Nos. 02-1736(L), 02-1737

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENTUCKIANS FOR THE COMMONWEALTH, INC.,

Plaintiff-Appellee,

v.

COLONEL JOHN RIVENBURGH, Colonel, District Engineer, etc., et al.,

Federal Defendants-Appellants,

and

POCAHONTAS DEVELOPMENT CORPORATION, et al.,

Intervenor Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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Preliminary Statement

For the second time, this Court must review a decision from the same district court that will strangle coal mining in Appalachia by enjoining the construction of valley fills. The first time, in *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied,* ___ U.S. ___, 122 S. Ct. 920 (2002), the injunction came under the guise of the Surface Mining Control and Reclamation Act (SMCRA). This Court reversed that judgment because it violated a fundamental constitutional principle of federal-state relations embodied in the 11th Amendment.

This time, the injunction comes under the guise of the Clean Water Act and violates another well-established principle—that federal courts must defer to the reasonable interpretation of statutes by the executive branch, as acknowledged in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In particular, the district court held in its latest decision that the U.S. Army Corps of Engineers (Corps) lacks jurisdiction under the Clean Water Act to issue permits for valley fills. Yet the Clean Water Act allocates jurisdiction over "fill material" to the Corps, the Corps has historically regulated valley fills pursuant to this statutory authorization, and the Environmental Protection Agency (EPA) and the Corps have jointly promulgated formal regulations that confirm this allocation of jurisdiction to the Corps.

Overriding all of this, the district court constructed its own interpretation of the Clean Water Act—cobbled together from snippets of misconstrued legislative history and a revisionist recitation of the agencies' regulatory history—and imposed that interpretation on the Corps. The district court's refusal to defer to EPA's and the Corps' informed decisionmaking, and its insistence on substituting its own reading of the statute, run afoul of the proper role of courts in our system of government.

And what makes the district court's action all the more distressing is that this Court already held in *West Virginia Coal Ass'n v. Reilly*, 932 F.2d 964 (table), 1991 WL 75217 (4th Cir. May 13, 1991) (unpublished), that given the absence of any statutory prohibition against such an agreement, courts must defer to how EPA and the Corps decide to allocate Clean Water Act permitting authority between them. The district court's decision contravened this precedent.

Equally startling, the district court previously found in *Bragg* that the Corps' exercise of jurisdiction over valley fills is reasonable and faithful to the Clean Water Act. The district court made this finding in approving a consent decree that authorized the Corps to continue to issue permits for valley fills. *Bragg v. Robertson*, 54 F. Supp. 2d 653 (S.D. W.Va. 1999). The district court has now done an about-face and inexplicably held that placing Clean Water Act permitting authority in the Corps is unreasonable and *ultra vires*.

Simply put, the district court has swept aside more than twenty years of agency interpretation. It has ignored controlling law. And it has jeopardized the economies of Kentucky, West Virginia and other neighboring states that depend heavily on coal mining. The district court's injunction is erroneous and should be reversed.

Jurisdictional Statement

Plaintiff, Kentuckians For The Commonwealth (KFTC), sued officials of the Corps in the United States District Court for the Southern District of West Virginia. KFTC asserted counts under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*., and other federal statutes. KFTC asserted jurisdiction in the district court under 28 U.S.C. §§ 1331, 1361, 1551, 2201 and 2202. JA 17.

Two orders of the district court, the Honorable Charles H. Haden II, are being appealed. The first order, entered on May 8, 2002, and reported at 204 F. Supp. 2d 927, issued a permanent injunction against the Corps. JA 41-86. The second, entered on June 17, 2002, and reported at 206 F. Supp. 2d 782, denied motions to dissolve or stay the May 8 injunction. It also denied in part, and granted in part, motions to modify the May 8 injunction. JA 87-139.

Intervenor Defendants filed a timely notice of appeal on July 3, 2002. JA 144-47. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

Statement Of Issues

1. Did the district court err by refusing to defer to EPA's and the Corps' reasonable interpretation of "fill material" under the Clean Water Act, and substituting instead its own, incorrect reading of that term?

2. Did the district court abuse its discretion by entering an overly broad injunction that enjoined conduct that was not the subject of this lawsuit?

Statement Of The Case

KFTC is an environmental activist group with a self-appointed mission to advance "social justice" and the "quality of life for all Kentuckians." Complaint ¶ 7 (JA 18). On August 21, 2001, KFTC sued the Corps in the Huntington Division of the United States District Court for the Southern District of West Virginia.

KFTC contended in the first count of its complaint that the Corps lacked authority under its regulations to issue a permit under § 404(a) of the Clean Water Act to Martin County Coal Corporation (MCCC) to construct valley fills at a mining operation in Kentucky. According to KFTC, the proposed valley fills did not qualify as "fill material" within the meaning of the Corps' regulations at the time. Complaint ¶¶ 1, 41-42, 56-60 (JA 16, 26 & 30). KFTC sought alternative relief regarding MCCC's permit in its other counts in the event the Corps had jurisdiction to issue that permit. JA 30-32.

Although KFTC sought to invalidate MCCC's permit (which was later transferred to Beech Fork Processing, Inc. (Beech Fork)), KFTC did not name MCCC or Beech Fork as a defendant. Nor did KFTC file suit in Kentucky, even though the affected mine is in Kentucky, the challenged valley fills were to be built there, and KFTC's mission is focused on Kentucky.

KFTC's strategic reason for filing suit in West Virginia was revealed in the civil action cover sheet that KFTC filed with its complaint. KFTC stated in that document that its lawsuit is related to *Bragg*, and the day after filing suit, KFTC's counsel, who was also plaintiffs' counsel in *Bragg*, "relayed to the Clerk's Office" "per Judge Haden's direction" instructions to transfer the case from the Huntington Division to the Charleston Division (where Judge Haden sits) "due to a related case [*Bragg*], in that Division." *See* Intervenor Defendants' Docketing Statement, Exhibit A.

Following the transfer of the case and its assignment to Judge Haden, the Corps moved to transfer venue to the Eastern District of Kentucky. *See* JA 5 ¶ 17. Additionally, the Kentucky Coal Association, AEI Resources, Inc. (now Horizon NR, LLC) and Pocahontas Development Company (collectively, Intervenor Defendants) moved to intervene to protect their (and in the case of the Kentucky Coal Association, its members') property and mining rights. JA 5 ¶¶ 7 & 15;

6 ¶ 19. The district court denied the motion to transfer venue, JA 36-40 (reported at 204 F.R.D. 301), and approved the interventions. JA 6 ¶ 27; 40.

In February 2002, KFTC moved for summary judgment and a permanent injunction on count one. In making this motion, KFTC relied exclusively on the Corps' now superseded regulatory definition of "fill material" at 33 C.F.R. § 323.2(e), which KFTC claimed defined "fill material" in a manner that removed valley fills from the Corps' reach. KFTC did not rely in its motion on the language or legislative history of the Clean Water Act, or otherwise claim that the Corps could not properly define "fill material" in a way that would embrace valley fills.

The Corps cross-moved for summary judgment on the same count. The Corps contended, among other things, (i) that the district court should defer to EPA's and the Corps' interpretation that valley fills are "fill material" within the meaning of § 404(a) of the Clean Water Act and thus under the Corps' jurisdiction; and (ii) that the district court previously had affirmed the Corps' authority over valley fills by approving a consent decree in *Bragg* that ratified the Corps' ongoing jurisdiction to issue § 404(a) permits for valley fills. JA 468. The Corps also informed the district court that it was in the process of finalizing rules, amending the regulation on which KFTC relied, that would expressly confirm that valley fills are "fill material" within the Corps' jurisdiction. JA 311-12, 471.

Intervenor Defendants likewise cross-moved for summary judgment. *See* JA 9 ¶¶ 51 & 52. Intervenor Defendants also moved to dismiss because KFTC had failed to name an indispensable party, namely Beech Fork, which held the permit that KFTC sought to invalidate. *See* JA 7 ¶¶ 35, 36 & 38.

By a status report filed on May 6, 2002, the Corps advised the district court that EPA and the Corps had signed the new final rules defining "fill material," to be published in the Federal Register and to become effective June 10, 2002. *See* JA 10 ¶ 61. As the Corps informed the district court, these regulations define "fill material" as any material that has the effect of displacing a waterbody, regardless of the discharger's purpose. A valley fill obviously has that effect, and the new regulations expressly identify as an example of "fill material" the excess overburden that is generated by surface mining and that is used to construct valley fills. 67 Fed. Reg. 31129, 31133 (May 9, 2002) (final text of new joint regulations) (JA 156 & 168).

