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Muddying the *Chevron* Waters: The D.C. Circuit Lacks Doctrinal Clarity in *Waterkeeper Alliance v. EPA*

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MUDDYING THE *CHEVRON* WATERS: THE D.C. CIRCUIT LACKS DOCTRINAL CLARITY IN *WATERKEEPER ALLIANCE v. EPA*

Abstract: *Chevron* deference is one of the most contentious and misunderstood doctrines in administrative law. Justice John Paul Stevens’ opinion in the watershed 1984 case *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.* established a two-step framework for courts to use in evaluating agency rule-making authority. That clear two-step process has undergone rewording and revision over the years that has resulted in a lack of doctrinal clarity. On April 11, 2017, the U.S. Court of Appeals for the D.C. Circuit decided *Waterkeeper Alliance v. EPA*, a challenge brought by environmentalists to an EPA rule that exempted farmers from reporting certain types of pollution. Purporting to apply *Chevron*, the D.C. Circuit determined that the EPA did not possess the authority to pass the exemption. This Comment argues that although the D.C. Circuit arrived at the correct result, it did so in a doctrinally confusing manner by not clearly delineating the *Chevron* two-step test, thereby potentially complicating future *Chevron* analysis.

INTRODUCTION

Federal agencies have considerable influence over the laws and regulations that govern nearly all aspects of American life—from how we communicate and the prices businesses are allowed to charge us, to what we eat and drink and how we protect our environment.¹ Since 1984, actions taken by federal agencies have been analyzed under a doctrine called *Chevron* deference, which instructs courts to defer to an agency’s interpretation of a law administered by that agency when that law is ambiguous.²

At the broadest level, *Chevron* establishes a hierarchy for interpretative authority for statutes.³ At the top is Congress, whose will is expressed

¹ See generally, e.g., *King v. Burwell*, 135 S. Ct. 2480 (2015) (discussing the IRS’s final rule regarding the Patient Protection and Affordable Care Act); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (reviewing the FCC’s declaratory ruling regarding cable companies providing internet access), *Pauley v. Bethenergy Mines Inc.*, 501 U.S. 680 (1991) (reviewing the Department of Labor’s regulation concerning the Black Lung Benefits Act); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (concerning the language of the Immigration and Nationality Act); *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 842 (1984) (concerning the EPA’s interpretation of an ambiguity in the Clean Air Act).

² *Chevron*, 467 U.S. at 843.

³ See *id.* at 842–43 (establishing a procedure for judicial review of agency action that looks first to congressionally-written statutory text, then to the reasonableness of agency interpretation of that text).

through the text of the statute itself.⁴ Next is the agency responsible for implementing that statute, which has the authority to act when Congress's will is not clear.⁵ Last are the courts, which under *Chevron*, are to defer to agency interpretation, and are not to substitute their own "preferred" interpretation.⁶

This Comment focuses on one instance of judicial review under the *Chevron* deference standard before the U.S. Court of Appeals for the D.C. Circuit in the case of *Waterkeeper Alliance v. EPA*.⁷ Part I of this Comment discusses the current state of *Chevron* deference and introduces the facts of *Waterkeeper Alliance v. EPA*.⁸ Part II analyzes the reasoning of the two opinions of the D.C. Circuit in *Waterkeeper Alliance*.⁹ Finally, Part III argues that although the D.C. Circuit reached the correct decision in *Waterkeeper Alliance*, it did so in a manner that only further confuses *Chevron* analysis and represents a dangerous trend of the judiciary *over-deferring* to agencies.¹⁰

I. THE CURRENT STATE OF *CHEVRON* DEFERENCE AND *WATERKEEPER ALLIANCE V. EPA*

Since 1984 the standard of review for courts reviewing federal agency decision-making has been that laid out in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*¹¹ What became known after the case as *Chevron* deference requires judicial deference to agency interpretations of federal statutes, provided that those statutes are ambiguous and the agency's interpretation is reasonable.¹² If both conditions are met, the court must defer to the agency's interpretation of the statute, regardless of whether the court agrees with the agency's interpretation or believes that the interpretation is the best one possible.¹³ Part A of this section briefly outlines the meaning of *Chevron* deference and the current debate over what the test entails.¹⁴ Part B

⁴ *Id.* at 842–43 (stating that courts “must give effect to the unambiguously expressed intent of Congress”).

⁵ *Id.* at 843–44. This occurs when the statute is ambiguous. *Id.*

⁶ *Id.* at 865.

⁷ *Waterkeeper All. v. EPA*, 853 F.3d 527, 538 (D.C. Cir. 2017). This is not to be confused with a Second Circuit decision involving the same parties. *See generally* *Waterkeeper All. v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (evaluating similar agency permitting authority under the Clean Water Act).

⁸ *See infra* notes 11–60 and accompanying text.

⁹ *See infra* notes 61–93 and accompanying text.

¹⁰ *See infra* notes 94–106 and accompanying text.

¹¹ 467 U.S. 842, 842–43 (1984); *see also* Jonathan Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 985 (2016) (describing *Chevron* as a “fixture” in administrative law and noting that it is cited by federal appellate courts in over 200 cases each year).

¹² *Chevron*, 467 U.S. at 842–43.

¹³ *Id.* at 843.

