Administrative Law
Law 6400 – Section 12
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Supplementary Materials
Part 2

Jonathan R. Siegel
GW Law School
The letter reads in part: ‘On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of $7.2MM, The Bank of Hartsville with deposits of $12.8MM, The First Federal Savings and Loan Association with deposits of $5.4MM, The Mutual Savings and Loan Association with deposits of $8.2MM and the Sonoco Employees Credit Union with deposits of $6.5MM. The aforementioned are as of December 31, 1968.’

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PER CURIAM.

In its present posture this case presents a narrow, but substantial, question with respect to the proper procedure to be followed when a reviewing court determines that an administrative agency’s stated justification for informal action does not provide an adequate basis for judicial review.

In 1967, respondents submitted an application to the Comptroller of the Currency for a certificate authorizing them to organize a new bank in Hartsville, South Carolina. See 12 U.S.C. § 27; 12 CFR § 4.2 (1972). On the basis of information received from a national bank examiner and from various interested parties, the Comptroller denied the application and notified respondents of his decision through a brief letter, which stated in part: ‘(W)e have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.’ No formal hearings were required by the controlling statute or guaranteed by the applicable regulations, although the latter provided for hearings when requested and when granted at the discretion of the Comptroller. Respondents did not request a formal hearing but asked for reconsideration. That request was granted and a supplemental field examination was conducted, whereupon the Comptroller again denied the application, this time stating in a letter that ‘we were unable to reach a favorable conclusion as to the need factor,’ and explaining that conclusion to some extent. Respondents then brought an action in federal district court seeking review of the Comptroller’s decision. The entire administrative record was placed before the court, and, upon an examination of that record and of the two letters of explanation, the court granted summary judgment against respondents, holding that de novo review was not warranted in the circumstances and finding that ‘although the Comptroller may have erred, there is substantial basis for his determination, and . . . it was neither capricious nor arbitrary.’ On appeal, the Court of Appeals did not reach the merits. Rather, it held that the Comptroller’s ruling was ‘unacceptable’ because ‘its basis’ was not stated with sufficient clarity to permit judicial review. For the present, the Comptroller does not challenge this aspect of the court’s decision. He does, however, seek review here of the procedures that the Court of Appeals specifically ordered to be followed in the District Court on remand. The court held that the case should be remanded ‘for a trial de novo before the District Court’ because ‘the Comptroller has twice inadequately and inarticulately resolved the (respondents’) presentation.’ The court further specified that in the District Court, respondents ‘will open the trial with proof of their application and compliance with the statutory inquiries, and proffer of any other relevant evidence.’ Then, ‘(t)e testimony may . . . be adduced by the Comptroller or intervenors manifesting opposition, if any, to the new bank.’ On the basis of the record thus made, the District Court was instructed to make its own findings of fact and conclusions of law in order to determine ‘whether the
Title 12 U.S.C. § 26 contemplates a wide-ranging ex parte investigation; it reads as follows: ‘Comptroller to determine if association can commence business. ‘Whenever a certificate is transmitted to the Comptroller of the Currency, as provide in this chapter, * * * the comptroller shall examine into the condition of such association, ascertain * * * whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.’ * * *

We agree with the Comptroller that the trial procedures thus outlined by the Court of Appeals for the remand in this case are unwarranted under present law.

Unquestionably, the Comptroller’s action is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701. * * * But it is also clear that neither the National Bank Act nor the APA requires the Comptroller to hold a hearing or to make formal findings on the hearing record when passing on applications for new banking authorities. See 12 U.S.C. § 26; 5 U.S.C. § 557. * * * Accordingly, the proper standard for judicial review of the Comptroller’s adjudications is not the ‘substantial evidence’ test which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. § 706(2)(E). Nor was the reviewing court free to hold a de novo hearing under § 706(2)(F) and thereafter determine whether the agency action was ‘unwarranted by the facts.’ It is quite plain from our decision in Citizens to Preserve Overton Park v. Volpe that de novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions. * * * Neither situation applies here. The proceeding in the District Court was obviously not brought to enforce the Comptroller’s decision, and the only deficiency suggested in agency action or proceedings is that the Comptroller inadequately explained his decision. As Overton Park demonstrates, however, that failure, if it occurred in this case, is not a deficiency in factfinding procedures such as to warrant the de novo hearing ordered in this case.

The appropriate standard for review was, accordingly, whether the Comptroller’s adjudication was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ as specified in 5 U.S.C. § 706(2) (A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. Respondents contend that the Court of Appeals did not envision a true de novo review and that, at most, all that was called for was the type of ‘plenary review’ contemplated by Overton Park. We cannot agree. The present remand instructions require the Comptroller and other parties to make an evidentiary record before the District Court ‘manifesting opposition, if any, to the new bank.’ The respondents were also to be afforded opportunities to support their application with ‘any other relevant evidence.’ These instructions seem to put aside the extensive administrative record already made and presented to the reviewing court.

If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. We add a caveat, however. Unlike Overton Park, in the present case there

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was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller’s action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller’s decision must be vacated and the matter remanded to him for further consideration. See SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). It is in this context that the Court of Appeals should determine whether and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency’s decision.

The petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes and Questions

1. In Florida Light and Power v. Lorion, 470 U.S. 729 (1985), the Supreme Court provided its most recent gloss on the principles set forth in Overton Park and Camp v. Pitts, as it considered again what a court should do when an administrative record is inadequate for judicial review. After quoting Camp for the proposition that “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court,” the Court said:

The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court. Citizens to Preserve Overton Park v. Volpe, * * *. If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. * * * The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred. See 5 U.S.C. §§ 551(13), 704, 706.

2. What should a court do if it suspects that the reasons specified by an agency for the action it took are not the real reasons? If this fact were shown, would it be a basis for overturning the agency’s action? If the taking of testimony from agency officials or other discovery is not permitted, and the court is restricted to considering the administrative record in which the agency states its official reasons for action, how could the true reason ever be demonstrated?

3. More generally, if a court is uncertain as to why an agency took the action it took, why
is a remand to the agency the best means of getting that information to the court? Why shouldn’t the court just conduct its normally factfinding proceedings, as in any case in which a fact (here, the agency’s reasons for acting) is in dispute?

**UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD**
Supreme Court of the United States, 1950
340 U.S. 474

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The essential issue raised by this case *** is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act *** on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.

The Court of Appeals for the Second Circuit granted enforcement of an order directing, in the main, that petitioner reinstate with back pay an employee found to have been discharged because he gave testimony under the Wagner Act, 29 U.S.C.A. § 151 et seq., and cease and desist from discriminating against any employee who files charges or gives testimony under that Act. The court below, Judge Swan dissenting, decreed full enforcement of the order. ***

I.

Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties in its application derive from history, and to that extent an elucidation of this history may clear them away.

The Wagner Act provided: ‘The findings of the Board as to the facts, if supported by evidence, shall be conclusive.’ *** This Court read ‘evidence’ to mean ‘substantial evidence,’ *** and we said that ‘(s)ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ *** Accordingly, it ‘must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.’ ***

The very smoothness of the ‘substantial evidence’ formula as the standard for reviewing the evidentiary validity of the Board’s findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was ‘substantial,’ the phrasing of this Court’s process of review readily lent itself to the notion that it was enough that the evidence supporting the Board’s result was ‘substantial’ when considered by itself. If is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board’s findings. ***

Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board’s administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and
judge. Accusations of partisan bias were not wanting. The ‘irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence’ was said to be a ‘serious menace.’ No doubt some, perhaps even much, of the criticism was baseless and some surely was reckless. What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against ‘shocking injustices’ and intimations of judicial ‘abdication’ with which some courts granted enforcement of the Board’s order stimulated pressures for legislative relief from alleged administrative excesses.

The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General. It is worth noting that despite its aim to tighten control over administrative determinations of fact, the Walter-Logan Bill contented itself with the conventional formula that an agency’s decision could be set aside if ‘the findings of fact are not supported by substantial evidence.’

The final report of the Attorney General’s Committee was submitted in January, 1941. The majority concluded that ‘(d)issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies.’ Departure from the ‘substantial evidence’ test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.\(^{12}\)

Three members of the Committee registered a dissent. Their view was that the ‘present system or lack of system of judicial review’ led to inconsistency and uncertainty. They reported that under a ‘prevalent’ interpretation of the ‘substantial evidence’ rule ‘if what is called ‘substantial evidence’ is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored.’ Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by

\(^{12}\)Referring to proposals to enlarge the scope of review to permit inquiry whether the findings are supported by the weight of the evidence, the majority said: ‘Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application. ‘In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between ‘substantial evidence’ and ‘weight of evidence’ is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. ‘Substantial evidence’ may well be equivalent to the ‘weight of evidence’ when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided. ‘In the second place the wisdom of a general change to review of the ‘weight of evidence’ is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications.’ Final Report, 91–92.
Senator Taft gave this explanation to the Senate of the meaning of the section: ‘In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board.’