Just two days later, on May 8, 2002, the district court granted KFTC's summary judgment motion and denied the cross-motions. In doing so, the district court went much further in reasoning and effect than KFTC had advocated. Whereas count one sought only to invalidate Beech Fork's permit, the district court declared illegal the Corps' issuance of § 404(a) permits for valley fills over the past two decades. JA 41-42, 83-84. The district court also enjoined the Corps

"from issuing *any* further § 404 permits that have no primary purpose or use but the disposal of waste." JA 84.[1] This specifically included a prohibition on the issuance of *any* "mountaintop removal overburden valley fill permits solely for waste disposal." *Id.*

The reference to mountaintop mining fill permits was curious, because the Beech Fork site is a contour mining operation, not a mountaintop mining operation. JA 818 ¶ 3.[2] And although KFTC had brought the lawsuit against Corps officials in the Huntington District only, the district court did not limit the geographic scope of its injunction. JA 83-84.

There was more. The district court went far beyond KFTC's contention that the Corps' approval of the Beech Fork permit violated the Corps' regulations, declaring instead that the Clean Water Act itself deprived the Corps of permitting authority over valley fills and that the Act made unlawful any attempt by EPA and the Corps to allocate such jurisdiction to the Corps. JA 41-42. The district court also effectively enjoined enforcement of EPA's and the Corps' new regulations, although KFTC's lawsuit had sought no relief in that respect. In fact, the district

[1] Emphasis added throughout unless otherwise noted.

[2] Contour mining follows a coal seam around the contour of a mountain, creating a ring around the outside of the mountain where coal has been mined, much like road construction along a hillside. Mountaintop mining involves the removal of the entire upper section of a mountain to access coal and typically involves the removal of multiple seams of coal.

court declared that no rulemaking could *ever* provide the Corps with authority over valley fills. JA 81.

The district court justified these broad pronouncements by reading into § 404(a) a proviso that, as the district court variously and inconsistently described it, limits "fill material" to "dredged spoil," JA 45, "material deposited for some beneficial primary purpose," *id.*, or material with a "primary constructive purpose." JA 46. In its actual decree, the district court provided yet another formulation, enjoining the issuance of § 404(a) permits "that have no primary purpose or use but the disposal of waste." JA 84.

The district court also deprecated the agencies' new regulations, intoning that they were the product of "immense political and economic pressures," JA 80, and that the regulations were indefensible because in the district court's mind they were "designed simply for the benefit of the mining industry and its employees." JA 83.

The district court did all this without prior notice to the parties and without the benefit of reviewing the administrative record of the regulations that it effectively invalidated. The district court also identified no irregularity in the rulemaking process. Nor did the district court explain why it is improper (or unusual) for regulations to reflect a choice between competing, and even intense, political interests.

Ironically, the district court did not award KFTC any relief in the May 8 order with respect to the Beech Fork permit, the only permit for which KFTC sought relief. The district court also made no ruling on the motion to dismiss because of KFTC's failure to join Beech Fork.

The Corps and Intervenor Defendants subsequently moved to stay the district court's injunction and to modify and clarify its scope. *See* JA 10 ¶¶ 63 & 64; 11 ¶¶ 67-68. KFTC moved for specific injunctive relief with respect to Beech Fork. *See* JA 11 ¶ 69.

By order of June 17, 2002, the district court declined to stay its injunction. The district court also stated that its injunction extended beyond permits for valley fills, but refused to say specifically whether its injunction extended to other common and necessary mining activities such as refuse impoundments and the construction of sediment ponds. JA 87. The district court also refused to give any guidance to the Corps and the regulated community how to determine whether a proposed fill satisfies the district court's conception of "fill material." JA 50-51.

The district court did decree in the June 17 order that its injunction was prospective only and pertained only to the Corps' Huntington District. That was not a meaningful modification with respect to valley fills, though. The Huntington District embraces much of eastern Kentucky, most of West Virginia, and parts of Virginia, North Carolina, and Ohio. JA 43. Virtually all of the nation's valley fills

are constructed within the Huntington District. *Id.* The June 17 order thus did little to diminish the impact of the injunction on surface mining operations.

And as before, the district court denied KFTC any injunctive relief concerning Beech Fork. JA 51. This time, though, the district court finally ruled on Intervenor Defendants' motion to dismiss for failure to join Beech Fork, denying that motion on the surprising basis that Beech Fork had no "legally protected interest" in its permit that KFTC sought to void. JA 49.

Statement Of Facts

A. Permitting Programs Under The Clean Water Act

The Clean Water Act establishes two major permitting programs that are pertinent to this appeal. One pertains to "end-of-pipe" effluent discharges that are assimilated by the receiving waters. The other pertains to discharges of "dredged or fill material" that displace the receiving waters.

The first of these programs is established by § 402 of the Act, 33 U.S.C. § 1342, and is administered by EPA either directly or through EPA-approved state programs. These permits are called National Pollutant Discharge Elimination System (NPDES) permits, and they regulate point source discharges of most "pollutants" into the waters of the United States, with the notable exception of "dredged or fill material," which are subject to the Corps' permitting program described below. *See* 33 U.S.C. § 1342(a)(1).

EPA implements the § 402 NPDES permitting program by imposing "effluent limitations" designed to limit the concentrations of pollutants discharged into receiving waters. To this end, NPDES permits typically impose detailed "technology-based" limitations on the rate and concentration of pollutants (usually expressed in parts per million) allowed in the "end-of-pipe" discharges of waste water by a permittee and, if necessary, more stringent limits to ensure that in-stream pollutant concentrations do not exceed those allowed by applicable state water quality standards. *See, e.g.*, 33 U.S.C. §§ 1311(a) & (b), § 1342(a)(2); 40 C.F.R. § 401.11(i) & Parts 401-471; *see also EPA v. California ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 202-08 (1976) (explaining the NPDES program).

The § 402 permitting program imposes ongoing responsibilities on the operator of a discharging facility to control, monitor, and report the concentration of pollutants in its wastewater. Requirements for the proper use, maintenance, and installation of monitoring equipment are specified in an NPDES permit, as are the type, intervals, and frequency of required monitoring. *See* 40 C.F.R. § 122.48. Permittees must test their effluent in conformity with these requirements, and they must report these test results to EPA on a regular basis. *See* 33 U.S.C. § 1318(a). Permittees also must maintain their monitoring records for three years, including information such as the date, place, time, and results of wastewater sampling. *See* 40 C.F.R. § 122.41(j). All of these measures are designed to ensure that the

pollutant carrying capacity of the receiving waters is not exceeded by the aggregate concentration of pollutants discharged into the stream. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (explaining that through the NPDES program, regulators "could simply determine whether a company was emptying more pollutants into the water than the Act allowed in order to detect a violation of the statute").

The second permitting program is established by § 404 of the Clean Water Act, 33 U.S.C. § 1344(a), and is administered by the Corps (as the delegate of the Secretary of the Army) or by a State (with EPA's approval). *See* 33 U.S.C. §§ 1344(a), (d) & (g).[3] Whether issued by the Corps or a State, permits under § 404 authorize the discharge of "dredged or fill material" into waters of the United States at "specified disposal sites." 33 U.S.C. § 1344(a).

In contrast to the NPDES program, § 404(a) permits are not issued in terms of limits on the concentration of pollutants in the discharge. Nor do these permits impose any obligation to monitor the pollutant concentrations in the discharge. That is because discharges contemplated by § 404(a) are not assimilated or absorbed by the receiving body of water. They *displace* it.

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[3] To date, only Michigan and New Jersey have received such approval.

The Corps may authorize fills under § 404(a) either by individual or general permits. Individual permits are issued for specific sites. General permits are authorizations issued by rulemaking for classes of activities determined by the Corps to have minimal adverse impacts on waters of the United States and frequently take the form of a nationwide permit. *See* 33 U.S.C. § 1344(e).

The issuance of discharge permits under the Corps' individual and general permitting programs is governed by a number of environmental standards. First, § 404(b) of the Clean Water Act requires EPA, in conjunction with the Corps, to promulgate a set of mandatory environmental standards for the issuance of § 404 permits. These are known generally as the § 404(b)(1) Guidelines, and every fill permit under § 404 must comply with these standards. *See* 33 U.S.C. § 1344(b)(1); 40 C.F.R. Parts 230-232.

These guidelines mandate a sequenced evaluation of the ecological effects of a proposed fill, in which the Corps must determine (i) whether aquatic impacts of the proposed discharge have been *avoided* to the extent practicable; (ii) whether any remaining impacts have been *minimized*; and (iii) whether the discharger can *compensate* for unavoidable losses through either the restoration, creation, enhancement, or preservation of aquatic resources. 40 C.F.R. §§ 230.5; .10(a), (d); & .70-77. Together, EPA and the Corps use the § 404(b)(1) Guidelines to "*avoid* adverse impacts and *offset* unavoidable adverse impacts" to aquatic resources from

fills. Army–EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (March 12, 1990).

In addition, § 401 of the Clean Water Act, 33 U.S.C. § 1341, requires applicants for federal discharge permits, including § 404(a) fill permits, to obtain a state certification that the discharge will comply with state water quality standards. If a State determines that permit conditions are needed to prevent a discharge from causing the violation of a state water quality standard or other requirement, the Corps must include such conditions in the discharge permit. Otherwise, the Corps may not issue the discharge permit. 33 U.S.C. § 1341(a)(2).