¹⁴ *See infra* notes 16–47 and accompanying text.

of this section discusses the facts and procedural posture of *Waterkeeper Alliance v. EPA*.¹⁵

A. The Meaning of Chevron's Two Steps

In *Chevron*, Justice John Paul Stevens established a two-question process for reviewing a federal agency's interpretation of a statute.¹⁶ The first question analyzes the text of the statute in question, seeking to determine whether it unambiguously expresses the intent of Congress.¹⁷ If the court finds no ambiguity in the text, then the *Chevron* inquiry is over, and Congress's interpretation stands.¹⁸ If, however, the court does find ambiguity, then the agency's interpretation will survive, as long as it is a reasonable interpretation of that ambiguity.¹⁹ The consensus is that the step-two reasonableness inquiry is equivalent to arbitrary and capricious review.²⁰

These two questions are the two "steps" of *Chevron*: the statute is interpreted, *de novo*, by the reviewing court to determine if there is any ambiguity, and if there is, then the agency's proffered interpretation controls as long as that interpretation is reasonable.²¹ Justice Stevens's opinion makes it clear that the steps are intended to be sequential, because if the court determines that the statute is unambiguous, then "that is the end of the matter."²² If there is no ambiguity to be found in the statute, then there is no room for the agency to exercise its interpretive authority.²³

¹⁵ See *infra* notes 48–60 and accompanying text.

¹⁶ *Chevron*, 467 U.S. at 842–43.

¹⁷ *Id.* ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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.")

¹⁸ *Id.*

¹⁹ *Id.* ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

²⁰ See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 359 (7th ed. 2011) (stating that the "weight of scholarly opinion" equates step two of *Chevron* with arbitrary and capricious review); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 1009 (7th ed. 2014) (noting that arbitrary and capricious review is the standard called for by the Administrative Procedures Act). The Supreme Court has explained that a court can set aside an agency action as arbitrary and capricious if the agency completely lacks a rational explanation for its decision; for example, if the agency "offer[ed] an explanation for its decision that runs counter to the evidence before [it]" or is "so implausible" that it cannot be explained by a "difference in view." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

²¹ *Chevron*, 467 U.S. at 842–43.

²² *Id.*

²³ See *id.* ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

In the years since *Chevron* was decided, however, this clear two-step process has been muddied to the point that some scholars claim that courts now engage in only a single step review for reasonableness, removing the first step from the analysis.²⁴ The Supreme Court contributed to the confusion in *Entergy Corp. v. Riverkeeper, Inc.*, in which Justice Antonin Scalia, writing for the majority, admitted to skipping step one of *Chevron*, arguing that step one was not needed because the second-step reasonableness inquiry necessarily covered whether Congress had spoken directly on the issue.²⁵ In *INS v. Cardoza-Fonseca*, the Court invoked *Chevron* for the proposition that agency interpretations are invalid if they contradict clear congressional intent, but did so without delineating the two-step process.²⁶ The majority admitted that the statute included ambiguity, the resolution of which would warrant deference, but that the agency's interpretation was incorrect nonetheless.²⁷ Justice Scalia wrote a concurring opinion criticizing the majority for its misunderstanding of the role of the courts in statutory interpretation and the meaning of *Chevron*.²⁸

Supporters of the argument that the two steps are redundant claim that step one is merely a species of step two: if Congress has spoken directly on the issue, then any agency interpretation that contradicts Congress's purpose is necessarily unreasonable.²⁹ At times, the courts are rather clear that they are only engaging in a single-step inquiry.³⁰ This is not always the case, however,

²⁴ Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

²⁵ 556 U.S. 208, 218 n.4. What is surprising about Justice Scalia's position here is that it contradicts the reasoning laid out in his widely cited defense of *Chevron*, which was that any potential for over-deference could be curbed by a strong reading of *Chevron* step one. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521 (arguing that a "strict constructionist" approach to statutory interpretation results in fewer instances of ambiguity for agencies to interpret). Justice Scalia states that the justification for *Chevron* deference comes from Congress's intent to delegate to executive agencies the power to resolve ambiguities in statutes. *Id.* at 516. This places step one, which determines whether any ambiguity is present, at the forefront. *Id.* In the article Justice Scalia argues that if courts tend to find that the meaning of statutes are apparent from the text (which, as a supporter of textualism, he often would), then there will be fewer opportunities for *Chevron* deference to rear its head. *Id.* at 521.

²⁶ See 480 U.S. 421, 447-48 (1987) (citing *Chevron* but failing to explicitly proceed through the two-step analysis).

²⁷ *Id.* at 448. Notably, the court did not engage in a reasonableness analysis for the agency's interpretation. *Id.*

²⁸ *Id.* at 454 (Scalia, J., concurring) (criticizing the majority's formulation for over-stating the authority of the judiciary and describing it as an "evisceration" of *Chevron*).

²⁹ Stephenson & Vermeule, *supra* note 24, at 599.