One is tempted to say ‘uncritical’ because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing ‘substantial evidence’ test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon ‘suspicion, surmise, implications, or plainly incredible evidence,’ and indicate that courts are to exact higher standards ‘in the exercise of their independent judgment’ and on consideration of ‘the whole record.’

Similar dissatisfaction with too restricted application of the ‘substantial evidence’ test is reflected in the legislative history of the Taft-Hartley Act. The bill as reported to the House provided that the ‘findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence.’ The bill left the House with this provision. Early committee prints in the Senate provided for review by ‘weight of the evidence’ or ‘clearly erroneous’ standards. But, as the Senate Committee Report relates, ‘it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clearify any ambiguity in that statute, however, the committee inserted the words ‘questions of fact, if supported by substantial evidence on the record considered as a whole * * *.”

This phraseology was adopted by the Senate. The House conferees agreed. * * *

It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications. Enfrocement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left
no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board’s order rests on adequate proof.

It would be mischievous wordplaying to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General’s Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

To be sure, the requirement for canvassing ‘the whole record’ in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertise which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.

There remains, then, the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automatons. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.
Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar ‘substantial evidence’ terminology indicates that no drastic reversal of attitude was intended.

But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute if often ‘the art of proliferating a purpose’, * * * revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed ‘substantial evidence’ test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

From this it follows that enactment of these statutes does not require every Court of Appeals to alter its practice. Some--perhaps a majority--have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

II.

Our disagreement with the view of the court below that the scope of review of Labor Board decisions is unaltered by recent legislation does not of itself, as we have noted, require reversal of its decision. The court may have applied a standard of review which satisfies the present Congressional requirement.

The decision of the Court of Appeals is assailed on two grounds. It is said (1) that the court
erred in holding that it was barred from taking into account the report of the examiner [the old name for an Administrative Law Judge] on questions of fact insofar as that report was rejected by the Board, and (2) that the Board’s order was not supported by substantial evidence on the record considered as a whole, even apart from the validity of the court’s refusal to consider the rejected portions of the examiner’s report.

The latter contention is easily met. It is true that two of the earlier decisions of the court below were among those disapproved by Congress. But this disapproval, we have seen, may well have been caused by unintended intimations of judicial phrasing. And in any event, it is clear from the court’s opinion in this case that it in fact did consider the ‘record as a whole,’ and did not deem itself merely the judicial echo of the Board’s conclusion. The testimony of the company’s witnesses was inconsistent, and there was clear evidence that the complaining employee had been discharged by an officer who was at one time influenced against him because of his appearance at the Board hearing. On such a record we could not say that it would be error to grant enforcement.

The first contention, however, raises serious questions to which we now turn.

III.

The Court of Appeals deemed itself bound by the Board’s rejection of the examiner’s findings because the court considered these findings not ‘as unassailable as a master’s.’ *** They are not. Section 10(c) of the Labor Management Relations Act provides that ‘If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact * * *.’ The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner’s findings only when they are ‘clearly erroneous.’ Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

The Court of Appeals concluded from this premise ‘that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board’s reversal as a factor in the court’s own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity.’ Much as we respect the logical acumen of the Chief Judge of the Court of Appeals, we do not find ourselves pinioned between the horns of his dilemma.

We are aware that to give the examiner’s findings less finality than a master’s and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. But we ought not to fashion an exclusionary rule merely to reduce the number of imponderables to be considered by reviewing courts.

The Taft-Hartley Act provides that ‘The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.’ *** Surely an examiner’s report is as much a part of the record as the complaint or the testimony. According to the Administrative Procedure Act, ‘All decisions (including initial, recommended, or tentative decisions) shall become a part of the record * * *.’ [5 U.S.C. § 557(b)] We found that this Act’s provision for judicial review has the same meaning as that in the Taft-Hartley Act. The similarity of the two statutes in language and purpose also requires that the definition of ‘record’
found in the Administrative Procedure Act be construed to be applicable as well to the term ‘record’ as used in the Taft-Hartley Act.

It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner’s report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

This aim was set forth by the Attorney General’s Committee on Administrative Procedure: ‘In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.’

Apparently it was the Committee’s opinion that these recommendations should not be obligatory. For the bill which accompanied the Final Report required only that hearing officers make an initial decision which would become final in the absence of further agency action, and that agencies which differed on the facts from their examiners give reasons and record citations supporting their conclusion. This proposal was further moderated by the Administrative Procedure Act. It permits agencies to use examiners to record testimony but not to evaluate it, and contains the rather obscure provision that an agency which reviews an examiner’s report has ‘all the powers which it would have in making the initial decision.’

But this refusal to make mandatory the recommendations of the Attorney General’s Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner’s opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner’s report such probative force as it intrinsically commands. To the contrary, § 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners. Section 10(c) of the Labor Management Relations Act requires that examiners ‘shall issue *** a proposed report, together with a recommended order’. Both statutes thus evince a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administration counsel that we attribute to the Labor Board’s examiners both due regard for the responsibility which Congress imposes on them and the competence to discharge it.

The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the Senate Committee responsible for the Administrative Procedure Act explained in its report that examiners’ decisions ‘would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing.’ The House Report reflects the same attitude; and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner.

We do not require that the examiner’s findings be given more weight than in reason and in the light of judicial experience they deserve. The ‘substantial evidence’ standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence
supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is ‘substantial.’

The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything ‘logically probative of some matter requiring to be proved.’ *** This Court has refused to accept assumptions of fact which are demonstrably false, * * * even when agreed to by the parties. * * * Machinery for discovery of evidence has been strengthened; the boundaries of judicial notice have been slowly but perceptibly enlarged. It would reverse this process for courts to deny examiners’ findings the probative force they would have in the conduct of affairs outside a courtroom.

We therefore remand the cause to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board’s order is substantial. But the court need not limit its reexamination of the case to the effect of that report on its decision. We leave it free to grant or deny enforcement as it thinks the principles expressed in this opinion dictate.

Judgment vacated and cause remanded.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur with parts I and II of this opinion but as to part III agree with the opinion of the court below.

Notes and Questions

1. Having read the foregoing opinion, would you describe the standard by which a court reviews an agency’s findings of fact made in the course of an administrative adjudication as (a) more stringent, (b) less stringent, or (c) the same as the standard by which an appellate court considers factual findings in a civil case tried by a jury? A civil case tried by the court? Exactly how does the “substantial evidence” standard differ from the “weight of the evidence” standard?

2. Employee X sues the ABC corporation, claiming that ABC fired X for union organizing activities. The case turns largely on the question of whether any supervisory employee at ABC had knowledge that X was a union organizer. On this question, there is a credibility conflict between supervisor S, who denies any knowledge of X’s union activities, and employee Y, who claims to have overheard S vowing to fire X because of X’s union organizing. An Administrative Law Judge at the National Labor Relations Board hears the case and recommends a finding in favor of the employee. The Board upholds this finding on administrative appeal, and the employer seeks judicial review. What is the role of the court in reviewing the credibility determinations of the agency? How and why would the answer change in a case in which the Board reverses the finding of the ALJ?
3. *Universal Camera* concerned judicial review of an agency finding made in the course of adjudication. Read 5 U.S.C. § 706. Does the statute provide a different standard for reviewing factual findings made by agencies in the course of rulemaking? If so, what is that standard?

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
United States Court of Appeals for the District of Columbia Circuit, 1984
745 F.2d 677

Before GINSBURG and SCALIA, Circuit Judges, and VAN PELT, District Judge.

SCALIA, Circuit Judge:

The Association of Data Processing Service Organizations, Inc. ("ADAPSO"), a national trade association representing the data processing industry, and two of its members petition this court for review of two orders of the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1848 (1982). In No. 82-1910, they seek review of the Board’s July 9, 1982 order approving Citicorp’s application to establish a subsidiary, Citishare, to engage in certain data processing and transmission services. *** In No. 82-2108, they seek review of the Board’s August 23, 1982 order, entered after notice and comment rulemaking, amending those portions of Regulation Y which dealt with the performance of data processing activities by bank holding companies. *** ("Regulation Y Order"). We consolidated the two appeals.