Further, EPA retains a role in the Corps' issuance of § 404(a) permits. In addition to its role as promulgator of the § 404(b)(1) Guidelines, EPA has the authority to veto the discharge of dredged or fill material at a specified disposal site if it determines that the discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds, fisheries, wildlife, or recreational areas. 33 U.S.C. § 1344(c).

B. Initial Regulatory Definitions Of "Fill Material"

The Clean Water Act does not define the term "fill material." That term has thus been subject to definition by EPA and the Corps.

The Corps was the first to adopt a definition of “fill material” under § 404(a). In 1975, its regulation provided that “fill material” includes “any ‘pollutant’ used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body *for any purpose*.” 33 C.F.R. § 209.120(d)(6) (1975); *see also* 39 Fed. Reg. 12115, 12119 (April 3, 1974). This is commonly known as an “effects” definition because it does not consider the purpose or reason for the discharge. Rather, it considers only the effect of the discharge, *i.e.,* whether it has the effect of replacing water with dry land or raising the bottom elevation of a water body, regardless of why the discharge was made.

EPA adopted its own regulation defining “fill material” a few months later that was identical to the Corps’ definition. 40 Fed. Reg. 41292, 41293 & 41298 (Sept. 5, 1975) (incorporating by reference the Corps’ definition of “fill material” at 33 C.F.R. § 209.120(d)). This definition was part of EPA’s regulations governing the § 404(b)(1) Guidelines which EPA is statutorily charged with developing. 40 C.F.R. § 232.2(b) (1975).

In 1977, the Corps amended its definition of “fill material.” Under the Corps’ revised definition, “fill material” excluded any substance discharged “primarily to dispose of waste.” 42 Fed. Reg. 37122, 37145 (July 19, 1977) (codifying 33 C.F.R. § 323.2(m)). In enacting this revised definition—known as a

"purpose" definition because it considers the purpose or reason for the discharge—the Corps did not state that the Clean Water Act compels such a definition of "fill material" or that an "effects" definition is an impermissible construction of the statute. Rather, the Corps adopted the new definition merely to shift to EPA the primary permitting authority over "waste materials such as sludge, garbage, trash, and debris" that the Corps admitted "technically fit within our [prior] definition of 'fill material.'" 42 Fed. Reg. at 37130.

Even under its revised definition, however, the Corps did not categorically disavow permitting authority over all discharges of solid wastes. Rather, the Corps stated that "the *initial* decision relating to this type of discharge should be through the NPDES program" and that the Corps would retain secondary permitting authority. *Id.* Additionally, the Corps stated that notwithstanding the change in its "administrative" rules, it would continue to "process Section 404 permits for these types of activities to the extent that a levee or other type of containment structure must be placed in the water as part of the overall disposal plan," although it would not take any final action on the § 404 permit application until a decision on the NPDES permit had been made. *Id.*[4]

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[4] Valley fills and refuse impoundments associated with coal mining activities meet this test. Valley fills have sediment collection ponds constructed just downstream of the fill, and refuse impoundments are themselves containment structures. *See West Virginia Coal Association v. Reilly,* 728 F. Supp. 1276, 1281

(continued…)

EPA declined to adopt the Corps' revised definition of "fill material." In fact, EPA considered adoption of a "purpose" definition in a 1979 proposed rulemaking for the NPDES program and EPA-approved state § 404 programs, *see* 44 Fed. Reg. 32854 (June 7, 1979), but rejected that formulation and elected to retain its original "effects" definition. 45 Fed. Reg. 33290, 33299 & 33421 (May 19, 1980) (codifying 40 C.F.R. Parts 122-125). EPA also left unaffected in this rulemaking the "effects" definition for the § 404(b)(1) Guidelines that it had adopted in 1975 for use by the Corps in administering the federal § 404 program. *See* 40 C.F.R. § 230.3.

In doing this, EPA explicated the illogic of a "purpose" definition, stating that "the purpose of the discharge is immaterial to its effect on the waters of the United States; a landfill motivated by the need to dispose of waste and a landfill intended to create a building site both result in the loss of waters of the United States and pose a risk of contaminating the surrounding area." 45 Fed. Reg. at 33299. EPA also noted that the § 404 program is "better suited" for activities that fill waters. This is because "the section 404(b)(1) guidelines require consideration of alternate sites" while "the NPDES program does not provide for a comparable alternatives analysis. In addition, the section 404(b)(1) guidelines look at the

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& 1288 (S.D. W.Va. 1989) (placement of the material for pond embankment is within Corps' "purpose" test).

ecological impact of the discharge" while "the NPDES program uses technology-based effluent limitations." *Id*. As a result, EPA reasoned that "all discharges with the effect of fill should be handled under the 404 program instead of the 402 program" in order to better prevent the destruction of valuable wetland ecosystems. *Id*. Finally, EPA stated that the "primary purpose test is difficult to apply, particularly where a project has two purposes, or where the purpose changes over time." *Id.*

Recognizing the discrepancy between the Corps' "purpose" definition and its "effects" definition, EPA eventually suspended in 1980 its definition of "fill material" for purposes of the federal § 404 program, "temporarily reserv[ing]" it "pending further discussions [with the Corps]." 45 Fed. Reg. 85336, 85341-42 (Dec. 24, 1980). Even then, however, EPA kept its "effects" definition intact for purposes of the § 402 program as well as for EPA-approved state § 404 programs. *Id.* at 85341. Noting the "regulatory gap" that this situation potentially created, EPA additionally stated that filling operations could continue under EPA-issued "administrative orders" that would require dischargers to apply to the Corps for a § 404(a) permit. *Id*. at 85341-42.

C. The Harmonization Of Agency Definitions

In 1984, EPA and the Corps agreed to propose and adopt by rulemaking a joint definition of "fill material." *See* 51 Fed. Reg. 8871 (March 14, 1986). They

did so as part of a settlement agreement in a lawsuit brought by several prominent environmental groups challenging the Corps' "purpose" definition of "fill material." 14 Envtl. L. Rep. 20262, 20263 & 20265 ¶ 24, 1984 WL 21207 (D.D.C. Feb. 10, 1984) (publishing court order approving settlement). Those groups contended that the Corps' definition was illegal and that the "effects" definition was required—precisely the opposite of KFTC's position. *See National Wildlife Federation v. Marsh,* Civil Action No. 82-3632 (D.D.C.), Complaint, Count XV.

Although EPA and the Corps did not issue a joint regulatory definition until 2002, they entered into an inter-agency agreement in 1986 to govern their respective authority over wastes until further, formal rulemaking occurred. Entitled a "Memorandum of Agreement on Solid Waste" and published in the Federal Register, this agreement addressed the treatment under the Clean Water Act of "discharges of solid and semi-solid waste materials discharged into the waters of the United States for the purpose of disposal of waste." 51 Fed. Reg. 8871 (March 14, 1986) (hereafter, 1986 Solid Waste MOA).

Rather than placing regulation of discharges of these "waste materials" solely with EPA, the agencies agreed in the 1986 Solid Waste MOA that the Corps had § 404(a) authority over certain of these discharges. To that end, the 1986 Solid Waste MOA provided that a discharge of solid waste would normally be

considered the discharge of "fill material" within the Corps' jurisdiction depending upon the following factors:

a. The discharge has as its primary purpose or has as one principle [sic] purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.

b. The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities.

c. *A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat.*

d. The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.

1986 Solid Waste MOA § B.4 (51 Fed. Reg. at 8872). As indicated, the third factor considered the effect of the fill.[5]

Importantly, the 1986 Solid Waste MOA contemplated that either agency might exercise jurisdiction over some aspects of solid waste discharges. *See* 1986 Sold Waste MOA, §§ B.4 & C.2 (51 Fed. Reg. at 8872). Additionally, the 1986 Solid Waste MOA required the agencies' regional representatives to reach further agreements concerning permitting protocol where confusion existed, to ensure

[5] The district court stated that this list does not indicate whether its criteria are disjunctive or conjunctive. JA 67. However, the list is self-evidently disjunctive. The second factor addresses fills resulting from road-building and other construction activities. The fourth factor addresses sanitary landfills. These criteria plainly concern different situations.

consistency "in a manner that imposes no unnecessary burden on the regulated sector." 51 Fed. Reg. at 8872.