³⁰ See *Entergy Corp.*, 556 U.S. at 218 (examining an agency interpretation for reasonableness without first determining whether the statute was ambiguous).

and this inconsistency has led to the murky state of the doctrine inherited by the D.C. Circuit in *Waterkeeper*.³¹

The argument for a two-step test draws from the text of *Chevron* as written by Justice Stevens, and emphasizes a clear sequential inquiry.³² A strict reading of *Chevron* step one places primary emphasis on statutory text, looking only at the clarity of Congress's instructions.³³ Step one, as the interpretation of statutory text, answers the question of law as to Congress's intent.³⁴ If ambiguity is found, then what is left is a question of implementation, which is a policy area governed by the relevant agency, not congressionally-created law.³⁵

How thoroughly the court treats the step one question has significant implications for future agency lawmaking in the area covered by the statute in question.³⁶ If the court determines that the statute means (or cannot mean) X, then that decision precludes later agency interpretations that contradict X.³⁷ A decision that the statute *may* mean Y, but does not have to, however, does not limit future agency interpretations.³⁸ In *National Cable & Telecommunications Assn. v. Brand X Internet Services*, the Supreme Court ruled that an agency's interpretation of an ambiguous statute takes precedence over a court's prior interpretation if the two conflict.³⁹ Thus the courts must be clear

³¹ See *Waterkeeper All.*, 853 F.3d at 534 (applying *Chevron* without proceeding through a two-step analysis); see also *Freeman v. Quicken Loans*, 566 U.S. 624, 631 (2012) (stating that the Court was not applying *Chevron*, despite determining that the statute unambiguously forecloses the agency's interpretation).

³² *Chevron*, 467 U.S. at 842–43; see Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 618 (2009) (arguing that courts that do not engage in explicit step one analysis are not clear as to what standard they are reviewing under, and thereby tend to over-extend their role in the interpretive process).

³³ *Chevron*, 467 U.S. at 842–43.

³⁴ RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE 161–62 (5th ed. 2010) (explaining that once a court concludes at *Chevron* step one that Congress did not resolve the issue in question, it is now an issue of policy, not law).

³⁵ *Pauley v. Bethenergy Mines Inc.*, 501 U.S. 680, 696 (1991) (stating that resolution of ambiguity is a question of policy, delegated to the agency by Congress); *Chevron*, 467 U.S. at 864–66; see *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994) (describing agency interpretation of ambiguity as a policy decision entitled to judicial deference).

³⁶ *Stephenson & Vermeule*, *supra* note 24, at 600 (arguing for a one-step approach and suggesting that a strict independent step one inquiry can result in less room for agency interpretation, because it invites the judiciary to make a point determination on the statute at the outset—thereby fixing its interpretation, rather than simply setting the limits on a range of permissive interpretations—which limits the number of opportunities for agencies to submit their own interpretation).

³⁷ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 983 (2005); Bamberger & Strauss, *supra* note 32, at 616.

³⁸ See *Brand X*, 545 U.S. at 983; Bamberger & Strauss, *supra* note 32, at 616.

³⁹ *Brand X*, 545 U.S. at 982. This power is only available to the agency at *Chevron* step two. *Id.* at 982–83. If the prior court interpretation ruled that the statute was unambiguous (a step one determination), then there is no room for the agency to exercise any authority. *Id.*

about what test they are purporting to use in order to be clear about what the impact of their decision will be.⁴⁰

The debate over *Chevron*, in addition to its practical significance within administrative law, also implicates the fundamental nature of separation of powers in the federal system of government.⁴¹ The power to make substantive law in the federal sphere rests, originally, entirely with Congress.⁴² Agency power derives from grants from Congress in two ways: through explicit delegation in the text of statutes, and implied delegation via the agencies' power to resolve statutory ambiguities when implementing them.⁴³ *Chevron* serves to maintain the proper role of agency power, as directed by Congress—to allow control where Congress intended to control, and delegate where it intended to delegate.⁴⁴ Maintaining this balance is necessary to maintain political accountability (by vesting power in democratically-elected legislators) while allowing for the smooth and effective operation of the federal government (by allowing expert administrators to fill in gaps in laws passed by Congress).⁴⁵ *Chevron* seeks to properly balance the roles of the three branches of government in statutory interpretation.⁴⁶ This requires accommodating Congress's legislative and the executive's quasi-legislative (via rulemaking) powers with the role of the judiciary to "say what the law is."⁴⁷

B. Facts and Procedural History of Waterkeeper Alliance v. EPA

Waterkeeper Alliance v. EPA is a challenge brought by environmentalist groups to a Final Rule passed by the Environmental Protection Agency that exempts farms from certain reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CER-

⁴⁰ See *id.*; see also *supra* notes 98–101 and accompanying text.

⁴¹ Scalia, *supra* note 21, at 514–15.

⁴² U.S. CONST. art. I, § 8.

⁴³ *Pauley*, 501 U.S. at 696 (stating that Congress delegates policymaking authority through express delegation or the introduction of ambiguous text in the statute); *Chevron*, 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

⁴⁴ *Pauley*, 501 U.S. at 696 ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches."); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (stating that courts must defer to agency authority when Congress has intended to delegate, but *only* when Congress has done so); *Chevron*, 467 U.S. at 866 (stating that judicial deference is required to ensure that policy decisions are made by the branches that are democratically elected).

⁴⁵ See *Chevron*, 467 U.S. at 865 (discussing the responsibility of courts to respect Congress's power to delegate policymaking authority to executive agencies); *supra* note 40.

⁴⁶ *Chevron*, 467 U.S. at 866.

⁴⁷ *Id.*; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This concern regarding the judiciary minimizing its role to interpret the law is raised by Judge Brown's concurrence in this case, which she refers to as "judicial abdication." *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring).