The Bank Holding Company Act of 1956 *** requires all bank holding companies to seek prior regulatory approval before engaging in nonbanking activities. The restrictions do not apply to:

activities ... which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.... In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

12 U.S.C. § 1843(c)(8). Section 1848, the source of our review authority, provides that “[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.” *Id.* at § 1848.

On February 23, 1979, Citicorp applied for authority to engage, through its subsidiary Citishare, in the processing and transmission of banking, financial, and economic related data through timesharing, electronic funds transfer, home banking and other techniques. It also sought permission to sell its excess computing capacity and some computer hardware. The Board published notice of Citicorp’s application, which was protested by ADAPSO, and set it for formal hearing. *** Before the hearing was held, Citicorp amended its application to add certain activities and to request amendment of Regulation Y to permit the activities it had specified. The Board published
an Amended Order for Hearing and invited public comments and participation. * * * A formal hearing was held before an Administrative Law Judge in which the merits of both the application and the proposed rule were considered. In addition, more than sixty companies and individuals submitted written comments on the proposed rule. On March 29, 1982, the ALJ decided that the activities proposed by Citicorp were closely related to banking and would produce benefits to the public which would outweigh their costs. * * * The ALJ also recommended amendments to Regulation Y that would permit those activities contained in the Citicorp application. On July 9, 1982, the Board adopted the ALJ’s recommendation to approve the Citicorp application, with certain restrictions. On August 23, 1982, the Board adopted the ALJ’s recommended amendments to Regulation Y, again with certain restrictions. ADAPSO, and two of its members, participants in the actions below, filed these petitions for review.

I. STANDARD OF REVIEW

We are faced at the outset with a dispute regarding the proper standard of review. These consolidated appeals call for us to review both an on-the-record adjudication and an informal notice and comment rulemaking. Petitioners contend that the substantial evidence standard, which presumably authorizes more rigorous judicial review, should govern our review of both orders. * * * The Board agrees, noting that § 1848 applies a substantial evidence standard to factual determinations. * * * Intervenor Citicorp contends that while the substantial evidence standard should govern review of the Citicorp order, Regulation Y should be upset only if arbitrary or capricious. * * * The parties’ submissions on this point reflect considerable confusion, which is understandable when one examines decisions defining the standard of review under this statute.

Both of the Supreme Court’s opinions reviewing action of the Board in amending Regulation Y noted that the Board’s determination “is entitled to the greatest deference,” * * * but neither of them discussed the applicable standard of review, or even referred to § 1848. The courts of appeals, however, have applied the substantial evidence standard of § 1848 to Board adjudications such as the authorization in the first order here under review, * * * while applying the arbitrary or capricious standard, despite § 1848, to Board rules, including specifically amendments of Regulation Y. * * * In fact one appellate opinion has, like this one, addressed precisely the situation in which both an adjudicatory authorization and an amendment of Regulation Y were at issue in the same case--and applied the § 1848 substantial evidence standard to the former but the arbitrary or capricious standard to the latter. * * * This would make a lot of sense if, as the Board has argued in some cases, § 1848 in its totality applies only to adjudication rather than rulemaking, since it is limited to “orders” of the Board, a word which the Administrative Procedure Act (“APA”) defines to mean the product of an adjudication. See 5 U.S.C. § 551(4), (6) (1982). Such a technical interpretation of the provision, however, has been uniformly and quite correctly rejected. * * * That leaves the courts with the difficult task of explaining why the last sentence of § 1848, unlike all the rest of it, should be deemed to apply only to adjudication and not to rulemaking. Difficult, because there is nothing in either the text or the legislative history of the section to suggest such a result. The courts

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3 12 U.S.C. § 1848 reads as follows: Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board’s order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record
applying the arbitrary or capricious standard to Board rulemaking (which, as stated above, include all the courts that have confronted the issue) dispose of this problem either by totally ignoring it, * * * or by noting that the parties “do not appear to contest” the point, * * * or by the ipse dixit that “[w]e interpret [the last sentence of § 1848] to apply to findings of fact ‘on the record’ in an adjudicatory hearing as contrasted with a rulemaking proceeding.” * * *

We think that there is no basis for giving the last sentence of § 1848 anything less than the general application given to the rest of the section. The Supreme Court’s pronouncement that the “greatest deference” is to be given to the determinations of the Board, and the court of appeals decisions applying the arbitrary or capricious test to Board rulemaking, seem to us explicable on quite different grounds--namely, that in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter, separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere. We shall elaborate upon this point because it is not uncommon for parties to expend great effort in appeals before us to establish which of the two standards is applicable where in fact their operation is precisely the same.

The “scope of review” provisions of the APA, 5 U.S.C. § 706(2), are cumulative. Thus, an agency action which is supported by the required substantial evidence may in another regard be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”--for example, because it is an abrupt and unexplained departure from agency precedent. Paragraph (A) of subsection 706(2)--the “arbitrary or capricious” provision--is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs. Thus, in those situations where paragraph (E) has no application (informal rulemaking, for example, which is not governed by §§ 556 and 557 to which paragraph (E) refers), paragraph (A) takes up the slack, so to speak, enabling the courts to strike down, as arbitrary, agency action that is devoid of needed factual support. When the arbitrary or capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a “nonarbitrary” factual judgment supported only by evidence that is not substantial in the APA sense--i.e., not “’enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn ... is one of fact for the jury,’” * * *

We have noted on several occasions that the distinction between the substantial evidence test and the arbitrary or capricious test is “largely semantic,” * * * and have indeed described that view as “the emerging consensus of the Courts of Appeals.” * * * Leading commentators agree:

Does the extent of required factual support for rules depend in part on whether the standard for review is “substantial evidence” or “arbitrary and capricious”? Although from 1946 until some time during the 1970s the dominant answer probably was yes,
a change to a no answer has probably occurred during the 1970s .... 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:13 at 512 (2d ed. 1978).

In review of rules of general applicability made after “notice and comment” rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness. .... Review without an agency record thus comes down to review of reasonableness. [T]he question of reasonableness is also the one which the court must now ask itself in reviewing findings of fact under the post-APA substantial evidence rule. B. SCHWARTZ, ADMINISTRATIVE LAW 604, 606 (1976).

As noted earlier, this does not consign paragraph (E) of the APA’s judicial review section to pointlessness. The distinctive function of paragraph (E)—what it achieves that paragraph (A) does not—is to require substantial evidence to be found within the record of closed-record proceedings to which it exclusively applies. The importance of that requirement should not be underestimated. It is true that, as the Supreme Court said in Camp v. Pitts, even informal agency action (not governed by paragraph (E)) must be reviewed only on the basis of “the administrative record already in existence.” But that is quite a different and less onerous requirement, meaning only that whether the administrator was arbitrary must be determined on the basis of what he had before him when he acted, and not on the basis of “some new record made initially in the reviewing court.” That “administrative record” might well include crucial material that was neither shown to nor known by the private parties in the proceeding—as indeed appears to have been the situation in Camp v. Pitts itself. It is true that, in informal rulemaking, at least the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation. That requirement, however, does not extend to all data, * * * and it only applies in rulemaking and not in other informal agency action, since it derives not from the arbitrary or capricious test but from the command of 5 U.S.C. § 553 that “the agency ... give interested persons an opportunity to participate in the rule making.” * * *

Consolidated cases such as those before us here—involving simultaneous review of a rule (whose factual basis is governed only by paragraph (A)’s catch-all control against “arbitrary or capricious” action) and of a formal adjudication dealing with the same subject (whose factual basis is governed by paragraph (E)’s requirement of substantial evidence)—demonstrate why the foregoing interpretation of the two standards is the only interpretation that makes sense. If the standards were substantively different (and leaving aside for the moment consideration of any special effect of § 1848), the Citicorp order, authorizing one bank holding company’s data processing services, would be subject to more rigorous judicial review of factual support than the Regulation Y order which, due to its general applicability, would affect the operations of every bank holding company in the nation. Or, to put the point another way: If the Board had never issued any Regulation Y, and simply determined in the context of a particular application that the provision of timesharing services is “closely related” to banking, that determination, which could be reconsidered and revised in the context of the next adjudication, would require more factual support than the same determination in a rulemaking, which would have immediate nationwide application and, until amended by further rulemaking, would have to be applied to all subsequent applications.
This seemingly upside-down application of varying standards is not an issue in the present case since, as we have observed, § 1848 makes it clear that only one standard--the substantial evidence test--applies to review of all Board actions. The relevance of the foregoing discussion here is to determine what that standard means. What we have said suggests that the normal (APA) meaning of the “substantial evidence” terminology connotes a substantive standard no different from the arbitrary or capricious test. One cannot dismiss out of hand, however, the possibility that, in this particular statute, a different meaning was intended--in which case that different standard would govern review of both rulemaking and adjudication. A number of “substantial evidence” review provisions have been attached to rulemaking authority, particularly in recent years. * * * It is conceivable that some of these were intended * * * to require the courts “to scrutinize [agency] actions more closely than an ‘arbitrary and capricious’ standard would allow.” * * * Congress’s unpropitious use of the “substantial evidence” APA language for such a purpose is plausible, since the standard has acquired a reputation for being more stringent.6 One should not be too quick, however, to impute such a congressional intent. There is surely little appeal to an ineffable review standard that lies somewhere in-between the quantum of factual support required to go to a jury (the traditional “substantial evidence” test) and the “preponderance of the evidence” standard that would apply in de novo review. Moreover, 5 U.S.C. § 559 provides that a subsequent statute shall not be held to supersede or modify the APA provisions “except to the extent that it does so expressly.” While the provision for “substantial evidence” review where the APA would otherwise require only “arbitrary or capricious” review is unquestionably an “express” alteration, surely the import of the § 559 instruction is that Congress’s intent to make a substantive change be clear. * * *