It was the 1986 Solid Waste MOA that this Court accepted in *West Virginia Coal Association v. Reilly* as an appropriate means for EPA and the Corps to resolve the definition of "fill material" under the Clean Water Act as it relates to valley fills. The *Reilly* litigation was a challenge to EPA's 1988 "Policy for Instream Treatment and Filling by the Coal Mining Industry" (1988 In-Stream Fill Policy) which was an outgrowth of the 1986 Solid Waste MOA. *Reilly*, 728 F. Supp. at 1280 n.2. The 1988 In-Stream Fill Policy recognized that under the criteria of the 1986 Solid Waste MOA, the Corps possessed permitting authority over some phases of the construction of in-stream treatment ponds created for mining operations. The 1988 In-Stream Fill Policy additionally stated that EPA also had authority under the 1986 Solid Waste MOA over some phases of in-stream treatment ponds. The plaintiffs in *Reilly* argued that such permitting authority properly belonged with the Corps exclusively, notwithstanding any agency agreements that gave EPA shared jurisdiction.

The district court in *Reilly* recognized that the 1986 Solid Waste MOA was adopted pursuant to the congressional command in the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of [Clean Water Act] permits." *Reilly,* 728 F. Supp. at

1279 (quoting 33 U.S.C. § 1344(q)). The district court further recognized that EPA and the Corps had entered into the 1986 Solid Waste MOA "for the specific purpose of clarifying the parameters of their respective permitting programs." *Id.* at 1287. Accordingly, the district court held that the 1986 Solid Waste MOA was valid and that the agencies' allocation of permitting authority thereunder required deference. *Id.* at 1293.

This Court affirmed, endorsing the 1986 Solid Waste MOA as a valid means to address the potential conflicts between EPA's and the Corps' definitions of "fill material." In particular, the Court held that that "[s]ince appellants offer no statutory prohibition against the participation of EPA in an agreement with the Army Corps of Engineers in their efforts to define the boundaries of the respective agency's permitting authority, further review is unwarranted." 1991 WL 75217 at **5.[6]

Also, EPA re-affirmed its "effects" definition of "fill material" in 1988. EPA did so in final regulations for the federal § 404 program that withdrew its "reservation" from 1980 and that imposed a definition substantially tracking EPA's

[6] The district court stated that this Court supposedly agreed in *Reilly* that "§ 404 permits are not available for disposal of surface coal mine overburden" under the 1986 Solid Waste MOA. JA 68. Not so. As discussed, the issue in *Reilly* was not whether the Corps could issue such permits, but whether EPA too had shared permitting authority under the 1986 Solid Waste MOA.

"effects" definition from 1975. 53 Fed. Reg. 20764, 20774 (June 6, 1988) (codified at 40 C.F.R. § 232.2(i)). EPA made clear at that time that its "effects" definition applied to both federal and state § 404 programs. 53 Fed. Reg. at 20774 (codifying 40 C.F.R. § 232.2). For 25 years, therefore, EPA has consistently applied an "effects" test to define the term "fill material."

D. Regulation Of Valley Fills

As this Court knows from *Bragg*, valley fills are a necessary consequence of surface mining operations in Appalachia. This is because "rock taken from its natural state and broken up naturally 'swells,' perhaps by as much as 15 to 25%." *Bragg*, 248 F.3d at 286. Federal and state laws require that the excess rock and dirt created as a result and that is not needed to restore the mountain—known as excess overburden or spoil—must be placed permanently in a stable location. *See* 30 U.S.C. § 1265(b)(22). In the rugged terrain of Appalachia, ridgetops and hilltops cannot accommodate the permanent, stable location of excess overburden. Instead, the only feasible place for excess overburden is in valley fills. JA 769-70 ¶ 2; 774-77 & 779-814.

Valley and other types of fills also are needed for underground mining. Underground mining produces residual rock and coal from the cleaning of the deep-mined coal that is frequently disposed of in refuse impoundments or fills. JA 775 ¶ 3. Therefore, by virtue of the regulatory requirement for the stable

placement of excess spoil and the laws of gravity, the coal industry simply could not exist in mountainous areas without valley fills. *See also Reilly,* 728 F. Supp. at 1293 (describing valley fills as "necessary to carry on mining operations").

EPA and the Corps maintain that federal discharge permits are needed for the construction of most valley fills. This is a function of the broad definition of "pollutant" in the Clean Water Act. That definition includes "rock" and "sand," 33 U.S.C. § 1362(6), and thus seemingly encompasses the rock and dirt used to construct valley fills.

The agencies' position also reflects the agencies' expansive view of the term "waters of the United States." EPA and the Corps claim that this term, and thus their authority, extends upstream beyond the reach of even intermittent portions of streams. Indeed, the Corps has stated that even "ephemeral" streams qualify as waters of the United States under certain circumstances. 65 Fed. Reg. 12818, 12823 (March 9, 2000). An ephemeral stream can be a water channel that flows only in response to rain and snow melt. 67 Fed. Reg. 2020, 2094 (Jan. 15, 2002); *see also* Affidavit of Barry Doss ¶ 6 (explaining Corps' practice of expansively defining its jurisdiction to extend almost to the ridgetop of valleys) (JA 776-77).

As a simple matter of topography, the location where two mountains meet often contains a stream that falls under EPA's and the Corps' expansive view of

"waters of the United States." This necessitates, according to the agencies, a federal discharge permit for the construction of valley fills in those locations.

The Corps historically has been the agency that has issued these permits for valley fills. Most of these approvals have come under a nationwide permit, NWP 21, that the Corps first issued in an interim final rule in 1982. 47 Fed. Reg. 31794 (July 22, 1982). The 1988 In-Stream Fill Policy relied upon this practice as well, providing expressly that any required mitigation be an enforceable condition of the § 404 nationwide permit authorization from the Corps for a valley fill. *See* 1988 EPA In-Stream Fill Policy, condition No. 1.b.(4) (reprinted in *Reilly*, 728 F. Supp. at 1280 n.2).

E. The Consent Decree In *Bragg*

The accepted regulatory treatment of valley fills under the Clean Water Act was judicially approved in *Bragg*. In *Bragg*, another environmental group and several individuals, all represented by KFTC's counsel, sued the Corps and the West Virginia surface mining authority to outlaw valley fills in West Virginia. Like KFTC, the *Bragg* plaintiffs asserted that the Corps' regulations allegedly defined "fill material" to exclude valley fills from the Corps' permitting jurisdiction.

The plaintiffs in *Bragg* settled their claims against the Corps. In that settlement, they agreed that they would "not challenge the Corps' authority under

CWA section 404 to authorize discharges of surface mining spoil into waters of the United States based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e)." JA 315 & 321-22 ¶ 16. In exchange, the Corps agreed to conduct an Environmental Impact Statement "on a proposal to consider developing agency policies . . . to minimize to the extent practicable, the adverse effects to waters of the United States . . . affected by mountaintop mining operations, and to the environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills." *Id*. at ¶¶ 7, 9 (JA 317-18). The Corps also agreed that prior to completing the Environmental Impact Statement it would, "as a general matter," limit authorization of valley fills under NWP 21 to valley fills in waters draining a watershed of less than 250 acres and require an individual permit for fills in larger watersheds. *Id.* at ¶ 11 (JA 318-19).

The district court treated the settlement as a consent order requiring judicial approval and a determination whether the agreement was "lawful" and "fair, reasonable and faithful to the objective of the governing statutes." *Bragg v. Robertson*, 54 F. Supp. 2d 653, 663 (S.D. W.Va. 1999). Based on that review, the district court approved the agreement, which authorized on-going approval of valley fills by the Corps under § 404(a), finding that the agreement "accords with the law and is fair, reasonable and faithful to the objectives of SMCRA and CWA [Clean Water Act]." *Id.* at 665, 670.

F. The Joint Regulations

In April 2000, during the Clinton Administration, EPA and the Corps finally proposed new joint regulations that adopt a uniform "effects" definition of "fill material" for all Clean Water Act programs. 65 Fed. Reg. 21292 (April 20, 2000) (JA 148). In doing so, the agencies stated that a "purpose" definition leads to results that are "clearly contrary to the intent of Congress expressed in the plain words of the CWA sections 404 and 301" and that "[t]hese problems are avoided by focusing on the effect of the material to be discharged rather than the purpose." *Id.* at 21294 (JA 150). The agencies further concurred that "[w]ith regard to proposed discharges of coal mining overburden, we believe that the placement of such material into waters of the U.S. has the effect of fill and therefore, should be regulated under CWA section 404." *Id.* at 21295 (JA 151).

After considering comments received over two years, EPA and the Corps signed for publication the final version of their joint regulations on May 3, 2002. As finalized, these regulations define "fill material" as any "material placed in waters of the United States where the material has *the effect of*" either "[r]eplacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water." 67 Fed. Reg. 31129, 31143 (May 9, 2002) (JA 170).

The new rules include examples that make clear that this definition applies to valley fills. One such statement appears in the new definition of "fill material":

> Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, *overburden from mining* or other excavation activities and materials used to create any structure or infrastructure in the waters of the United States.

Id. To the same effect is the definition of "discharge of fill material" included in the new regulations. It includes as an example of a "discharge of fill material" the "placement of overburden, slurry, or tailings or similar mining-related materials." *Id.* at 31135 (JA 162).

