of uncertainty as to how a project may ultimately affect the environment, both natural and wildlife. She would argue that a loss of trust between the EPA and business entities that must apply for a section 404 permit undermines the regulatory effectiveness of the CWA as well as these businesses’ ability to succeed in the face of other unpredictable risks inherent in carrying out business operations. In a world full of perfectly rational actors, Bratspies’ solution may carry more weight than it does in reality.

Contrary to Bratspies’ solution, Mingo Logan Coal cannot be blamed for any distrust toward the EPA from this point forward. Other companies and businesses applying for a section 404 permit will not trust the EPA either due to its unprecedented move in retrospectively revoking Mingo Logan Coal’s permit. As long as the EPA has this unlimited veto power, not only is regulatory trust unviable as a possible solution, but also, a growing distrust will further smear an already rocky relationship between the federal agency and industries across the country.

Ironically, the EPA has acknowledged and addressed the role that uncertainty and risk play in creating and reforming its own public policy. The EPA, however, enjoys the advantage of data analysis not available for those business entities that its veto power can potentially destroy. Only the EPA itself can provide any data or improved information to potentially help businesses predict if and when the EPA will use its veto power. Its decision to invoke section 404(c) is not a scientific equation businesses can readily crack; the uncertainty involved can only be resolved by the EPA.

123. See id. at 575.
124. See id.
126. See Bratspies, supra note 117, at 577 (indicating that a loss of trust diminishes businesses’ ability to persevere).
127. See generally NATIONAL RESEARCH COUNCIL, COMMITTEE ON IMPROVING RISK ANALYSIS APPROACH USED BY THE U.S. EPA (2009), available at http://www.epa.gov/region9/science/seminars/2012/advancing-risk-assessment.pdf (listing a number of substantial challenges it faces similar to industries affected by § 404, “including long delays in completing complex risk assessments, some of which take decades to complete; lack of data, which leads to important uncertainty in risk assessments; and the need for risk assessment of many unevaluated chemicals in the marketplace and emerging agents”).
128. See id. (considering uncertainty and variability throughout the risk-assessment process but dismissing their irreparable effect because “uncertainty can be reduced by the use of more or better data . . . [and v]ariability cannot be reduced, but it can be better characterized with improved information”).
absent the intervention of Congress or future court decisions.

Other authors have also written about the negative consequences of uncertainty, particularly within the realm of government regulation.129 Under the auspices of contract law, Professor Alex Seita points out that the bargain theory provides for a mutually exclusive exchange between two parties.130 Once a party omits certain calculated risks, he finds an estimate of his expected gain from the bargain, but it will be "very much in error when unfavorable outcomes actually occur."131 If one party breaches the contract, the law will enforce the contract by awarding a remedy despite unanticipated circumstances.132 Even if a CWA section 404 permit is considered a contract between a company and the federal government via the Army Corps and the EPA, the agreement lacks a similar remedy to provide insurance for businesses in the case of unanticipated circumstances.133

Businesses and investors are left with no safety net if they find themselves in a Mingo Logan situation. When government or an affiliated agency suddenly changes a policy, as the EPA did by exerting its power in an unprecedented way, it creates a new uncertainty businesses never encountered.134 The EPA and the U.S. Court of Appeals have placed an undue burden on businesses of not only hedging uncertainty from the market, but also, the uncertainty that accompanies the EPA's capricious authority.

The analysis provided above regarding uncertainty, risk, and its

129. See Farber, supra note 107, at 909 (describing a policy of ignoring all nonquantifiable harms as "literally a recipe for disaster"); see also Alex Y. Seita, Uncertainty and Contract Law, 46 U. Pitt. L. Rev. 75, 90–91 (1984) (noting that in contract law the more relevant information a party acquires before making a contract, the better able he is to protect himself against or to prevent dangerous outcomes); cf. Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 527 (1986) (focusing on two consequences of changes in government policy, including the imposition of risk and modification of incentives to engage in affected activities).

130. See Seita, supra note 129, at 84–85 ("The bargain theory of contracts assumes that in a voluntary exchange, each party to a contract will seek to maximize his own welfare, for no rational individual will ever voluntarily place himself into a position in which he is worse off.").

131. See id. at 87 (explaining that unfavorable outcomes transform a contract that once promised an attractive profit into something that burdens the profit with a loss).