CLA”) and the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”).⁴⁸ CERCLA and EPCRA require entities to report releases into the environment of substances determined to be hazardous and extremely hazardous, respectively, in quantities over certain thresholds.⁴⁹ The Final Rule granted a limited exception to these general reporting requirements, exempting farms from reporting the release of ammonia and hydrogen sulfide from animal waste into the air.⁵⁰

The EPA justified the exemption on the grounds that such farm reports were unlikely in most cases to result in government response or intervention, while the costs of compliance were significant for both the farms and the agency itself.⁵¹ The U.S. Court of Appeals for the D.C. Circuit, however, accepted evidence, which was not refuted by the EPA, that a government response was not wholly impossible.⁵² Commenters to the EPA’s Proposed Rule raised concerns regarding the dangers of unusually concentrated releases that

⁴⁸ 42 U.S.C. §§ 9603, 11004 (2012); *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017); CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,948 (Dec. 18, 2008) (codified at 40 C.F.R. pt. 302, 355). CERCLA, also known as Superfund, was enacted in 1980 to remediate sites contaminated with toxic waste. *Superfund: CERCLA Overview*, U.S. EPA, <https://www.epa.gov/superfund/superfund-cercla-overview> [<https://perma.cc/4GLT-6ECY>]. EPCRA, enacted in 1986 in response to a series of high-profile chemical spills (including one in Bhopal, India), identifies locations of toxic chemicals and requires facilities to develop emergency disaster plans. *What Is EPCRA?*, U.S. EPA, <https://www.epa.gov/epcra/what-epcra> [<https://perma.cc/AUD4-XN6C>]. The Final Rule was established through informal legislative rulemaking, which is done through a process called notice-and-comment. 5 U.S.C. § 553 (2012); PIERCE, *supra* note 34, at 561–68 (explaining informal rule-making processes). In this process the agency submits a proposed rule, which is open for the public and interested parties to comment on. 5 U.S.C. § 533. After the close of the comment period, the agency may revise the rule, and then promulgates it in its final form. *Id.* The rule in *Waterkeeper Alliance* was first proposed on December 28, 2007, and open for comments for ninety days. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. at 76,951. The final rule was published on December 18, 2008, to take effect on January 20, 2009. *Id.* at 76,949.

⁴⁹ 42 U.S.C. §§ 9603(a), 11004(a). These reports are sent to the National Response Center, which then informs all necessary government agencies, including local officials. *id.*

⁵⁰ *Waterkeeper All.*, 853 F.3d at 530. There was a carve-out in the Final Rule that denied the EPCRA exemption to large-scale meat-producing farms, also known as concentrated animal feeding operations (“CAFOs”). *Id.* at 532. The National Pork Producer’s Council entered the case to challenge the CAFO carve-out, however, because the court vacated the Final Rule and this challenge was not considered. *Id.* at 538.

⁵¹ *Id.* at 532; *see id.* at 536–37. The EPA specifically determined that “in most cases” a response would be impractical, though the court emphasized that the qualification therefore implied that there are some situations that would call for a response. *Id.* at 536. The EPA estimated that over ten years, the exemption would save over \$60 million in compliance costs for farms, and \$8 million in costs for federal agencies. *Id.* at 537.

⁵² *Id.* at 536. The court stated that potential responses within the EPA’s authority include both removal and remedial actions. *Id.* at 537. These actions can take the form of instituting monitoring requirements, requiring stricter safety measures for storage of hazardous materials, relocating neighboring residents, and other protective measures. *Id.* The EPA, in defending the rule, argued that these types of responses would “rarely” be used, but could not conclusively rule them out. *Id.*

occur as a result of manure storage.⁵³ This storage requires agitation of the storage pit, which can result in significant, concentrated releases that have the potential to endanger nearby humans and animals.⁵⁴ State and national emergency response agencies also testified to the value of disclosure of potentially harmful emissions, both for direct intervention and for evaluating emergency calls and tips.⁵⁵

The case was brought directly to the D.C. Circuit under a jurisdictional provision in CERCLA that provides for direct review by the Court of Appeals.⁵⁶ The EPA argued that the plaintiffs lacked standing to challenge CERCLA (and thus lacked a jurisdictional hook to be in the Court of Appeals).⁵⁷ According to the EPA, the plaintiffs had not suffered sufficient injury, because CERCLA does not require public disclosure of the reported information.⁵⁸ EPCRA's reporting requirements, however, which do trigger disclosure, are tied to those established in CERCLA.⁵⁹ Thus any reduction in CERCLA requirements, like that established by the Final Rule, results in a reduction of disclosures under EPCRA, and therefore a reduction of publicly disclosed information.⁶⁰

II. THE D.C. CIRCUIT'S TWO OPINIONS IN *WATERKEEPER ALLIANCE V. EPA*

A. The Majority Opinion Rules That the EPA Lacked the Authority to Pass the Final Rule

The D.C. Circuit determined that the EPA did not possess sufficient authority to grant the Final Rule exempting farms from its reporting require-

⁵³ *Id.* at 536.