EPA's and the Corps' joint regulations became effective June 10, 2002. 67 Fed. Reg. at 31129, 31130 (JA 156-57). It is these regulations that the district court has effectively prohibited the Corps' Huntington District from implementing.

Summary Of Argument

The district court erroneously failed to defer to EPA's and the Corps' definition of "fill material" in contravention of *Chevron*. The Clean Water Act does not limit the term "fill material" to fills for constructive uses, and nothing on the face of the statute or otherwise clearly indicates an express congressional intent to impose any such limitation. The interpretation provided by EPA and the Corps, embodied in their formal rulemaking and practice, is a permissible construction of the term. Established law required the district court to defer to the agencies'

interpretation, and the district court's injunction, which overrides that interpretation and exceeds the scope of the lawsuit, should be reversed.

Standard Of Review

The district court's grant of summary judgment is reviewed *de novo*. This includes the district court's interpretation of the Clean Water Act. *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (holding that "issue of statutory construction" is a "pure question of law" that is reviewed *de novo* and that "no deference" is accorded the district court's statutory interpretation).

The scope of the district court's injunction is reviewed for an abuse of discretion. *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001).

Argument

Where, as here, the Court faces a question of statutory construction against the backdrop of agency interpretation, the settled two-part test of *Chevron* dictates the governing standard:

- First, the Court must examine the statute to see if Congress has directly spoken to the precise question at issue in words that compel a single result. If it has, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

- Second, if the statute is silent or ambiguous on the precise question at issue, the Court must defer to the agency's interpretation, as long as that interpretation is plausible.

E.g., Jones v. American Postal Workers Union, 192 F.3d 417, 423 (4th Cir. 1999); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000); *Akindemowo v. INS,* 61 F.3d 282, 284-85 (4th Cir. 1995).

Application of that two-part test here compels the conclusion that the district court erred in not deferring to EPA's and the Corps' "effects" definition of "fill material." Those agencies' interpretation is a reasonable construction of a term that Congress did not define and on which Congress did not express any clear contrary intent.

I. CONGRESS EXPRESSED NO INTENT, MUCH LESS CLEAR INTENT, TO EXCLUDE ANY TYPE OF FILL FROM § 404(A)

The district court erroneously held under the first step of *Chevron* that § 404(a) is unambiguously limited to certain types of fills. JA 47-55, 81-83. Nothing in the Clean Water Act imposes that limitation. The other sources to which the district court looked do not establish congressional intent to impose any such limitation either.

A. The Text Of § 404(a) Does Not Limit The Scope Of "Fill Material"

Although the text of a statute is the controlling indication of congressional intent, the district court overlooked that § 404(a) does not limit or qualify in any way the term "fill material." That statute says nothing about fills with

"constructive" or "beneficial" uses. Nor does § 404(a) state that "fill material" is limited to dredged spoil. To the contrary, § 404(a) refers to "dredged *or* fill material." 33 U.S.C. § 1344(a). This disjunctive reference indicates that "fill material" is different than "dredged material" and that § 404(a) is not limited to dredged spoil. *E.g., Garcia v. United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."); *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-40 (1978) (same).

Indeed, the Clean Water Act contains no definition of "fill material," much less a definition that limits that term to certain types of fills. The district court acknowledged this lack of a statutory definition, JA 49, but failed to credit its significance. For it is well established that when Congress uses an undefined term in a statute, the ordinary, dictionary meaning of the term is intended. *E.g., Minter v. Beck,* 230 F.3d 663, 666 (4th Cir. 2000) ("Because the term 'impediment' is not defined in the AEDPA, we turn to the dictionary definition for its common meaning."); *United States v. Midgett,* 198 F.3d 143, 146 (4th Cir. 1999) (turning to dictionary meaning of statutory term in the "absence of a definition from Congress").

The ordinary meaning of the term "fill material" suggests that all fills, including waste fills, are covered by § 404(a). The dictionary defines "fill," as a verb or a noun, without reference to purpose, but rather in terms of effect, as in:

> **fill.** v. 1. To make or become full. 2. *To build up the level of (low-lying land) with material such as earth or gravel.* 3. To stop or plug up. . . n. 1. An amount needed to make full, complete, or satisfied . . . 2. Material for filling.

American Heritage Dictionary (4th ed. 2001). The breadth of this dictionary definition indicates, if anything, that the term "fill material" in § 404(a) includes discharges with the effect of a fill, *i.e.*, that build up, that raise the level of, or that fill up the waters of the United States, regardless of the discharger's motive.

As a result, the most that could be said in support of the district court's holding given the absence of a statutory definition is that the Clean Water Act is silent about the meaning of "fill material." But even this is insufficient to satisfy the first prong of *Chevron,* because such silence does not establish clear congressional intent. *E.g., Barnhart v. Walton*, ___ U.S. ___, 122 S. Ct. 1265, 1270 (2002) (statutory "silence, after all, normally creates ambiguity. It does not resolve it."); *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (statute ambiguous if it "does not speak directly to the issues" in dispute); *Chevron*, 467 U.S. at 841-42, 862-65 (Clean Air Act ambiguous on meaning of "stationary source" because Act did not define the term's meaning); *Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir.

2001) (deference to agency interpretation required where "Congress did not define" statutory term at issue); *Jones*, 192 F.3d at 426 (same).

In other words, it simply cannot be said that the language of the Clean Water Act "compels" the conclusion that waste fills are excluded from § 404(a), that § 404(a) is limited to discharges of dredged spoil, that § 404(a) applies only to fills for "constructive" purposes, or any of the other iterations the district court proferred. *Chevron*, 467 U.S. at 860 (statutory language must "compel" a single result to be unambiguous). The absence of a statutory definition of "fill material," and the omission of any express limitation in § 404(a), prevent any holding of clear congressional intent to impose such limitations. *Piney Run Preservation Ass'n v. County Commissioners*, 268 F.3d 255, 267 (4th Cir. 2001) (Clean Water Act ambiguous because statute does not "explicitly explain the scope of permit protection" provision).

B. The Structure Of The Clean Water Act Does Not Compel Exclusion Of Waste Fills From The Scope Of "Fill Material"

In addition to sidestepping the text of § 404(a), the district court failed to consider the entire structure, and other provisions, of the Clean Water Act. Yet these too indicate that waste fills do, and should, qualify as "fill material."

There are, for example, the contrasting standards and procedures between §§ 402 and 404. Because fill materials are not assimilated by the waters into which they are discharged but displace them, application of § 402's effluent

concentration and monitoring standards to fills makes no sense. Rather, the "avoidance, minimization and mitigation" criteria of the § 404(b)(1) Guidelines provide coherent standards for assessing the ecological effects of fills. This is true regardless of the reason for the fill. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (statutes are construed to provide rational results).

Additionally, there is the fact that the Clean Water Act allows the discharge of fill material at "specified disposal sites." 33 U.S.C. § 1344(a); *see also* 33 U.S.C. § 1344(b) (providing that § 404(b)(1) Guidelines apply to "disposal sites"). Disposal is "[t]he act of throwing out or away" something. American Heritage Dictionary (4th ed. 2001). That the Clean Water Act speaks about discharging fill material at "disposal sites" thus demonstrates that Congress contemplated that fill material could be discharged for the purpose of getting rid of things, *i.e.*, waste disposal.

And perhaps most importantly, there is no practical reason to differentiate the treatment of fills under the Clean Water Act based on the motive behind their construction. The discharge of rock, sand and dirt to construct a fill has the same effect regardless of whether the discharge is for the purpose of constructing a building or for disposing of excess mining overburden. It displaces the affected portion of the water body with rock, sand and dirt. There is no reason to believe

that Congress intended to compel different treatment under the Clean Water Act for fills comprised of the same materials and with the exact same effect. *See United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) (interpreting the meaning of "addition" of a pollutant, and declining to distinguish between dirt sidecast from a ditch and dirt trucked in from another site, because "[t]he effects on hydrology and the environment are the same").

The district court improperly ignored all these considerations. Taken together, however, they further defeat any conclusion that the Clean Water Act expressly and unambiguously excludes fills from § 404(a) based on the discharger's motive. *E.g., Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (construction of statute requires consideration of statute's entire structure).

C. Section 404(f)(2) Does Not Limit The Meaning Of "Fill Material"

The sole textual foundation that the district court gave for its opinion, § 404(f)(2) of the Clean Water Act, 33 U.S.C. § 1344(f)(2), does not establish congressional intent to exclude waste fills from § 404(a) either. That subpart, which was not part of the original enactment of the Clean Water Act in 1972 but the result of an amendment in 1977, does not define the term "fill material," much less limit it in any way. By its own terms, therefore, § 404(f)(2) is not instructive on the meaning of "fill material" in § 404(a).

The structure of § 404, and the context of § 404(f)(2) within that structure, further show that § 404(f)(2) does not limit § 404(a) to fills made "for the '*purpose*' of bringing an '*area*' . . . into a '*use*,'" as the district court declared. JA 59-60. The operative subpart of § 404 is *not* § 404(f), but § 404(a). That latter provision, § 404(a), imposes a general obligation to obtain a permit "for the discharge of dredged or fill material" without reference to purpose or use. 33 U.S.C. § 1344(a).