With regard to the “substantial evidence” provision of § 1848[, the] Supreme Court has evidently rejected the notion that it alters normal APA review requirements, since the Court’s opinions reviewing Board action deem the provision unworthy of mention, and specifically accord the Board “the greatest deference.” * * * We hold, therefore, that the § 1848 “substantial evidence” requirement applicable to our review here demands a quantum of factual support no different from that demanded by the substantial evidence provision of the APA, which is in turn no different from that demanded by the arbitrary or capricious standard. * * *

[The court upheld both the adjudicatory order and the regulation.]

Notes and Questions

1. Did the court implement or frustrate the intent of Congress in enacting a specific standard of review for review of the Board’s orders in the Board’s organic statute?

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6 * * * The reason for this reputation, one may surmise, is that under the APA the substantial evidence test applies almost exclusively to formal adjudication (formal rulemaking is rare), which is, by contrast to rulemaking, characteristically long on facts and short on policy--so that the inadequacy of factual support is typically the central issue in the judicial appeal and is the most common reason for reversal.
Statutory Background for the *Chevron* Case

Under the Clean Air Act, every state is required to meet the National Ambient Air Quality Standards (the NAAQS). An area within a state that does not meet the NAAQS is called a “non-attainment area.” Typically, attainment is determined on a county-by-county basis, so a non-attainment area is typically a county.

In 1970, Congress amended the Clean Air Act. As amended, the Act provided that any state that has any non-attainment areas must have a state implementation plan (SIP) for the Clean Air Act. Each SIP had to provide that any *new* stationary source of pollution in a non-attainment area must have a permit. The same was true of any *modified* stationary source of pollution in a non-attainment area. Existing stationary sources of pollution in non-attainment areas could continue to exist without permits so long as they were not modified.

The term “modified” had a special statutory definition. A stationary source was “modified” if it was changed so that it emitted more pollution than before. Changing an existing stationary source of pollution so as to reduce its emissions of pollution didn’t count as “modifying” it and no permit was required. But to change a source so that it emitted more pollution than before created a “modified” source and required a permit.

The key statutory requirement was this: a permit could be issued for a new or modified stationary source of pollution in a non-attainment area only if the equipment to be used in the new or modified stationary source achieved the “lowest achievable emission rate.”

As you will see in the *Chevron* case, a critical issue in the case was the definition of “stationary source of pollution.” To understand the importance of this term, consider the following hypothetical situation (see next page):
A manufacturing plant has two emission pipes. Each pipe emits 50 pounds of pollutant per day. The plant owner desires to upgrade the plant’s equipment. The upgrade, which will cost $50,000, will result in shutting off one of the plant’s pipes entirely, but increasing the emissions of the other to 70 pounds of pollutant per day. Technology exists that would permit the plant owner to upgrade the plant so as to shut off one pipe entirely and reduce the emissions of the other to 30 pounds of pollutant per day, but the plant owner doesn’t want to use that technology because it would cost $500,000 to upgrade to it. (See diagram)

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Consider these questions carefully (they will be asked in class):

1. Would the owner’s desired upgrade require a permit under the Clear Air Act?
2. Could a permit lawfully be issued for the owner’s desired upgrade?
3. What effect did the EPA’s regulation, discussed in *Chevron*, have on these questions?
Whither *Chevron*?

**E.E.O.C. V. ARABIAN AMERICAN OIL CO., 499 U.S. 244 (1991):** The Court had to decide whether the employment nondiscrimination provisions of Title VII of the Civil Rights Act of 1964 applied to a claim by a United States citizen that his employer, a United States corporation, fired him, on account of his race, while he was working for the company in Saudi Arabia. In deciding that Title VII does not apply, the Court invoked the general presumption that congressional legislation is intended to apply only within United States territory unless a contrary intent appears. The Court noted that the Equal Employment Opportunity Commission, which is “one of the two federal agencies with primary responsibility for enforcing Title VII” had interpreted the statute as applying extraterritorially, at least with regard to the employment of U.S. citizens by U.S. employers. However, the Court, speaking through Chief Justice Rehnquist, said:

In *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-146 (1976), we addressed the proper deference to be afforded the EEOC’s guidelines. Recognizing that “Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations,” we held that the level of deference afforded “‘will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’” *Id.*, at 141, 142 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The EEOC’s interpretation does not fare well under these standards.

**Notes and Questions**

1. Was the Court right to rely on a pre-*Chevron* decision in determining how much deference the agency’s view should receive in post-*Chevron* cases?

2. Why is the agency’s lack of rulemaking authority relevant to the amount of deference it should receive?

* * * * *

**LECHMERE, INC. v. NATIONAL LABOR RELATIONS BOARD, 502 U.S. 527 (1992):** The United Food and Commercial Workers Union attempted to organize the employees of a store owned by Lechmere, Inc. Such an organizing campaign may ultimately be decided by vote of the employees in a secret-ballot election conducted by the National Labor Relations Board, but the Board will hold an election only if a sufficient number of employees (30% of the employees in the potential bargaining unit) express interest in being represented by a union. The union may experience difficulties in generating such interest because of lack of access to the employees. In this case, the union attempted to reach the employees by placing handbills in the windshields of cars in the store’s parking lot, but company officials informed the union organizers that the parking lot was private property and asked them to leave, which the organizers did. The union then attempted to
reach employees by standing on a small, publicly-owned grassy strip near the parking lot, but without much success. Advertisements in local newspapers drew little response. By copying down the license plate numbers of cars entering the parking lot, the union managed to identify about one-fifth of the employees.

Section 7 of the National Labor Relations Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations,” and Section 8 makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” section 7. The union filed a charge with the NLRB that the company was engaging in an unfair labor practice by preventing the union from entering company property to attempt to organize the employees. The Board sustained the charge and ordered the company permit union organizers to enter the parking lot. On judicial review, a court of appeals sustained the Board’s order.

The Supreme Court granted certiorari. The Court acknowledged that in the prior case of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), it had determined that, in some circumstances, § 7 of the NLRA requires employers to permit union organizers to enter their property to attempt to organize their employees. The Court noted, however, that Babcock & Wilcox had held that, while an employer may not prevent its employees from discussing unionization among themselves, the employer may normally exclude union organizers who are not already employees from the employer’s property. The case made an exception only for circumstances “where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,” as in the Babcock & Wilcox case itself, which concerned a factory located on an isolated 100-acre tract.

However, in the 1988 administrative case of Jean Country, 291 N.L.R.B. 11 (1988), the Board adopted a more generous, three-part balancing test to determine when employers must give union organizers access to their property. The Board claimed that the courts should give deference to the Board’s approach. The Court, speaking through Justice Thomas, responded:

Citing its role “as the agency with responsibility for implementing national labor policy,” the Board maintains in this case that Jean Country is a reasonable interpretation of the NLRA entitled to judicial deference. *** It is certainly true, and we have long recognized, that the Board has the “special function of applying the general provisions of the Act to the complexities of industrial life.” *** Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers. See, e.g., NLRB v. Food & Commercial Workers, 484 U.S. 112, 123 (1987); cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984).

Before we reach any issue of deference to the Board, however, we must first determine whether Jean Country—at least as applied to nonemployee organizational trespassing—is consistent with our past interpretation of § 7. “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).
In *Babcock*, we held that the Act drew a distinction “of substance,” 351 U.S., at 113, between the union activities of employees and nonemployees. By reversing the Board’s interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer’s property.