⁵⁴ *Id.* at 536–67. The court noted that the exposures caused by pit agitation poses significant risks, with fatalities reported. *Id.* Despite the risks, the EPA stated that such activities would “rarely” require an agency response. *Id.* The court again seized on the term “rarely” as an implication that there might be times that such a response is necessary. *Id.*

⁵⁵ *Id.* An emergency planning commission illustrated the value of this knowledge in a scenario in which emergency responders receive a call in the dead of night reporting a foul odor. *Id.* at 537. The information in the CERCLA/EPCRA reports would give the responders an idea of possible causes of the odor, and possibly narrow an investigation when the agencies begin a search. *Id.* at 537. Commenters to the Proposed Rule also emphasized the need to keep local authorities informed of potentially dangerous situations. *Id.*

⁵⁶ 42 U.S.C. § 9613(a) (2012). EPCRA does not contain a similar provision. *Waterkeeper All.*, 853 F.3d at 532. The court can hear a consolidated challenge involving multiple statutes as long as one of the statutes provides for direct review. *Id.* at 533; *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1195 (D.C. Cir. 1995).

⁵⁷ *Waterkeeper All.*, 853 F.3d at 533.

⁵⁸ *Id.* The Supreme Court has ruled that plaintiffs suffer an informational injury sufficient to grant standing when an agency action cuts them off from “information which must be publicly disclosed pursuant to a statute.” *FEC v. Akins*, 524 U.S. 11, 21 (1998).

⁵⁹ 42 U.S.C. §§ 9603(a), 11004(a); *Waterkeeper All.*, 853 F.3d at 534.

⁶⁰ *Waterkeeper All.*, 853 F.3d at 534.

ments under CERCLA and EPCRA.⁶¹ The court stated that the agency did not point to specific statutory ambiguity, but rather pointed to “unrelated exemptions” written into the statutes by Congress that it believed “collectively create ambiguity.”⁶² The court stated that this was not a viable foundation for an exercise of agency interpretation.⁶³ The court therefore ruled that the Final Rule was not a valid exercise of agency authority, and vacated the rule.⁶⁴

The court began its analysis using the formulation of *Chevron* laid out in *Entergy Corp.*, which interpreted *Chevron* to say that a “reasonable agency interpretation prevails.”⁶⁵ This formulation cut out *Chevron* step one because there is no mention of ambiguity, and specifically omitted the sequential nature of the inquiry.⁶⁶

The court nonetheless answered the ambiguity question, finding that the EPA’s attempt to find implied ambiguity in the reporting requirements by pointing to other exceptions was insufficient.⁶⁷ The EPA argued that the presence of other exceptions to the general reporting requirements creates ambiguity as to whether the EPA had the authority to pass further exemptions.⁶⁸ The court noted that the presence of some exceptions written into the statutory text did not necessarily bar all others, particularly in administrative contexts where Congress often left issues up to agency discretion.⁶⁹ In this case, however, the court determined that Congress combined those limited exemptions with an otherwise “sweeping reporting mandate” in CERCLA and EPCRA.⁷⁰ This mandate constituted a “straightforward reporting require-

⁶¹ *Waterkeeper All. v. EPA*, 853 F.3d 527, 537–38 (D.C. Cir. 2017).

⁶² *Id.* at 534.

⁶³ *Id.*

⁶⁴ *Id.* at 537–38.

⁶⁵ *Id.* (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009)).

⁶⁶ *See supra* notes 24–25 and accompanying text.

⁶⁷ *Waterkeeper All.*, 853 F.3d at 534.

⁶⁸ *Id.* The statutes include exceptions for certain types of pollution (including automobile exhaust and certain nuclear material), cases that do not result in exposure to the public at large (such as exposures that are contained entirely within a workplace), and releases that are already reported under other federal statutes. *Id.*; 42 U.S.C. § 9601(22) (2012).

⁶⁹ *Waterkeeper All.*, 853 F.3d at 534. The court states that the presence of the exceptions, had they been on their own, may have been enough to read in authority for the EPA to grant further exceptions. *Id.* This is consistent with *Chevron*’s general spirit of deference, particularly the theory of implied deference. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982–83 (2005) (holding that agency interpretations, when they satisfy *Chevron*, can contradict judicial interpretations); *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 842, 844 (1984) (instructing courts to defer to the reasonable policy decisions made by executive agencies).

⁷⁰ *Waterkeeper All.*, 853 F.3d at 535. The language in CERCLA requires reporting of “any” release over the minimum, and EPCRA’s requirements refer directly to those required under CERCLA. 42 U.S.C. §§ 9603(a), 11004(a) (2012).

ment” that allowed no room for the EPA to construe ambiguity to create authority to pass further exemptions.⁷¹

The EPA also pointed to its authority to establish certain administrative aspects of the reporting requirements, including setting the minimum reportable quantities and a general authority to pass any regulations necessary to carry out the provisions of the statutes.⁷² According to the court, these grants of authority gave the EPA the ability to designate additional reportable substances, but did not provide a basis for authority to exempt substances already required under the statute.⁷³ The EPA read into this grant of authority, along with Congress’s prior authorized exemptions, a congressional intention to maximize efficiency and limit the burden on reporting entities and government agencies.⁷⁴ The court granted that this may have been a motivation for some of the exceptions, but absent specific language granting EPA the authority to consider efficiency in its administration of the reporting statutes, the EPA could not pass this exemption on the basis of efficiency analysis.⁷⁵ The agency, the court stated, could not disregard Congress’s instructions just because it determined a reporting requirement was “not worth the trouble.”⁷⁶

The EPA also asserted its *de minimis* power, which allows agencies to disregard the literal terms of a statute if enforcing those terms would result in “pointless expenditure,” which occurs if there is no regulatory benefit at all.⁷⁷

⁷¹ *Waterkeeper All.*, 852 F.3d at 535. Further, the statutes lack what the court calls “language of delegation,” such as “as appropriate,” “under circumstances to be determined by the EPA,” and the like. *Id.* Thus the court found no evidence to support the EPA’s contention that Congress had granted it authority to alter the generally broad reporting requirements. *Id.*

⁷² *Id.*; 42 U.S.C. §§ 9615, 11048.