In contrast, § 404(f), which has two subparts, establishes several exceptions to that general permitting obligation. 33 U.S.C. § 1344(f). The first subpart, § 404(f)(1), identifies the specific activities that are exempt, "except as provided in paragraph 2 of this subsection [§ 404(f)(2)]." These activities include fills associated with normal farming, silviculture, and ranching activities and various other maintenance and construction projects. The second subpart, § 404(f)(2), then provides the following limitation on the § 404(f)(1) exceptions:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

The reason the § 404(f) exceptions were added to § 404 after the fact was that the broad language of § 404(a) applies to discharges for all sorts of purposes, and Congress did not want to subject routine agricultural, silvicultural, and maintenance activities to the requirements of that permitting obligation. Facing "widespread concern that many activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedure" of the § 404 permitting process, 4 Legislative History of the Clean Water Act of 1977 at 897 (Sen. Randolph), Congress exempted certain low-impact activities from that process via § 404(f)(1). *See National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) ("Congress emphatically did not want the law to impede these bucolic pursuits."); *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994) ("Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural [and other] activities that have little or no adverse effect on the waters of the United States.").

Section 404(f)(2) simply ensures that this exemption does not reach too broadly. As noted by Senator Muskie during the Senate debate on the 1977 amendments that added § 404(f), "[w]hile it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas

of water into dry land or impede circulation or reduce the reach or size of the water body." 3 Legislative History of the Clean Water Act of 1977 at 474 (Sen. Muskie).

The language, context and history of § 404(f)(2) thus show that the subsection functions solely to limit the scope of the exemptions granted in § 404(f)(1). For this reason it is often referred to as the "recapture provision," because its function is to "recapture" certain activities that § 404(f)(1) would otherwise exempt from the general permit requirement of § 404(a). *See, e.g., Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) (noting that the "'recapture provision' . . . can preclude the normal farming exceptions" from applying); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1176 (D. Mass. 1986) ("Section (f)(2), the 'recapture provision,' seizes upon certain activities which on their face appear exempt in order to bring them back under the statute.").

It is erroneous, therefore, to read § 404(f)(2), as did the district court, as limiting § 404(a) or otherwise spreading a "constructive use" gloss over the whole of § 404. Subsection (f)(2) operates only in respect to the specific section to which it is annexed—*i.e.*, § 404(f)(1), which begins, "[e]xcept as provided in paragraph (2) of this subsection,"—and has no broader significance. Its only effect is to require a permit of those "recaptured" activities that do not fall within the permitting exception of § 404(f)(1), and it does not limit the category of activities

which may qualify for a permit. *United States v. Morrow*, 266 U.S. 531, 534-35 (1925) ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause.") (internal citations omitted); *United States v. McClure*, 305 U.S. 472, 477 (1939) (accord); *see also National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen*, 152 F.3d 283, 290 (4th Cir. 1998) ("In looking for the plain meaning of a statutory term, we also refer to the specific context (usually the subsection) in which the term is used.").

Of course, it is transparent why the district court seized onto § 404(f)(2) and took it out of context—§ 404(f) is the *only* portion of the Clean Water Act that employs the words "purpose" and "use" in any way in conjunction with a fill permit. However, the mere appearance of those two words in § 404(f) provides no legitimate basis for reading such terms into § 404(a). *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 171 n.7 (2001) ("Congress' decision to exempt certain types of these discharges [in § 404(f)] does not affect, much less address, the definition of 'navigable waters'"—another term used in § 404(a)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (omission by Congress of language in one section of the same statute generally reflects Congress' intent and purpose to exclude it in the former

section); *United States v. Barial,* 31 F.3d 216, 218 (4th Cir. 1994) (same holding as *Russello* where different language appeared in subpart (a) and (c) of a provision).

D. The Legislative History Of The Clean Water Act Is Inconclusive

Like its concentration on § 404(f)(2), the district court's explication of the Clean Water Act's legislative history was without merit. The first prong of *Chevron* mandates a search for definite, unambiguous congressional intent. That mandate is not met by reliance on isolated comments of individual legislators, because the relevant inquiry under *Chevron* is the intent of Congress and not of one or two members. *Garcia*, 469 U.S. at 76 ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates."); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000) ("a brief comment from the floor by a single legislator, albeit one of the Act's sponsors, is not conclusive evidence of what the entire legislative body believes"). Nor is the mandate of *Chevron* satisfied through selective emphasis on only parts of the legislative record, because that too can misrepresent congressional intent. *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 990 (4th Cir. 1996) (declining to consider statute's legislative history because any such consideration would necessarily be selective).

Yet that is what the district court did, relying on the comments of two senators as the proxy for the intent of the entire Congress. JA 52-54. Worse, those

comments, which the district court contended reflect the will of Congress, do not pertain to the version of § 404 enacted into law. They do not even pertain to the term "fill material." They regard instead a proposed amendment that did not include the term "fill material" and that was rejected in favor of the differently worded House bill.

In particular, Senator Ellender of Louisiana proposed the amendment that was the focus of the comments on which the district court relied. That amendment sought to carve out "dredged material" from the scope of § 402 and to give permitting authority over that material to the Corps instead of EPA. It was that proposal—which addressed only "dredged material," not "fill material"—that was the subject of the statements of Senators Ellender and Muskie cited by the district court.

Senator Ellender's proposal was not adopted in the Senate. The final Senate bill did not carve out dredged material from § 402, but dealt with dredged material in a subpart of § 402. S. Conf. Rep. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3818. Then in the conference committee, the Senate bill was rejected in favor of the House bill. The House bill contained a separate section designated § 404. In it, the Corps was given jurisdiction over discharges of both "dredged material" and "fill material." *Id.* at 3818-19. The cited statements of Senators Ellender and Muskie thus have no relevance to the precise issue at hand.

They concern a proposed amendment that Congress rejected and that contained a different structure and different language from the statute Congress enacted. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 199-200 (1974) (deletion of a provision by a conference committee "militates against a judgment that Congress intended a result that it expressly declined to enact"); *Norfolk & Western Railway Co. v. Roberson,* 918 F.2d 1144, 1148 n.3 (4th Cir. 1990) (rejecting reliance on language in rejected Senate bill to establish congressional intent); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969) ("[U]nsuccessful attempts at legislation are not the best guides to legislative intent.").

As for the House bill that actually became law, there is nothing in the legislative history establishing that the bill was intended to exclude waste fills, or any other kind of fill, from § 404(a). Nothing in the committee reports states that § 404(a) has that effect. *See Garcia*, 469 U.S. at 76 (committee reports are more authoritative expressions of congressional intent than individual statements of members). Nor is there any such statement in the floor debates. Indeed, neither the committee reports nor the floor debates even refer to fills for "constructive" or "beneficial" purposes, much less single them out as the exclusive subject of § 404(a).

Viewed in its entirety, therefore, the legislative history of the Clean Water Act does not evince a clear congressional intent to limit the Corps' jurisdiction

under § 404(a) to certain types of fills. At most, it could be said that the legislative history too is silent on this topic, because the committee reports and floor debates do not explain or otherwise expand upon the term "fill material." As with the silence in the statutory text, however, silence in the legislative history does not establish clear congressional intent in support of the district court's reading. *E.g., Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow" in statutory interpretation); *United States v. Mitchell,* 39 F.3d 465, 469 n.6 (4th Cir. 1994) ("Silence is an unreliable source of legislative intent."); *Beyer v. Commissioner of Internal Revenue*, 916 F.2d 153, 157 (4th Cir. 1990) ("Where the legislative history is inconclusive, it should not be relied upon to supply a provision not expressly in the statute.").

The infirmity of drawing definite conclusions about congressional intent in the face of silent legislative history is underscored by comments that Vermont's Senator Stafford made about the "purpose" definition. In hearings in 1985 over the nomination of Robert Dawson to be Assistant Secretary of the Army, several senators including Senator Stafford opposed the nomination because Dawson advocated a "purpose" definition for "fill material." That interpretation, these senators stated, contravened congressional intent, as the following comments from Senator Stafford indicate:

> [Mr. Dawson's view] is a very narrow interpretation of section 404 *that is entirely inconsistent with*

> *Congressional intent*. . . . * * * Such * * * a policy ignores the fact that regulation of wetlands filling under the Clean Water Act is based on the fact of depositing fill, not the intent of the person doing so.

131 Cong. Rec. S. 34083-84 (Dec. 4, 1985); *see also* 131 Cong. Rec. S. 34099-34104 (Dec. 4, 1985) (similar comments of Rhode Island Senator Chafee).