*Jean Country*, which applies broadly to “all access cases,” 291 N.L.R.B., at 14, misapprehends this critical point. At least as applied to nonemployees, *Jean Country* significantly erodes *Babcock’s* general rule that “an employer may validly post his property against nonemployee distribution of union literature,” 351 U.S., at 112. We reaffirm that general rule today, and reject the Board’s attempt to recast it as a multifactor balancing test.

**Notes and Questions**

Is the Court correct to say that its ruling issued in 1956 (i.e., before *Chevron*) constitutes a holding “in *Chevron* terms” that the statute “speaks to the issue” presented? How should a court handle the situation where an agency decides to depart from a pre-*Chevron* judicial ruling?

* * * * *

**GOOD SAMARITAN HOSP. v. SHALALA, 508 U.S. 402 (1993):** The Court had to decide whether to defer to a regulation promulgated by the Secretary of Health and Human Services to implement the Medicare Act. The plaintiffs claimed, among other things, that the regulation should receive no deference because the Secretary had, over the years, shifted its interpretation of the governing statute several times. In an opinion by Justice White, the Court said:

The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. *See Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 180-183 (1957). Indeed, “[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to the administrative understanding of the statutes.” *NLRB v. Iron Workers*, 434 U.S. 335, 351 (1978). On the other hand, the consistency of an agency’s position is a factor in assessing the weight that position is due. As we have stated: “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987). How much weight should be given to the agency’s views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings, will depend on the facts of individual cases. * * *
Why is the consistency of an agency’s interpretation of its organic statute, or the lack thereof, relevant to the question of whether the agency’s interpretation should receive judicial deference? Think about the various possible explanations for why Chevron deference exists at all. Under which of them would consistency or inconsistency on the part of the agency be relevant?

* * * * *

NATIONAL CABLE & TELECOMMUNICATIONS ASS’N v. BRAND X INTERNET SERVICES, 125 S.Ct. 2688 (2005): The Communications Act subjects all providers of “telecommunications servic[e]” to mandatory common-carrier regulation. The Federal Communications Commission concluded that cable companies that sell broadband Internet service do not provide “telecommunications servic[e]” as the Communications Act defines that term. In reviewing this interpretation, the Supreme Court said:

In *Chevron*, this Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866. If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation. *Id.*, at 843-844.

The *Chevron* framework governs our review of the Commission’s construction. Congress has delegated to the Commission the authority to “execute and enforce” the Communications Act, § 151, and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act. * * * These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission’s jurisdiction. * * * Hence, as we have in the past, we apply the *Chevron* framework to the Commission’s interpretation of the Communications Act. * * *

Some of the respondents dispute this conclusion, on the ground that the Commission’s interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57 (1983). For if the agency adequately explains the reasons for a reversal of policy, “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”
* * * “An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis,” Chevron, supra, at 863-864, for example, in response to changed factual circumstances, or a change in administrations, see State Farm, supra, at 59, (REHNQUIST, J., concurring in part and dissenting in part). That is no doubt why in Chevron itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy. See 467 U.S., at 857-858. We therefore have no difficulty concluding that Chevron applies.

B

The Court of Appeals declined to apply Chevron because it thought the Commission’s interpretation of the Communications Act foreclosed by the conflicting construction of the Act it had adopted in [AT & T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000)]. See 345 F.3d, at 1127-1132. It based that holding on the assumption that Portland’s construction overrode the Commission’s, regardless of whether Portland had held the statute to be unambiguous. 345 F.3d, at 1131. That reasoning was incorrect.

A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from Chevron itself. Chevron established a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”

Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court’s interpretation to override an agency’s. Chevron’s premise is that it is for agencies, not courts, to fill statutory gaps. See 467 U.S., at 843-844, and n. 11. The better rule is to hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency’s construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

A contrary rule would produce anomalous results. It would mean that whether an agency’s interpretation of an ambiguous statute is entitled to Chevron deference would turn on the order in which the interpretations issue: If the court’s construction came first, its construction would prevail, whereas if the agency’s came first, the agency’s construction would command Chevron deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals’ rule, moreover, would “lead to the ossification of large portions of our statutory law,” * * * by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither Chevron nor the doctrine of
stare decisis requires these haphazard results.  * * *

The dissent answers that allowing an agency to override what a court believes to be the best interpretation of a statute makes “judicial decisions subject to reversal by Executive officers.”  * * *  It does not.  Since Chevron teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong.  Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.  In all other respects, the court’s prior ruling remains binding law (for example, as to agency interpretations to which Chevron is inapplicable).  The precedent has not been “reversed” by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been “reversed” by a state court that adopts a conflicting (yet authoritative) interpretation of state law.  * * *

Justice Stevens, concurring, said:

While I join the Court’s opinion in full, I add this caveat concerning Part III-B, which correctly explains why a court of appeals’ interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency.  That explanation would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.

Justice Scalia, dissenting, said:

The Court today * * * invent[s] yet another breathtaking novelty:  judicial decisions subject to reversal by Executive officers.  * * *

I would adhere to what has been the rule in the past:  When a court interprets a statute without Chevron deference to agency views, its interpretation (whether or not asserted to rest upon an unambiguous text) is the law.  I might add that it is a great mystery why any of this is relevant here.  Whatever the stare decisis effect of AT & T Corp. v. Portland, 216 F.3d 871 (C.A.9 2000), in the Ninth Circuit, it surely does not govern this Court’s decision.  And—despite the Court’s peculiar, self-abnegating suggestion to the contrary, ante, at 2703—the Ninth Circuit would already be obliged to abandon Portland’s holding in the face of this Court’s decision that the Commission’s construction of “telecommunications service” is entitled to deference and is reasonable.  It is a sadness that the Court should go so far out of its way to make bad law.

Notes and Questions

Does Brand X modify Lechmere?  How about Good Samaritan Hospital?
FOOD AND DRUG ADMINISTRATION v. BROWN & WILLIAMSON TOBACCO CORPORATION, 529 U.S. 120 (2000): The Food, Drug, and Cosmetic Act authorizes the FDA to regulate “drugs” and “devices.” The Act defines “drug” to include “articles (other than food) intended to affect the structure or any function of the body.” 21 U.S.C. § 321(g)(1)(C). It defines “device,” in part, as “an instrument, apparatus, implement, machine, contrivance, ... or other similar or related article, including any component, part, or accessory, which is ... intended to affect the structure or any function of the body.” § 321(h). Using the notice-and-comment rulemaking process, the FDA determined that nicotine is a “drug” and that cigarettes are “drug delivery devices” within the meaning of the Act. Accordingly, the FDA determined to regulate the distribution of cigarettes. While it did not prohibit cigarettes, it prohibited their sale to persons under the age of 18 and imposed numerous regulations on the advertising and distribution of cigarettes.

Brown and Williamson, a cigarette manufacturer, challenged the regulations as beyond the agency’s statutory authority. The company asserted that nicotine was not a drug, and that, if it was, the agency would have no choice under the statute but to ban the distribution of cigarettes entirely. The agency claimed that its interpretation of the word “drug” in the statute was entitled to Chevron deference. In an opinion by Justice O’Connor, the Court said:

A threshold issue is the appropriate framework for analyzing the FDA’s assertion of authority to regulate tobacco products. Because this case involves an administrative agency’s construction of a statute that it administers, our analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron, a reviewing court must first ask “whether Congress has directly spoken to the precise question at issue.” Id., at 842, 104 S.Ct. 2778. If Congress has done so, the inquiry is at an end; the court “must give effect to the unambiguously expressed intent of Congress.” * * * But if Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible. * * * Such deference is justified because “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones,” Chevron, supra, at 866, and because of the agency’s greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated. * * *

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. * * * It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” * * * A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme,” * * * and “fit, if possible, all parts into an harmonious whole.” * * * Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress
has spoken subsequently and more specifically to the topic at hand. In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.

The Court agreed with Brown and Williamson’s argument that, if nicotine was a “drug” within the meaning of the FDCA, the FDA would be required to ban cigarettes altogether because they are not “safe” as the FDCA requires. Noting that other statutes make clear that Congress intends cigarettes to be lawful, the Court concluded that Congress did not intend the FDA to have authority to regulate cigarettes. The Court also drew this same inference from the numerous federal statutes that already regulate the marketing of cigarettes specifically. Returning to the agency’s claim of *Chevron* deference, the Court then said:

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. See *Chevron, supra*, at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no “reasonable assurance of safety,” it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.

We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of “safety” as it is used throughout the Act—a concept central to the FDCA’s regulatory scheme—but also ignore the plain implication of Congress’ subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.
Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.