⁷³ *Waterkeeper All.*, 853 F.3d at 535.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* Any further exceptions would contravene Congress’s intent to require broad, comprehensive reports of any releases of hazardous material, as made clear in the statutes. *Id.* This read of a sweeping mandate is essential, and sets the case apart from *Entergy Corp.*, in which the Supreme Court allowed the EPA to engage in a cost-benefit analysis under provisions of the Clean Water Act because there was no such mandate. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). Other provisions in the Clean Water Act allowed for cost considerations, and the specific provision in question did not forbid it. *Id.* at 223. Under *Chevron* analysis then, at least after *Entergy Corp.*, agency action is generally allowable, unless it is expressly forbidden by Congress. *Id.* at 222. This comports with the general spirit of deference to agency expertise that animates *Chevron*. See *id.* at 223 (recognizing that *Chevron* acts to expand the scope of permissive agency action); *Chevron*, 467 U.S. at 854 (directing courts to defer to reasonable agency interpretations of the statutes the agencies implement).

⁷⁷ *Waterkeeper All.*, 853 F.3d at 535; *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (“Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.”). The court makes it clear, however, that the *de minimis* exception is *not* a balancing test, and so the power cannot be exercised if a regulatory benefit is found, regardless of whether the agency believes that this benefit is outweighed by the costs. *Waterkeeper All.*, 853 F.3d at 535; *Ala. Power*, 636 F.2d at 361 (stating that the *de minimis* exception is not available

Because the court found some value to be gained from the reports, the court held that the Final Rule exempting the farms from the standard reporting requirements was beyond the EPA's authority to pass.⁷⁸ Thus, because the court found no statutory ambiguity to be interpreted and no basis for an exercise of the *de minimis* exception, it concluded that the EPA did not have the authority to pass the Final Rule.⁷⁹

B. Judge Janice Brown's Concurrence Criticizes the Majority's Chevron Analysis

Judge Brown's concurrence began by recognizing that the majority came to the correct conclusion in ruling that the EPA did not point to sufficient ambiguity to justify its exercise of authority.⁸⁰ The concurring opinion, however, criticized the majority for its clumsy formulation of the *Chevron* standard and its potential to confuse further *Chevron* analysis.⁸¹ According to Judge Brown, the issue with the majority's use of *Entergy Corp.*'s formulation of *Chevron* is that *Entergy Corp.* was limited to the principle that an agency's unreasonable interpretation is outside of any ambiguity.⁸² This, she wrote, does not establish a rule for situations in which a court finds that the agency's interpretation is reasonable, but has not determined via *Chevron* step one that there is statutory ambiguity to interpret.⁸³

According to the concurrence, this case was easily disposed of via *Chevron* step one.⁸⁴ The EPA did not provide any statutory ambiguity that could grant it power to act, and therefore there was nothing left to analyze under

when the function provides some benefits, but when the agency determines those benefits are outweighed by the costs).

⁷⁸ *Waterkeeper All.*, 853 F.3d at 537. The court accepted evidence from the public commentary on the proposed rule that put forth possible uses for the information. See *supra* notes 52–54 and accompanying text.

⁷⁹ *Waterkeeper All.*, 853 F.3d at 537–38.

⁸⁰ *Waterkeeper All. v. EPA*, 853 F.3d 527, 538 (D.C. Cir. 2017) (Brown, J., concurring).

⁸¹ *Id.* The court uses the formulation from *Entergy Corp.*, which inverts the two-step analysis by beginning with “a reasonable agency interpretation prevails,” unless Congress has spoken on the issue, and the agency's interpretation conflicts with Congress's. *Id.*; *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

⁸² *Waterkeeper All.*, 853 F.3d at 538 (Brown, J., concurring). This formulation goes through *Chevron* backwards, by first deciding if the interpretation is reasonable, before determining whether the statute is ambiguous. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 842, 842–43 (1984) (establishing a two-step test, for ambiguity followed by reasonableness). It does not alter the actual outcome of the test (because if the interpretation is unreasonable, it would have failed *Chevron* step two anyway), but risks complicating future applicability. See *infra* notes 101–105 and accompanying text (discussing the future-applicability issues of a simple reasonableness test).

⁸³ *Waterkeeper All.*, 853 F.3d at 538 (Brown, J., concurring).