Senator Stafford was a member of the Congress that passed the Clean Water Act. As his statements reveal, Senator Stafford had very definite views about the meaning of § 404(a). A silent legislative history masks those views as well as those of other members who similarly understood that § 404(a) is not limited to fills for constructive uses. A silent record, therefore, does not reflect how Congress actually understood the issue in question, and any inference based on that silence is improper speculation.

E. The Rivers And Harbors Act Does Not Support The District Court's Interpretation

The district court's reliance on the Rivers and Harbors Act (RHA) is based on a fallacy. The district court theorized that the Clean Water Act was the mere re-codification or re-enactment of the RHA, with §§ 402 and 404 of the Clean Water Act allegedly representing the continuation of §§ 13 and 10, respectively, of the RHA. JA 55-59. That is not the case.

Sections 10 and 13 of the RHA are still very much in place and are found at 33 U.S.C. §§ 403 and 407. The Corps also still has separate regulations

implementing a permitting program under § 10 of the RHA. These regulations mandate that a § 10 permit is required for "structures or work in or affecting navigable waters," 33 C.F.R. § 322.1, and the Corps continues to issue both § 10 *and* § 404 permits, often for separate parts of the same project. *See* 33 C.F.R. Pt. 322 (§ 10 permitting regulations); 33 C.F.R. Pt. 323 (§ 404 permitting regulations).

In no sense, then, can it be said that § 404 re-codified § 10 of the RHA, or that the Clean Water Act was simply a continuation of the RHA. Rather, the Clean Water Act—specifically, the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act Amendments of 1977—was a series of amendments to the Water Quality Act of 1948. *See* Water Quality Act, June 30, 1948, ch. 758, 62 Stat. 1155. These amendments were not some compilation of pre-existing programs that Congress snapped together like "Lego" pieces. They constituted, as this Court has acknowledged, a wholesale re-write and expansion of existing environmental law. *Piney Run*, 268 F.3d at 265 ("[t]he [1972] CWA (and its later amendments) represented a fundamental change in the manner of federal regulation of water pollution").

Before 1972, the Water Quality Act addressed water pollution largely by funding state and municipal water treatment systems and by requiring the establishment of state water quality standards. That statute lacked any meaningful enforcement authority and proved ineffective in controlling individual discharges

of pollution. The 1972 Amendments, therefore, instituted a whole new system of individual permits for discharges divided between EPA and the Corps.

The district court thus erred in confining the Clean Water Act to the structure and logic of the RHA. And even then, the district court drew artificial distinctions between §§ 10 and 13 of the RHA. Under the district court's view, the Corps' permitting authority under § 10 concentrates on dredged spoil and is concerned with fills for constructive uses only, while § 13 addresses discharges of all other polluting substances. JA 58-59. There is no support for this distinction in the statute.

The district court based its narrow reading of § 10 on the third sentence of that statute, which reads:

> [I]t shall not be lawful to excavate or fill, *or in any manner to alter or modify the course, location, condition, or capacity of*, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403.

This provision does not mention "dredged spoil." It does not mention "constructive" or "beneficial" fills. It instead uses the unqualified term "fill" without any limitation on the composition or purpose of the "fill." This is followed by a catchall that broadly prohibits the alteration or modification of the subject

water bodies "*in any manner*." This too is without regard to the nature of the substance causing the alteration or modification, or the purpose for its doing so. In short, the plain language of § 10 contradicts the district court's narrow reading of that statute.

This is borne out too by the analysis of § 10 in *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). In that case, the Supreme Court held that the United States could bring an enforcement action under the first sentence of § 10 against a defendant that discharged "industrial solids"—*a waste*—into the waters of the United States. The first sentence of § 10 reads: "The creation of *any* obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited." 33 U.S.C. § 403.

Relying on the term "any," the Supreme Court expressly rejected the idea that the ban on obstructing navigation in the first sentence of § 10 is limited to obstructions caused by structures. *Id.* at 487. As the Supreme Court noted, "clogging the channel with deposits of inorganic solids" is sufficient alone to violate § 10 if the deposits obstruct navigation. *Id*. at 489. *See also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899) (holding that "*anything, wherever done or however done*, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the

navigable waters of the United States, is within the terms of the prohibition" of § 10).

By the same reasoning, the use of the term "any" in the third sentence of §10 plainly indicates that waste discharges are covered by that provision if those discharges alter or modify the subject water bodies in the indicated ways. In other words, the focus of even the third sentence in §10 is not the nature of the discharged substance or the reason for its discharge, but its effect. *E.g., National Coalition*, 152 F.3d at 29 (identical words in same statute are to be interpreted in same way).[7]

F. SMCRA Is Irrelevant To The Scope Of The Corps' Jurisdiction

The district court's foray into SMCRA, 30 U.S.C. § 1201 *et seq.*, was misplaced. Apart from the fact that SMCRA was enacted five years after § 404(a) of the Clean Water Act, *see O'Gilvie v. United States,* 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted

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[7] The district court attempted to distinguish *Republic Steel* because that decision arose under the first, and not the third, sentence of §10. JA 32. The district court overlooked that the language critical to the Supreme Court's decision—the unqualified word "any"—also appears in the third sentence. Thus, *Republic Steel* validates that waste discharges are not categorically excluded from even the third sentence of RHA §10.

Similarly, the district court too narrowly read the Corps' regulations under § 10. As the Federal Appellants noted in their opening brief at pages 20 and 21, those regulations require a permit from the Corps for fills in navigable waters without respect to the purpose of the fill. *See* 33 C.F.R. § 209.120(b)(1)(i)(b).

statute”), nothing in SMCRA speaks to the Corps’ permitting authority under § 404(a). Nor does SMCRA use the term “fill material,” much less define it. SMCRA is thus irrelevant to the congressional intent behind § 404(a), as evidenced by the fact that none of the parties relied on SMCRA in their summary judgment briefs. *Russello,* 464 U.S. at 25 (“Language in one statute usually sheds little light upon the meaning of different language in another statute. . . .”); *United States v. Mitchell*, 39 F.3d 465, 470 n.7 (4th Cir. 1994) (same).

In fact, the district court’s reliance on SMCRA is a non-sequitur and appears to have been an effort to revive the vacated rulings that the district court made about SMCRA in *Bragg*. The district court maintained that SMCRA permits valley fills only when a mine agrees to improve the land for an equal or better economic or public use (*i.e.,* a “constructive” use) in exchange for a variance from the general SMCRA duty to restore “approximate original contour.” JA 69-72. While, as the United States correctly observes, this reading is flatly untrue, *see* Federal Appellants’ Opening Brief at 27, the district court’s reading has no nexus to the Corps’ jurisdiction. Whether or not SMCRA permits valley fills only in the circumstances identified by the district court says nothing about whether it is EPA or the Corps that must issue federal discharge permits for those fills when those circumstances exist.

By the same token, OSM's so-called "buffer zone" regulation sheds no light on congressional intent regarding the Corps' Clean Water Act permitting authority. In addition to the fact that the "buffer zone" regulation does not even address that issue, the regulation is not a congressional enactment, but an agency rule. A regulation promulgated several years after the enactment of the Clean Water Act, by an agency that had no authority to interpret or administer that Act and that was acting under a different statute, has no relevance to the meaning of "fill material." *See Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 790 n.12 (4th Cir. 1988) (no deference accorded to interpretation of statute by agency that does not administer the statute).

G. Agency Definitions Of "Fill Material" Do Not Supply Missing Congressional Intent

The final ground that the district court gave for its reading of § 404(a) was, surprisingly, EPA's and the Corps' prior regulatory definitions of "fill material." This was surprising because the district court misconstrued the regulatory history to make it seem, contrary to reality, that the agencies had "longstanding regulatory interpretations" consistent with the district court's revisionist reading of § 404(a).

For example, the district court declared that EPA had always adopted a "purpose" definition, despite EPA's numerous statements over a quarter of a century declaring that a "purpose" definition is illogical, unworkable and inconsistent with the Clean Water Act and despite EPA's express rejection of a

"purpose" definition in 1980. The district court made this bizarre declaration by deeming EPA's regulations ambiguous and by simply omitting any discussion of EPA's longstanding opposition to a "purpose" definition. JA 65. But even if EPA's prior regulations were ambiguous—which they were not—the district court was required to defer to EPA's interpretation of its own regulations. The district court could not fashion its own reading of what those regulations supposedly meant to suit its purposes. *E.g., Barnhart,* 122 S. Ct. at 1270; *Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994); *Pharmaceuticals, Inc. v. Sigma-Tau*, 288 F.3d 141, 146 (4th Cir. 2002).

The district court's treatment of the Corps' regulations was similarly skewed. In the first place, the district court made no mention of the Corps' original "effects" definition of "fill material" and by omission suggested incorrectly that the Corps had always adhered to a "purpose" definition. *See* JA 61-62. But if any consideration were to be given to agency interpretation, these earlier regulations, following on the heels of the Clean Water Act, would traditionally be the more meaningful source. *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's *contemporaneous construction* which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'").