*Notes and Questions*

How did the Court know that Congress did not desire it to give *Chevron* deference to the agency’s interpretation of the FDA? Was the Court’s reasoning appropriate?
A CHEVRON CASE STUDY
ENVIRONMENTAL DEFENSE FUND v. US EPA

It’s difficult to get a real sense of how Chevron works from an abstract discussion of the principles involved. Any real Chevron case is a long tangle of statutory language, legislative reports and floor statements, agency opinions, and arguments from private parties challenging agency action. In order to give you a sense of the actual flavor of Chevron litigation, it’s necessary to look at at least one real case in some detail. I have selected Environmental Defense Fund v. US EPA, 907 F.2d 1146 (D.C. Cir. 1990). The case presents a good example of the effects of the Chevron doctrine on statutory interpretation in administrative cases.

Necessarily, our look at this case will entail a deep delving into a complex statutory scheme. This will be difficult, but try to hang in there. You can’t appreciate the court’s Chevron ruling if you don’t pay close attention to the detailed statutory scheme involved. If nothing else, you will pick up a little environmental law along the way.

The materials included here are excerpts from (1) the court’s decision, (2) the statute involved, (3) two of the legislative reports that accompanied the statute when it was passed, and (4) the “concise statement of basis and purpose” published by the EPA when it promulgated its regulations construing the statute. If you want to get the most realistic sense of what it’s like to try to litigate one of these cases, read the materials in the order in which they came into existence: that is, first the statute itself, along with the reports accompanying it, then the EPA decision, and the court’s opinion last. But if you want a slightly easier way of looking at the materials, start with the court’s decision. That will give you a better idea of what the issue is and what the arguments are, which will help you to understand the other materials.

Throughout your reading of the materials, ask yourself these questions:

1. What exactly did Congress mean by passing the disputed statutory language?
2. Is the disputed language clear or ambiguous?
3. How do the various materials cited by the majority and dissenting opinions bear on the meaning of the statutory language?
4. In the end, do you think the agency made a legitimate choice within the range permitted by the statutory language, or did it disregard the statutory language for reasons of its own?
1. The Court’s Decision

NATURAL RESOURCES DEFENSE COUNCIL, INC. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
907 F.2d 1146 (D.C. Cir. 1990)

Before WALD, Chief Judge, and RUTH B. GINSBURG and WILLIAMS, Circuit Judges.

PER CURIAM:¹

This case concerns the disposal of hazardous waste by “deep injection”; that is, the injection of hazardous waste into “wells” located thousands of feet beneath the surface of the earth. The Environmental Protection Agency (“EPA”) has issued regulations under the Resource Conservation and Recovery Act (“RCRA”) governing this method of hazardous waste disposal, and various petitioners challenge them. Industry petitioners claim the regulations are too stringent; environmental petitioners claim they are too lenient. We hold that the regulations are reasonable exercises of the EPA’s authority and discretion under RCRA **.

I. BACKGROUND

The Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6901 et seq. (1982 & Supp. III 1985), governs the land disposal of hazardous waste. As originally passed, RCRA declared that “disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment,” and that “alternatives to existing methods of land disposal must be developed.” 90 Stat. 2795, 2797 (1976). RCRA directed the Administrator of the EPA to promulgate regulations establishing “such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste ... as may be necessary to protect human health and the environment.” 42 U.S.C. § 6924.

Eight years later, a frustrated Congress, irritated at the slow pace at which the EPA was achieving RCRA’s goals, passed the Hazardous and Solid Waste Amendments of 1984 (“HSWA”), Pub.L. No. 98-616, 98 Stat. 3221 (codified at scattered sections of 42 U.S.C. (Supp. III 1985)). As amended, RCRA pronounced that “land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes.” 42 U.S.C. § 6901(b)(7). HSWA also legislated new “land ban” provisions governing the land disposal of hazardous waste, § 6924(d)-(g) (set out in the margin).³ Subsection (d) governs all methods of land disposal, except disposal by deep injection, of certain, specified wastes (mostly toxic metals), popularly known as the “California list” wastes. Subsection (e) governs all methods of land disposal, except disposal by deep injection, of solvents and dioxins. Subsection (f) governs disposal by deep injection of the wastes specified in subsections (d) and (e). Finally, subsection (g) governs all methods of land disposal, including disposal by deep injection, of all hazardous wastes other than the “California list” or solvents and dioxins covered by subsections (d), (e), and (f). In toto, subsections (d) through (g)

¹ Parts I and II were written by Chief Judge Wald; Part III by Judge Williams.

³ [The Court reproduced the statutory provisions provided later in these materials.]
of § 6924 govern all methods of land disposal of all hazardous wastes.

In 1988, the EPA promulgated final rules pursuant to subsections (f) and (g) governing the disposal of hazardous wastes by deep injection. 53 Fed.Reg. 28,118 (1988). These rules supplemented the EPA’s Underground Injection Control (“UIC”) program, which governed underground injection of solid waste, to take into account injection of hazardous waste. The general scheme adopted by the EPA provided that underground injection of hazardous wastes would be prohibited unless the would-be injector obtained a permit from the EPA for a particular underground injection well. New rules located at 40 C.F.R. Part 148 identified the wastes otherwise prohibited from underground injection and specified the procedures for obtaining a permit to allow their injection. New Subpart G of 40 C.F.R. Part 146 set out technical criteria that underground injection wells must satisfy before they could be approved for hazardous waste disposal. In sum, the EPA’s regulatory scheme for deep well injection of hazardous waste contained two important components: (1) the substantive standard that a hazardous waste injection well must meet, and (2) the permit procedures by which an injector must demonstrate that a well meets that standard.

The new rules also presented the EPA’s interpretations of several key statutory terms. The permissibility of a land disposal method under subsections (d) through (g) of § 6924 turns on whether the method will be “protective of human health and the environment for as long as the waste remains hazardous.” Subsections (d), (e), and (g), but not (f), state that to meet this standard, an applicant must demonstrate to the Administrator, to a reasonable degree of certainty, that “there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.” With regard to these safety standards, the EPA made the following interpretations:

First, the EPA decided to apply the “no migration” standard to waste disposal governed by subsection (f) (deep injection of the “California list” wastes and solvents and dioxins) as well as to disposal governed by the other subsections.

Second, it decided that the term “the wastes” in the statutory no migration standard refers to the wastes that migrate out of the injection zone, and that the no migration standard is therefore satisfied if the injector demonstrates that no hazardous waste will migrate out of the injection zone.

The Chemical Manufacturers Association and other industry groups (collectively referred to as “CMA” or “industry petitioners”) claim that the EPA’s rules impose unreasonably strict requirements that are unrelated to protection of human health and the environment. The Natural Resources Defense Council and other environmental groups (collectively referred to as “NRDC” or “environmental petitioners”) claim the rules are not as protective of human health and the environment as the statute requires. * * *

In passing on the claims of the petitioners, we are guided, as always, by Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). With respect to each claim, we inquire “whether Congress has directly spoken to the precise question at issue.” Id. at 842. In determining the intent of Congress, we must look to “the particular statutory language at issue, as well as the language and design of the statute as a whole,” K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988), and we must employ traditional tools of statutory construction, including, where appropriate, legislative history. * * *

If the intent of Congress is clear, we must give it effect. 467 U.S. at 842-43. If, however, the statute is silent or ambiguous on a particular issue, we must defer to the agency’s interpretation of the statute.
so long as it is reasonable and consistent with the statutory purpose. *Id.* at 844-45.

II. INDUSTRY CLAIMS

* * *

[In part II of the opinion, the court upheld EPA’s action against the challenges brought by industry petitioners.]

III. NRDC CLAIMS

A. E.P.A.’S INTERPRETATION OF THE “NO MIGRATION” STANDARD.

Subsections (d), (e) and (g) of § 6924 ban the land disposal of hazardous wastes unless, for each of three specified methods, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

42 U.S.C. § 6924(d), (e), (g) (emphasis added). As we noted above, EPA read this “no migration” standard into subsection (f) as well, in the interests of uniform treatment. See 53 Fed.Reg. at 28,120 (col. 3). The issue here is whether the “no migration” standard would be violated if hazardous constituents seeped out of the storage area at a time where some of the stored wastes were still hazardous, but not those actually leaving.

“Hazardous constituent” is a term of art referring to a list of chemical compounds compiled at 40 C.F.R. Part 261, Appendix VIII. Since these are defined by molecular formulae without reference to concentrations, a single molecule of such a chemical is a “hazardous constituent.” A hazardous waste, by contrast, is such only if various factors, including the concentration of hazardous constituents, actually make it hazardous to human health or the environment. * * * Thus, read literally, the “no migration” standard would seem to prohibit the migration of even a single molecule (or perhaps an appropriate de minimis amount) for the statutory time period, even though the migrating waste is itself not hazardous at all.