⁸⁴ *Id.*

Chevron.⁸⁵ Judge Brown emphasized the importance of step one's gatekeeping function because of what she viewed as a degradation of step two analysis.⁸⁶ If *Chevron* step two amounted to little more than a rubber stamp, step one would take on a more important role in limiting the opportunities for agencies to exercise unchecked authority.⁸⁷ Further, as Judge Brown wrote, this step one analysis needed to remain wedded to statutory text.⁸⁸ Departing from the text moved further away from Congress's instructions, which allowed more opportunity to give agencies authority that was never intended to be given them.⁸⁹

According to Judge Brown, a return to the proper form of *Chevron* analysis is necessary because the combination of skipping the step one threshold determination and the weakened step two reasonableness review results in very little teeth to the courts' review of agency action.⁹⁰ In order for the courts' review to be more than a simple rubber stamp, the reviewing court would need to undertake substantive review, and the most effective way to do so is to stay grounded in the statutory text via *Chevron* step one.⁹¹ Finally, Judge Brown notes that an appeal of the one-step reasonableness standard is that it does not require a court to make a final decision on whether the statute is open to multiple meanings before considering the reasonableness of the agency's interpretation.⁹² This, however, would trivialize the importance of statutory clarity and, therefore, the importance of Congress.⁹³

⁸⁵ *Id.* Judge Brown rejected the EPA's suggestion that unrelated statutory text can be a sufficient basis for a finding of ambiguity. *Id.*

⁸⁶ *Id.* She cites authority claiming that step two has been reduced to arbitrary and capricious review that is not strictly governed by the statutory text (which is Congress's instructions) in question. *Id.* Arbitrary and capricious is the standard called for under the Administrative Procedure Act, and so in itself should not be objectionable. See 5 U.S.C. § 706 (2012) (requiring courts that are reviewing agency actions to set aside those actions found to be arbitrary and capricious). Judge Brown is concerned, however, that this diluted standard (which looks at the reasonableness of the agency's decision only, and not at Congress's instructions), when combined with weakened step one analysis, would result in a toothless review and very few agency actions being overturned. See *Waterkeeper All.*, 853 F.3d at 538-39 (Brown, J., concurring) (arguing that the effect of weakened *Chevron* analysis is "judicial abdication" from its duty to interpret the law).

⁸⁷ *Waterkeeper All.*, 853 F.3d at 538 (Brown, J., concurring).

⁸⁸ *Id.* This, she wrote, is a particularly critical because step-two reasonableness analysis has tended to have little basis in the actual statutory text. *Id.*

⁸⁹ *Id.* This is important because at the most basic level, all agency authority to act comes from that granted by Congress. See *id.*; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (holding that "an agency literally has no power to act . . . unless and until Congress confers power on it"). The statutory text is the basis for the agency's authority to act, so it needs to be considered when courts review that agency action. See *La Pub. Serv. Comm'n*, 476 U.S. at 374.

⁹⁰ *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

III. THE D.C. CIRCUIT'S *CHEVRON* ANALYSIS IN *WATERKEEPER* LACKS CLARITY AND DEPARTS FROM THE TWO STEP TEST

The U.S. Court of Appeals for the D.C. Circuit correctly ruled in *Waterkeeper Alliance v. EPA* that the EPA did not have the authority to pass the Final Rule.⁹⁴ The EPA did not identify any specific statutory ambiguity that would suffice to trigger *Chevron* deference, and its attempt to point to unrelated provisions that combine to “collectively” raise ambiguity was not a sufficient basis either.⁹⁵ Although the court came to the correct conclusion in the case, and did decide the essential ambiguity question, it did so in an imprecise manner that introduced further confusion into the *Chevron* analysis and continued on a path towards collapsing *Chevron*’s two-step inquiry into just a one-step reasonableness analysis.⁹⁶ The majority’s analysis did not proceed through the sequential *Chevron* framework.⁹⁷ This is evidenced by the court spending significantly more time on the issue of “collective” ambiguity than the argument deserves.⁹⁸ If the *Chevron* analysis had been laid out in its proper sequential form, it would have been readily evident that the notion of “collective” ambiguity arising from unrelated statutory provisions provided no basis for agency interpretation that would warrant deference.⁹⁹ The agency could not point to any specific ambiguity within the text, and according to Justice Stevens’s formulation in *Chevron*, that should have ended the inquiry.¹⁰⁰

The problem with allowing *Chevron* to collapse, as the concurrence recognized, is that a simple reasonableness inquiry allows courts to avoid making a determination on whether a statute contains ambiguity or is susceptible to multiple meanings.¹⁰¹ Not only is this a departure from the judiciary’s duty to “say what the law is,” it also has potential consequences for later actions

⁹⁴ 853 F.3d 527, 537–38 (D.C. Cir. 2017). (holding that the EPA lacked the authority for the rule because the statutes the agency was interpreting were unambiguous).

⁹⁵ *Id.* at 534.

⁹⁶ *See id.* at 537–38. (applying the *Chevron* standard but without utilizing the two-step framework).

⁹⁷ *Compare id.* at 534–35 (reviewing the EPA’s action for reasonableness without first establishing the existence of ambiguity in the controlling statute), with *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 842, 842–43 (1984) (laying out the sequential two-step framework).

⁹⁸ *See Waterkeeper All.*, 853 F.3d at 538 (Brown, J., concurring) (arguing that the theory of “collective ambiguity” as advanced by the EPA threatens the entire *Chevron* framework).

⁹⁹ *See id.* Step one, as discussed above, serves an important gatekeeping function. *See supra* notes 84–93 and accompanying text. Once the court determined that there was no ambiguity in the statute to be interpreted, the *Chevron* analysis should be complete. *See Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring).

¹⁰⁰ *Chevron*, 467 U.S. at 842–43 (“If the intent of Congress is clear, that is the end of the matter . . .”).