Equally problematic, the district court proceeded as though the "purpose" definition that the Corps adopted in 1977 was unambiguous. It was not. The Corps' 1977 regulation did not define the term "waste." The term "waste" also is neither used nor defined in the Clean Water Act. Therefore, in providing that "fill material" excludes discharges "primarily to dispose of waste," the Corps' 1977 regulation left considerable uncertainty about the breadth of materials outside the Corps' jurisdiction.

As discussed, the Corps stated when it promulgated its "purpose" definition that it did not intend to forfeit permitting authority over all discharges of solid wastes as a result. *See* page 17 above. This interpretation was confirmed in the 1986 Solid Waste MOA that acknowledged the Corps' jurisdiction over discharges of certain solid wastes. *See* pages 20-22 above. It also was confirmed in the Corps' nationwide permits promulgated through rulemaking, such as NWP 21. *See* page 26 above. The Corps' interpretation of its 1977 regulation, therefore, was not as absolutist as the district court portrayed.

In any event, the district court never explained how agency regulations adopted after the enactment of the Clean Water Act constitute the congressional intent behind that statute. The relevant inquiry under the first step of *Chevron* is congressional intent, not agency interpretation. Consideration of agency interpretation occurs only under the second step of *Chevron* in the event no clear

congressional intent can be identified. Regardless of what they precisely mean, therefore, the Corps' 1977 regulations do not, and cannot, make the Clean Water Act plain and unambiguous.

Furthermore, the district court's opinion implies that agencies are not permitted to change their interpretations, and that an interpretation of a certain vintage becomes the preferred reading. These propositions have been roundly rejected under *Chevron.* This is because, as the Supreme Court has acknowledged, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64; *accord, e.g., INS v. Cardoza-Fonesca,* 480 U.S. 421, 446 n.30 (1987); *Branch Banking & Trust Co. v. FDIC*, 172 F.3d 317, 328 n.13 (4th Cir. 1999).

II. THE "EFFECTS" DEFINITION IS A PERMISSIBLE INTERPRETATION OF § 404(A)

EPA's and the Corps' "effects" definition of "fill material," embodied most recently in their newly promulgated joint regulations, is manifestly reasonable. Settled law leaves no doubt that this interpretation is a plausible reading of § 404(a) that demands deference under the second step of *Chevron*.

A. The "Effects" Definition Is Reasonable

To qualify as reasonable under *Chevron*, an agency interpretation does not need to be the best reading of a statute. *Smiley v. Citibank (South Dakota), N.A.,*

517 U.S. 735, 744-45 (1996). Nor does it need to be the interpretation the Court would adopt were it writing on a clean slate. *Chevron*, 467 U.S. at 843 n.11. Moreover, the agency interpretation need not perfectly accommodate all affected interests or otherwise be flawless. The only question is whether the agency decision is so wholly unsupported by reason that it "exceeds the bounds of the permissible." *Barnhart*, 122 S. Ct. at 1269.

There is no question under that standard that EPA's and the Corps' "effects" definition is a plausible reading of § 404(a), if not the preferred reading. There is, of course, the common sense proposition that something called a "valley fill" ought to qualify as "fill material." *First United Methodist Church v. United States Gypsum Co.,* 882 F.2d 862, 869 (4th Cir. 1989) (stating that common sense is the "most fundamental guide to statutory construction"), *cert. denied,* 493 U.S. 1070 (1990). Also, the agencies' interpretation is consistent with the plain meaning of the term "fill" and the unqualified language of § 404(a). *See* pages 31-34 above. *See, e.g., Smiley*, 517 U.S. at 745 (finding agency interpretation of term reasonable because it is consistent with dictionary meaning). The agencies' interpretation additionally comports with the overall structure of the Clean Water Act. *See* pages 34-36 above. *See, e.g., Barnhart,* 122 S. Ct. at 1271 (noting that agency construction was reasonable because it made sense with statute's basic objectives).

As such, it cannot be held that the agencies' interpretation "exceeds the bounds of the permissible."

And were any additional confirmation necessary, the Court need look no further than the district court's approval of the settlement agreement in *Bragg* that authorized the Corps' continued permitting authority over valley fills. As the district court found in approving that agreement, the Corps' exercise of permitting authority "accords with the law and is *fair*, *reasonable* and *faithful to the objectives* of SMCRA and CWA [Clean Water Act]." *Bragg*, 54 F. Supp. 2d at 665 & 670.

The Court also need consider only what EPA declared when it rejected a "purpose" definition. *See* pages 18-19 above. A "purpose" definition, EPA stated, is illogical because the ecological effect of a fill does not depend on the motive behind its creation. 45 Fed. Reg. at 33299. A "purpose" definition is at odds with the structure of the Clean Water Act because the standards and procedures of the § 402 NPDES program are ill suited to fills, regardless of their purpose. *Id.* A "purpose" definition also is impractical and difficult to administer, especially for fills with multiple purposes or changing purposes. *Id.* These considerations establish in spades the reasonableness of the "effects" definition and why the district court was required to defer to EPA's and the Corps' interpretation.

B. The District Court's Invalid Considerations

Because of its mistaken belief that § 404(a) unambiguously excludes waste fills from the Corps' jurisdiction, the district court did not explicitly address whether the agencies' "effects" definition is reasonable under the second step of *Chevron*. Rather, the district court focused on whether *its own* reading of § 404(a) is "extreme and unreasonable." JA 103. That, of course, turns *Chevron* on its head and was a wholly invalid consideration.

As part of that discussion, the district court did express its belief that inclusion of waste fills within § 404(a) might clash with the "policy" of the Clean Water Act. JA 104-05. Yet, all proposed discharges under § 404(a) are subject to the comprehensive environmental standards in the § 404(b)(1) Guidelines that require the avoidance, minimization and mitigation of the ecological effects of discharges. *See* pages 14-15 above. Contrary to the district court's assertion, therefore, the inclusion of waste fills under § 404(a) does not result in unbridled fills made without regard to environmental consequences and does not in any way contravene the Clean Water Act's logic.

By the same token, the district court erred in declaring that fills for such purposes as "roads" and "malls" are worthwhile and justify "some diminution or loss of the nation's waters," while all waste fills "destroy environmental values without supplying the social benefit in return." JA 105. This was naked policy

making. The district court may prefer the proliferation of shopping malls and urban sprawl to coal mining, but others may legitimately feel that a supply of affordable coal has "social benefit" for our nation. It was not the province of the district court to decide this.

As the Supreme Court explained in *Chevron*, agency interpretations invariably and unavoidably reflect political choices. Under our system of government, resolution of these competing interests belongs not to the courts, but to the federal agencies that Congress charged with the administration of the statutes at issue and that have the expertise to administer the statutes:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. In other words, the whole point of the deference obligation is to remove courts from the business of weighing competing policy considerations when faced with agency interpretations. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) (noting that agency's expertise is superior to court's where dispute centers on whether regulation is reasonably necessary to effectuate statute's provisions or to accomplish purposes of the statute); *Akindemowo,* 61 F.3d at 284 ("agencies not only possess the

expertise to implement statutes and implement them at Congressional directive, but also . . . [they] formulate their interpretations of statutory language based on policy considerations, which are manifested by the elected branches of our federal system.”).

Any effort to weigh the “social benefit” of an agency’s interpretation, or to speculate about the political motivation behind its interpretation, as the district court did here, undermines that principle and improperly allows a court to substitute its personal viewpoint for those of the political branches. *Chemical Mfrs. Ass’n v. NRDC*, 470 U.S. 116, 134 (1985) (stating, in deferring to EPA’s interpretation of Clean Water Act, “we do not sit to judge the relative wisdom of competing statutory interpretations”); *Chevron,* 467 U.S. at 866 (“federal judges—who have no constituency—have a duty to respect legitimate policy choices by those who do.”); *NISH v. Cohen*, 247 F.3d 197, 202 (4th Cir. 2001) (“A reviewing court may not second-guess the wisdom of the agency’s reasonable policy choice.”).

Conclusion

There is no doubt that the district court does not like valley fills. The district court made that abundantly clear in its decisions below and in *Bragg*. The district court’s earnest opposition, however, is no justification for the district court’s substituting its views for those of EPA and the Corps. Those federal agencies have

provided what is, without question, a plausible reading of § 404(a), and established law required the district court to defer to that interpretation. If others disagree with that reading, their relief must come from Congress or the agencies themselves. The Court should reverse the injunction of the district court and enter judgment against KFTC on count one of its complaint.[8]

[8] For the reasons stated in pages 38 through 44 of the Federal Appellants' opening brief, the injunction also is overbroad. This is an independent basis for reversal.

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Request For Oral Argument

The Intervenor Defendants-Appellants respectfully request oral argument to assist the Court in addressing the complex issues raised by these consolidated appeals.

Certificate of Service

I certify that by August 19, 2002, two copies of the foregoing **Opening Brief Of Intervenor Defendants-Appellants** were mailed to each of the following counsel:

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