There is, however, an ambiguity in the statutory definition of the period—“as long as the wastes remain hazardous.” To which “wastes” does the clause refer? Since the consistency of wastes may vary throughout an injection zone (or a disposal unit), wastes in one part, particularly near the perimeter, may no longer be hazardous while wastes in another part still are. Can hazardous constituents in such non-hazardous wastes migrate without violating the “no migration” standard? Or must the operator assure no migration of constituents until all wastes throughout the injection zone are no longer hazardous? Noting this textual ambiguity, the EPA interpreted “the wastes” to

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12 Wastes may be hazardous for other reasons, such as exhibiting a hazardous characteristic (ignitability, corrosivity, reactivity, toxicity). 40 C.F.R. §§ 261.11(a)(1), (a)(2), 261.20-261.24. The statute gives the Administrator broad discretion in determining the criteria for listing wastes and in listing specific wastes. See 42 U.S.C. § 6921(a), (b).
The term “the wastes” also refers to each part of the larger body of wastes in the injection zone. Under this reading, hazardous constituents may migrate so long as “the wastes” immediately surrounding them at the border are no longer hazardous, or, putting it slightly differently, so long as they do not migrate in high enough concentrations to be hazardous wastes.

NRDC’s most powerful argument is then that EPA has artfully transformed the standard “no migration of hazardous constituents” into a quite different standard—“no migration of hazardous wastes.” We find this challenge quite close, but the ambiguity is serious enough to allow EPA under *Chevron* to resolve the issue in the way it has.

The EPA rests in part on a structural contention that “[o]rdinarily the term ‘hazardous constituents’ has no regulatory effect unless concentrations are also considered.” 53 Fed.Reg. at 28,122 (col. 3). *** This is true in the sense that RCRA “ordinarily” regulates “hazardous wastes,” which of course are defined (in part) in terms of concentrations of hazardous constituents, but it is obviously not a basis for reading “constituents” as “wastes” when Congress chooses the former. Nonetheless the exceptional character of the usage may suggest a need to be on guard against facile literalism.

The parties agree that we can learn something from § 6925(j), one of the rare other places in RCRA where Congress used the term “constituents” with a material regulatory effect. Section 6925(j) conditions a variance from certain technological control requirements for certain surface impoundments on the operator’s proving that there will be “no migration of any hazardous constituent [sic] into ground water or surface water at any future time.” 42 U.S.C. § 6925(j)(4). Even the EPA assumes that this other “no migration” standard prohibits migration of *any* hazardous constituent (down to a single molecule or an appropriate de minimis level). See Brief for Respondent at 54-55. Nonetheless, § 6925(j) does not contain the ambiguous “for so long as the wastes remain hazardous” clause. Furthermore, it contains an additional, if not earth-shattering, textual difference. While § 6924 prohibits “migration of hazardous constituents,” § 6925(j) prohibits “migration of *any* hazardous constituent.” If Congress had wanted § 6924’s “no migration” standards to cover a single molecule, it could have expressed the point as aggressively as in § 6925. And of course the context suggests a reason for a difference: § 6925(j)(4) protects water resources, which are not directly implicated under the controlling language of § 6924, and its “no migration” requirement works only as a condition for a variance. Overall, however, we find the statutory language and structure ambiguous and so turn to the legislative history.

Going into the Joint Conference, the House bill’s precursor of § 6924 did not insist on

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13 The term “the wastes” also refers to each part of the larger body of wastes in the injection zone. It is not true then, as the dissent suggests, that under our interpretation “the wastes” are never hazardous. *** Wastes at the very center of the injection zone that are still hazardous are “wastes” subject to the “no migration” prohibition, but the constituents in those wastes are not yet threatening to migrate. By the time those constituents have migrated to the boundary of the injection zone, “the wastes” surrounding them must have ceased to be hazardous. Thus the dissent is also wrong in asserting that our interpretation of the clause “for so long as the wastes remain hazardous” does not define a period of time. If the “no migration” standard is obeyed, the time period before any migration beyond the border of the injection zone will be no less than the time it takes for wastes to reach that border in a non-hazardous condition. The wastes at the edge of the injection zone will never be hazardous, as the dissent correctly notes, but that only means that the time period has already expired for those particular wastes. EPA properly focused on “the wastes” that reach the injection zone boundary because those are the only wastes that threaten to violate the “no migration” prohibition.
anything like “no migration.” It required the EPA to ban disposal of hazardous waste into deep injection wells if it “may not be protective of human health and the environment for as long as the waste remains hazardous.” H.R. 2867, 98th Cong., 1st Sess. § 5(a) (“Land Disposal of Certain Hazardous Wastes”) at 21 (1983). Other sections contained similar standards for prohibiting various methods of land disposal. See id. at 18-19, 23-24. The bill’s only “no migration” standard was in its version of what became § 6925(j). See id. § 5(b) (“Interim Status Surface Impoundments”) at 29. But for purposes of § 6925(j) the House bill specially redefined the term “hazardous constituent” to encompass only such constituents as would migrate “in concentrations which may adversely affect human health or the environment.” Id. § 18 (“Hazardous Constituents”) at 76. * * * The House specifically added this because it was concerned that “there may be no facilities that meet that kind of a rigorous test,” i.e., the strict “no migration” test. 129 Cong.Rec. 27,673; see also 129 Cong.Rec. 30,827-28 (adopting definition to clarify House’s intention).

The Senate bill provided a “no migration” standard in its prototype of § 6924 but, as even NRDC recognizes, it was clearly not as stringent as NRDC’s interpretation of § 6924 as enacted. See Brief for Petitioners NRDC at 22-23. It provided that

if a specified waste contains significant concentrations of one or more hazardous constituents that is highly toxic, highly mobile, or has a strong propensity to bioaccumulate, a method of land disposal may not be determined to be protective of human health and the environment for such specified hazardous waste, unless ... there will be no migration of such constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

130 Cong.Rec. 20,867-68 (setting forth final Senate Bill) (emphasis added). See also S.Rep. No. 284 at 84 (identical standard in earlier Senate draft). First, as NRDC concedes, this proposal required a showing of “no migration” only for those wastes that contained significant concentrations of certain hazardous constituents (those that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate). Brief for Petitioner NRDC at 22. Moreover, although there is some ambiguity in the proposal’s “no migration” standard too, the best interpretation seems to be that “such constituents” refers back to “significant concentrations” of highly toxic, etc. “hazardous constituents.” That reading explains why the Senate Report uses the terms constituents and wastes interchangeably in describing the standard. See S.Rep. No. 284 at 14 (describing the standard as “no migration of [certain] constituents “) (emphasis added); id. at 15 (describing the standard as prohibiting the “migration of the wastes “) (emphasis added).

To complete the picture on the eve of conference, we note the Senate’s version of § 6925(j)’s “no migration” standard. This used virtually the same language as Congress enacted in § 6925(j), see H.R. 2867 as amended in Senate, 98th Cong., 2d Sess. § 6(c), 130 Cong.Rec. 20,866, 20,869 (col. 3), with no limiting definition of “hazardous constituent” equivalent to the House’s. The Senate expressly noted the special ground for concern that we have already mentioned—§ 6925(j)’s application to migration into ground water. *** Thus, of the four clauses heading into conference (one from each house for each of §§ 6924 and 6925(j)), only one, the Senate version of § 6925(j), had a clause barring migration of hazardous constituents regardless of concentration.
The Conference’s discussion of the various clauses gives no hint of any intention to go beyond the two houses’ standards for § 6924. As to § 6925(j), there was a clear conflict between the House and Senate versions, because the House’s “no migration” standard included a limiting definition of “hazardous constituent” and the Senate’s did not. The Conference Report explicitly opted for the more stringent Senate version:

[T]he owner or operator must demonstrate no migration of any hazardous constituent into groundwater or surface water at any future time. In this formulation, the Conferences explicitly reject the provision contained in section 18 of the original House bill modifying the definition of hazardous constituent.

H.R.Conf.Rep. No. 1133 at 98, reprinted in 1984 U.S.CODEx CONG. & ADMIN. NEWS at 5669. By contrast, the Conference Report is silent on § 6924’s “no migration” standard, even though a conflict existed here as well, between the Senate’s “no migration” standard and the House’s general requirement of protecting human health and the environment. Obviously the Conference followed the Senate, changing its language in the course of doing so. In place of “no migration of such constituents” (“such” referring back to “significant concentrations” of certain types of hazardous constituents), it substituted “no migration of hazardous constituents.” Textually this minor change was necessary because another substantive change in the section had made it grammatically impossible for “such” to refer to its previous antecedent. If NRDC’s interpretation were adopted, however, this small textual change would have radically altered the Senate’s “no migration” standard and imposed a standard significantly more stringent than either house had passed.