¹⁰¹ *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring).

and proceedings that involve the statute, due to the Supreme Court's decision in *Brand X*.¹⁰² *Brand X* held that if a statute is found to be ambiguous, then an agency's interpretation can trump a court's prior interpretation of that statute.¹⁰³ This means that the decision to find the statute ambiguous or not is what determines whether the court has the power to reject the agency's decision.¹⁰⁴ If the statute is ambiguous, then the agency's interpretation will stand, unless it is found to be unreasonable.¹⁰⁵ Thus courts should be clear on

¹⁰² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (declaring that it is “emphatically the province and duty of the judicial department to say what the law is”). This judicial duty to determine the meaning of the law has been re-affirmed since the decision in *Marbury*. See, e.g., *Perez v. Mortg. Banker's Ass'n.*, 135 S. Ct. 1199, 1222-23 (2015) (Scalia, J., concurring) (invoking *Marbury*'s “say what the law is” language to question the validity of *Seminole Rock* deference to agency technical expertise). Congress explicitly granted this power to the judiciary via the Administrative Procedure Act, which states that in the realm of administrative law, “the reviewing court shall decide all relevant questions of law” and “interpret . . . statutory provisions . . .” 5 U.S.C. § 706 (2012). An abandonment of step one, which determines the delegation of authority through statutory interpretation (and is therefore a question of law), is inconsistent with this mandate. See *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring) (arguing that a *Chevron* analysis that avoids making a step one determination departs from the courts' duty to “say what the law is”); Bamberger & Strauss, *supra* note 32, at 625 n.50 (arguing that step one is a question of law because it determines the authority conferred to the agency by the statute). Though a court does not necessarily have to establish *exactly* what statutory text means, it must determine whether that statute is at least open to interpretation, and set the limits on the range of possible interpretations (in determining what would constitute an unreasonable interpretation). See *Waterkeeper All.*, 853 F.3d at 538 (Brown, J., concurring) (arguing that step one is where courts set the “boundaries of delegated authority,” which are the outer bounds within which the agency's interpretations can reasonably fall); *supra* notes 36–40 and accompanying text. Richard Pierce has argued that *Chevron* is compatible with this duty because “say[ing] what the law is” is satisfied by the step one inquiry. PIERCE, *supra* note 34, at 163. Once the issue has been evaluated under step one, a decision has been made on the statute's meaning (whether that meaning is clear, or some amount of ambiguity is present). Bamberger & Strauss, *supra* note 32, at 624. *Chevron* step two is a strictly policy question then, in which deference to agency discretion does not impose on the judiciary's law-interpreting role. See *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 986 (2005) (holding that upon finding a statute ambiguous at step one, courts are to defer to agency interpretations as long as they are “reasonable policy choice[s]”); PIERCE, *supra* note 34, at 161–62 (stating that *Chevron* step two covers policy decisions delegated by Congress to the agency interpreting the relevant statute); Bamberger & Strauss, *supra* note 32, at 624–25 (characterizing the two steps of *Chevron* as the dual roles of the judiciary, the first its independent interpretive role, and the second an oversight role).

¹⁰³ *Brand X*, 545 U.S. at 982. Though this appears unusual, as if the agency is allowed to “overrule” the court, it is simply the continued exercise of *Chevron* deference, just applied to a prior interpretation by a court, rather than one made in the moment. See *Chevron*, 467 U.S. at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). But see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing that a *Brand X* reversal of a court's interpretation amounts to “an unconstitutional revision of a judicial declaration of the law by a political branch”).

¹⁰⁴ *Brand X*, 545 U.S. at 982.

¹⁰⁵ *Id.* Unlike a determination, like in *Brand X*, where the court finds the statute unambiguous, and thus institutes its preferred meaning, if the court finds the agency's interpretation unreasona-

whether they are rejecting an agency's interpretation because the statute is already unambiguous, or because the statute is ambiguous but the proffered interpretation is unreasonable.¹⁰⁶

CONCLUSION

The battle over when courts are obligated to grant deference to agency interpretation of law continues on and figures to move to the forefront, as one of the *Chevron* doctrine's most prominent critics, Neil Gorsuch, has ascended to the Supreme Court. In 2017, in *Waterkeeper Alliance v. EPA*, the U.S. Court of Appeals for the D.C. Circuit waded in again, correctly determining that the EPA had exceeded its authority when it passed the Final Rule. In doing so, however, the court moved further towards collapsing the two-step *Chevron* formula, thereby potentially eroding Congress's control over agency action, encompassing a large swath of American law. Future decisions should follow the two-step process laid out in the original decision, ensuring that the doctrine is only applied in cases where agencies were intended to have authority to act from Congress. Doing so would also guarantee that all branches of government maintain their proper roles, with the legislature making the law, the judiciary interpreting it, and the executive carrying it out.

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ble, it can only vacate the rule, and return the matter to the agency for a new decision. *See id.* (reversing a vacatur by the Ninth Circuit of an FCC rule on reasonableness grounds).

¹⁰⁶ *See id.* at 982 (discussing the effects of a court's prior interpretation of a statute on subsequent agency interpretation); *see also* *United States v. Home Concrete & Supply LLC*, 566 U.S. 478, 493 (2012) (Scalia, J., concurring) (discussing the effects of the *Brand X* decision and its requirement that reviewing courts explicitly indicate whether they find the statute to be ambiguous or unambiguous).