132. See id. (negating the losses felt by the party suffering unanticipated circumstances).


134. See Kaplow, supra note 129, at 532 (observing that businesses are unfamiliar with having to juggle both market-created risks and government-created risks and noting that "[m]ost risks in society are not attributable to uncertainty concerning future government action").
detrimental effects to a business’ investments will be recognized and feared by businesses everywhere now that the U.S. Court of Appeals for the District of Columbia’s decision stands.\(^{135}\) In a Brief of Amici Curiae in support of Mingo Logan Coal, business groups ranging from the Chamber of Commerce and American Farm Bureau Federation to the Associated General Contractors of America and the National Mining Association joined together to persuade the Court of Appeals to rule against the EPA.\(^{136}\) The brief analyzed the practical consequences of an adverse ruling, including its effects on activities as diverse as the entities that signed onto the brief, ranging from construction and transportation to agriculture and manufacturing; these industries invest hundreds of billions of dollars in the U.S. economy.\(^{137}\) It declared that the EPA’s action injected a new and untenable level of uncertainty into thousands of project proponents’ investment planning processes.\(^{138}\) Regarding the investment risk, the brief provides hard-number examples supporting its claims.\(^{139}\) Ultimately, it concluded that an interpretation of section 404(c) that fundamentally contradicts the concept of permit finality dramatically changes the way project proponents view their investments and should not be considered reasonable under step two of the Supreme Court’s *Chevron* framework.\(^{140}\)


\(^{136}\) See Brief for The Chamber of Commerce of the U.S. et al. as Amici Curiae Supporting Appellee, Mingo Logan Coal Co. v. U.S. EPA, 714 F.3d 608 (2013) (No. 12-5150), 2012 WL 4960379, *2 (“Decreased investment in Section 404 permit-dependent projects will not only directly harm the vast array of industries whose operations require Section 404 permits, but will also result in less growth in numerous other sectors of the economy, since projects that require a Section 404 permit frequently provide substantial downstream economic benefits.”).

\(^{137}\) See *id.* at *1, 3 (using as an example the American Road and Transportation Builders Association’s (ARTBA) statement that “[i]f the Clean Water Act processes ARTBA members have come to rely upon are disturbed by EPA’s unprecedented modification of a previously issued Section 404 permit, it will be difficult, if not impossible, for ARTBA members to rely upon Clean Water Act permits to both build transportation improvements and accomplish environmental objectives through mitigation”).

\(^{138}\) *Id.* at *1.

\(^{139}\) See *id.* at *17 (“[I]f a project proponent faces a one percent chance that EPA would act under Section 404(c) after the permit issues, it would decrease the expected cost-benefit ratio for the project by 17.5%. A two percent chance that EPA would take adverse action – not an unrealistic assumption for a large or controversial project – would decrease the project’s cost-benefit ratio by 30%.”).

\(^{140}\) See *id.* at *22 (“Every project proponent that is contemplating an investment contingent on a Section 404 permit would have to recalculate the costs and benefits of investing, and many would undoubtedly decide that the inability to ever fully rely on a Section 404 permit tips the scales against investing.”).
III. COURTS CAN PROVIDE A TEMPORARY SOLUTION, BUT ONLY CONGRESS CAN ELIMINATE UNCERTAINTY BY REMOVING AMBIGUITY FROM THE STATUTE’S PROVISION

One of the most difficult aspects of enforcing and abiding by legislation is its lack of clarity and the broad application of the language. The CWA, for example, applies to many types of industries that engage in different practices, so it becomes extremely difficult to take the language of one statute and apply it across the board to every entity. A statute like section 404 that contains some ambiguity becomes even more complicated when it is applied to many businesses, enforced by agencies with changing leadership, and interpreted by courts with ideologies that shift as often as the membership.

Beyond the clarity and broad application, it is difficult to interpret and apply language written in the 1970s to such a globalized, twenty-first century world. In terms of research alone, it becomes problematic to decipher Congress’ intent when documents, transcripts, and reports are not readily available online or printed and available in law libraries. When section 404 was originally enacted in 1972, it affected how businesses moved forward with projects, but in no way did it affect such an array of industries to the degree that it does today. The businesses that must apply for a section 404 permit, those that now must worry about the EPA’s volatile veto power, pump hundreds of billions of dollars into the U.S. economy, and that money and those jobs hinge on a single word written somewhat haphazardly over forty years ago.

It is time for Congress, the body who created the issue in the first place, to fix the problem. It constantly amends sections of the CWA, the most recent of which is still pending in our slow and politically fractured legislative branch. The time it would take to propose an amendment and push it through Congress will be immensely rewarding to those businesses who are simply trying to do what they do best: employ workers, stimulate the market-driven economy, and advance society.

This Comment recommends that Congress amend section 404(c) of the CWA to remove any ambiguous language relating to the EPA’s power to deny or restrict certain disposal site specifications. By amending the

141. See id. at *1 (listing not only the types of activities and industries involved but also the amount of investments they facilitate).

142. See 33 U.S.C. § 1344(c) (2012) (“Denial or restriction of use of defined areas as disposal sites. The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds
statute to remedy the unpredictable interpretation of the EPA's power, this Comment recommends amending section 404(c) so that the affected and pertinent language reads as follows:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, if he determines, after notice and opportunity for public hearings, [but before the issuance of a permit by the Secretary in accordance with Section 404(b)], that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary.\[43\]

As evidenced by the proposed language, the EPA's approval of the application should be a condition precedent to the Army Corps' approval rather than an arbitrary, and possibly infinite, veto power. The statute originally created a working relationship between the Army Corps and the EPA, and this proposal may heighten tension between the two agencies while placing yet another check on the EPA's authority.

