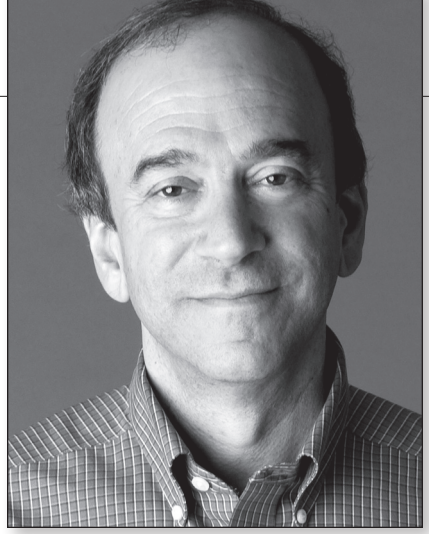

By Richard Lazarus

"Poof!"

That is the word that the federal district court invoked in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* in late March, disparaging the "magical thinking" behind EPA's argument that the Clean Water Act authorizes EPA to make disappear an otherwise valid Section 404 permit previously issued by the U.S. Army Corps of Engineers.

The court's ruling was stunning for two reasons. First, EPA's general authority to veto Army Corps Section 404 permits has never been disputed. The only issue in *Mingo Logan* was whether EPA's authority extended to permits previously issued by the corps. And, Section 404's language would seem, at the very least, to support the reasonableness of EPA's position.

Section 404(a) authorizes the secretary of the army to permit "the discharge of dredged or fill material into the navigable waters at specified disposal sites." Section 404(c) expressly extends EPA's authority "to prohibit the specification . . . of any defined area as a disposal site" to "includ[e] the *withdrawal* of specification." In addition, Section 404(c) provides that the EPA administrator can make such a determination "*whenever* he determines, after notice and opportunity for a public hearing, that the discharge of such materials into such area will have an unacceptable adverse [environmental] effect." The language's plain meaning therefore seems to contemplate a veto of existing permits and there is no prescribed time frame in which the administrator must act.

Judge Amy Berman Jackson's ruling was also stunning because of the historic nature of the EPA veto that the court overturned. The agency had vetoed a corps permit that authorized one of the largest mountaintop removal mining operations in Appalachia, disposing of more than 100 million cubic yards of spoil material and permanently burying more than seven linear miles of streams. The veto occurred only after years of litigation by environmentalists against the corps' practice of routinely granting Section 404 permits for mountaintop mining, EPA's repeated warnings that the corps was not adequately considering environmental effects, and the corps' denial of EPA's formal request that it revoke or modify the permit.

The district court's reasoning is also strained. The court stumbles in applying both of the two steps announced in *Chevron v. NRDC* for judicial review of an agency construction of statutory language. And the court's claim that EPA's logic "does not exactly leap off the page" might have been better directed at itself.

Did the district judge make mistakes in applying* Chevron's *two steps to an EPA action?

On *Chevron* Step One, which inquires whether there is a controlling plain meaning of the statute, the judge maintains two wholly contradictory positions. The first is that the plain meaning of the statutory language supports "deem[ing] EPA's action to be unlawful without venturing beyond the first step of analysis called for by *Chevron*." The second is that "it is undeniable that the provision is awkwardly written and extremely unclear." It is very hard to grasp how a provision that the court characterizes as "undeniabl[y]" "extremely unclear" nonetheless has plain meaning. And nothing in Subsections 404(p) or (q), cited by the court, closes that gap.

Nor is the judge any more convincing in applying *Chevron* Step Two. Here, she makes two mistakes. The first is finding that EPA is not entitled to *Chevron* deference, but at most only "some deference," because EPA shares statutory responsibility with the corps in administering Section 404. In 1979, however, the attorney general explained in a formal opinion why EPA, not the corps, has "the final authority to construe" Section 404: "It is the administrator who has general administrative responsibility under the act and who has general authority to prescribe regulations." And while he published that opinion in resolving a dispute between EPA and the corps over the interpretation of Section 404(f), not 404(c), the reasoning applies with even greater force to 404(c), which unlike 404(f), confers express authority on the administrator.

The judge's second mistake is equating the inquiry whether EPA's interpretation of Section 404(c) is reasonable with the question whether it is reasonable policy for EPA to veto a permit after the fact. Relying on amicus briefs, the court contended that EPA's possession of such veto authority was unreasonable because the market uncertainty it created would discourage business investment in activities permitted by the corps. The issue under *Chevron,* however, is not whether the court thinks a particular statutory interpretation is reasonable in terms of the judge's (or industry's) view of optimal social policy or, alternatively, is arbitrary and capricious as applied to particular facts. The court's role is limited to discerning whether the agency's construction is a reasonable interpretation of the words Congress used. And EPA's interpretation here of the legal significance of words like "withdrawal' and "whenever" should have easily satisfied that test.

The district court's judgment, on appeal, may well be short-lived. Poof!

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