The recent U.S. Court of Appeals decision,\[44\] a case of first impression, may not have purported the EPA's interpretation of section 404(c) as unconstitutional, but it certainly sets an uncomfortable precedent for business industries all over the U.S. If another case similar to Mingo Logan reaches the federal system before the legislative branch acts, this Comment recommends that courts rule similar to the U.S. District Court for the District of Columbia in Mingo Logan with a heavy emphasis and discussion on policy.\[45\] The policy behind a decision like this involves eliminating the complete uncertainty businesses will face if the EPA eternally carries veto power over any section 404 permit. It involves promoting business activity and economic stimulation while diminishing the disillusionment experienced by companies like Mingo Logan Coal Co.

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143. See id. (emphasis added) (proposed text in brackets).
144. See Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 614 (D.C. Cir. 2013), cert. denied 134 S. Ct. 1540 (2014) (holding that the text of § 404(c) clearly and unambiguously gave the EPA the power to act post-permit).
145. See Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133, 134 (D.D.C. 2012), rev'd, 714 F.3d 608, 614 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014) (holding that the CWA does not give EPA the power to render a permit invalid once it has been issued by the Army Corps).
It is about ensuring that the American Dream cannot be held hostage by federal agencies such as the EPA. While the analysis used by the district court may not hold constitutional muster, especially given the *Chevron* analysis, courts should use the abovementioned obvious public policy and equity analyses available to further support a conclusion that the EPA should not have this type of power and that section 404 did not intend to give it such overarching influence.\(^1\)

Businesses who are egregiously affected by an EPA action can find remedy in a civil case against the EPA, one that the Supreme Court has recently found not barred by the CWA.\(^2\) Although the plaintiffs in *Sackett v. EPA* were harmed by the EPA’s issuance of a CWA section 309 administrative compliance, they used the courts for a remedy similar to what businesses harmed by a section 404(c) issuance could seek.\(^3\) If a court allows a similar civil remedy with respect to section 404, then businesses harmed by the EPA and its section 404(c) power could file a new wave of cases.

Courts cannot be relied upon forever to provide remedies in the potentially infinite number of lawsuits arising from section 404. It is up to Congress to ultimately alleviate ambiguity and amend the statute to comport with the original intent of section 404(c). It must ensure the economic vitality of business industries while keeping a keen eye on possible detrimental effects to the environment prior to the issuance of §404 permits.

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146. Business industries recently found themselves on the losing side of a legal battle with the EPA once again in National Mining Ass’n v. McCarthy, Nos. 12-5310, 12-5311, 2014 WL 3377245, at *1 (D.C. Cir. July 11, 2014). This case analyzed the 2009 Enhanced Coordination Process adopted by the Army Corps and the EPA to facilitate their consideration of certain CWA permits, including those regulated by section 404. The District Court for the District of Columbia granted summary judgment for the plaintiffs, the States of West Virginia and Kentucky along with coal mining companies and trade associations, that challenged this procedure and the EPA’s Final Guidance. 880 F. Supp. 2d 119, 141–42 (D.D.C. 2012). The same federal court of appeals that ruled in favor of the EPA in Mingo Logan, however, reversed and remanded the decision of the district court in *National Mining Ass’n* as well, holding that the CWA did not prohibit the interagency plan for enhanced consultation and coordination with respect to applications and permits and that the EPA’s Final Guidance was not legislative rule subject to judicial review. 2014 WL 3377245, at *8.

147. *See Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012)* (concluding that the compliance order is final agency action for which there is no adequate remedy other than APA review and that the CWA does not preclude that review).

148. *See id.* at 1372 (agreeing with the plaintiffs that the order was “‘arbitrary [and] capricious’ under the Administrative Procedure Act . . . and that it deprived them of ‘life, liberty, or property, without due process of law,’ in violation of the Fifth Amendment.”).
CONCLUSION

For decades, the CWA section 404 was just another red tape permit businesses needed to obtain before beginning projects that involved the disposal of dredged or fill materials in any U.S. waters or wetlands. The EPA never used its power governed by section 404(c) to revoke a permit that had already been issued by the Army Corps until recently. This retrospective permit revocation had deleterious effects on one particular company, but the frightening and unpredictable potential effects will be felt by businesses across the U.S.

Section 404(c) sets forth the ability of the EPA to deny certain disposal sites within a business’ application. It tasks the EPA Administrator with notifying and working alongside the Secretary of the Army, acting through the Chief of Engineers, before that authority is used. If Congress could have predicted Mingo Logan on a federal court’s docket, then it may have decided differently when constructing the language found within the statute. The U.S. Court of Appeals’ recent unprecedented ruling will have a destructive effect on certain business industries that pump hundreds of billions of dollars into the United States economy.

The courts and, ultimately, Congress should provide additional guidance as to how and when the EPA can invoke its section 404(c) veto power. The ability of Congress to slightly amend the language as recommended earlier in this Comment could make all the difference. Its action, which is needed immediately, would be a simple solution to a complex and dangerous problem, a problem with a potential for havoc that has yet to be fully realized.