Of course nothing prevents a conference from adopting a position quite different from both houses. There can be compromises like the British naval rearmament decision of 1909, when, as Churchill put it, “The Admiralty had demanded six ships; the economists offered four; and we finally compromised on eight.” See Ted Morgan, Churchill: Young Man in a Hurry, 1874-1915 249 (1982). But one would expect at least a word of explanation in the Conference Report. In fact all it said was that “[t]he Conference substitute adopts provisions from both the House bill and the Senate amendment.” H.R.Conf.Rep. No. 1133 at 86, reprinted in 1984 U.S.CODEx CONG. & ADMIN. NEWS at 5657. Moreover, the participants seem most often to have either ignored or misunderstood the distinction between hazardous constituents and hazardous wastes, though it is central to NRDC’s interpretation. See S.Rep. No. 284 at 14-15 (conflating its no migration of “such constituents” standard with a no migration of “wastes” standard); 129 Cong.Rec. 27,673 (col. 2)--74 (col. 1) (Rep. Breaux repeatedly assuring other Congressmen that “hazardous constituent” would be defined in terms of concentration levels, even before the House amended the definition of hazardous constituent). As to § 6925(j), of course, Congress ultimately did focus on the distinction, made a choice, and explained it, and clearly expressed it in the statute. As to § 6924, however, there is

\(^{15}\) The other change was that under the conference proposal the “no migration” standard was to be triggered by the presence of any hazardous waste covered by the specific clause, rather than just those wastes that contained significant concentrations of certain hazardous constituents (those that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate).
neither focus nor choice nor explanation nor clarity.
Finding no clear congressional determination in § 6924 that hazardous constituents must not
migrate regardless of hazard, and the reasonableness of the EPA’s policy choice being unquestioned,
we affirm its decision.

* * *

WALD, Chief Judge, dissenting in part:

Congress has clearly announced that a method of land disposal of hazardous wastes cannot
meet its standard of being “protective of human health and the environment” unless the disposer can
prove there will be “no migration of hazardous constituents from the disposal unit or injection zone
for as long as the wastes remain hazardous.” 42 U.S.C. § 6924(g)(5). That is a stringent requirement
indeed, but one Congress intentionally imposed as the only alternative to a total ban on land disposal
of hazardous waste. In its rulemaking, the EPA has, however, substituted for this requirement
a far weaker requirement that there be no migration of hazardous waste from the injection zone. The
difference is significant: Congress required that there be no migration of hazardous constituents;
the EPA regulations allow some migration of hazardous constituents, so long as the migrating
constituents are not at so high a concentration that the migrating waste is a hazardous waste. I
respectfully dissent from the majority’s holding that this is a permissible interpretation of the
statute’s “no migration” standard.

A. The Text of the No Migration Standard

In interpreting a statute, one begins with the words themselves. The no migration standard
of subsection (g)(5) says that there must be “no migration of hazardous constituents from the
disposal unit or injection zone for as long as the wastes remain hazardous.” The two key terms are
“hazardous constituents” and “the wastes.”

1. “Hazardous Constituents”

The majority acknowledges that within the field of environmental law, “hazardous
constituent” is a term of art with a very specific meaning: it refers to the substances listed in
Appendix VIII to 40 C.F.R. Part 261. Any substance on this list (arsenic, for instance) is always a
hazardous constituent, regardless of the concentration at which it may be present. A waste may
contain hazardous constituents, yet not be a hazardous waste, if the concentration of hazardous
constituents in the waste is so low that the waste poses no hazard to human health or the
environment. Conversely, a waste may be a hazardous waste without containing a hazardous
constituent, if it displays certain characteristics, such as corrosivity. See 40 C.F.R. §§ 261.3
(defining “hazardous waste”), 261.22 (defining corrosivity). Thus, “hazardous constituent” and
“hazardous waste,” as used in RCRA, are not casual terms that vaguely describe dangerous things.
They are terms of art with specific, distinct meanings.

The term used in the no migration prohibition is “hazardous constituents.” By using this
term, Congress expressed an unmistakable intention that there be no migration out of the injection
zone of any substance listed in Appendix VIII of 40 C.F.R. Part 261 for as long as the wastes remain
hazardous. Under the EPA’s interpretation, however, hazardous constituents may migrate from the
injection zone, so long as they do not do so at hazardous concentrations. This interpretation clashes
with Congress’ words: if a migrating waste contained hazardous constituents at hazardous
concentrations, it would itself be a hazardous waste. The EPA is therefore reading the statute as
though it simply said, “there shall be no migration of hazardous waste from the injection zone.” Accepting the EPA’s interpretation means accepting the notion that Congress speaks English so poorly that when it expresses a desire to ban the migration of hazardous wastes from the injection zone, it first introduces a totally different term, “hazardous constituents,” and then qualifies that term in a way that robs it of its well-established meaning, rather than use the correct term in the first place.  

* * *


Furthermore, the EPA’s interpretation of which wastes—migratory or residual—determine the permissibility of migration renders meaningless the statutory phrase, “for as long as the wastes remain hazardous.” As the majority acknowledges, this statutory phrase describes the time period during which migration of hazardous constituents is forbidden. Under the EPA’s interpretation of “the wastes,” however, the phrase has no relevance to any time period at all. As the EPA sees it, the statute does not bar migration of hazardous constituents from the injection zone for any time period at all; rather it bars migration of hazardous wastes from the injection zone, forever. That is, under the EPA’s interpretation, the phrase, “for as long as the wastes remain hazardous” is only a reflection of the basic substantive restriction against migration of hazardous wastes that the statute imposes, not a temporal limitation. The majority believes that the EPA has resolved “an ambiguity in the statutory definition of the [time] period,” but to my mind it is peculiar to resolve such an acknowledged ambiguity in a way that makes the time period not a time period at all.

This conundrum becomes even more bizarre when one considers what the EPA’s interpretation does to the word “remain.” The statute bars migration of hazardous constituents “for as long as the wastes remain hazardous.” In order for something to remain hazardous, it must first be hazardous. That is, the statutory term “the wastes” must refer to something that at one time is, but at some later time may not be, hazardous.

Under the EPA’s interpretation, however, “the wastes” refers only to the wastes leaving the injection zone, and these wastes, according to the EPA, can never be hazardous. See Brief for Respondent at 57-59. The EPA’s interpretation therefore raises pregnantly the question of why Congress would forbid migration “for as long as the wastes remain hazardous” if, as the EPA claims, Congress meant “the wastes” to refer to wastes that could under no circumstances be hazardous in the first place. Congress’ use of the word “remain” is therefore yet another clear indication that “the wastes” does not refer to the wastes that migrate from the injection zone, but rather to the wastes that are deposited there in the first place.

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2 The majority suggests that if Congress meant the no migration standard to cover single molecules of hazardous constituents, it could have prohibited “migration of any hazardous constituent” rather than “migration of hazardous constituents.” * * * However, the majority concedes that this difference in phraseology is “not earth-shattering”; I would suggest that it does not even evoke a tremor. If we are going to speculate on what Congress might have said, I think the stronger inference, by far, is that had Congress meant to say, “there shall be no migration of hazardous wastes from the injection zone,” it would have said just that.

3 It might be argued that “the wastes” are hazardous when they are injected into the injection zone, but that they cease to be hazardous by the time they reach the border of the injection zone and migrate from it, and that therefore there is a time period in between, during which “the wastes” remain hazardous. The problem with this argument is that under the EPA’s definition, “the wastes” refers only to wastes that are migrating from the injection zone. When hazardous
wastes are first injected into the injection zone, they are not part of what the EPA calls “the wastes.” They do not become part of “the wastes” until they reach the border of the injection zone, by which time they must be nonhazardous. Thus, under the EPA’s definition, “the wastes” cannot remain hazardous, because they can never be hazardous. Once it is admitted that “the wastes” refers to the body of wastes in the injection zone, the EPA’s interpretation falls.

The majority attempts to accommodate the statute’s temporal limitation as well as its use of the word “remain” by suggesting still other meanings for the term “the wastes”: the majority says it refers to “the wastes containing the hazardous constituents that are leaving the injection zone” and it “also refers to each part of the larger body of wastes in the injection zone.” (emphasis added). But even overlooking the fact that the majority has simply replaced the EPA’s definition with others of its own making, once the majority concedes that “the wastes” refers to wastes within the injection zone, even to “[w]astes at the very center of the injection zone that are still hazardous,” it follows from the literal text of the statute that there can be no migration of hazardous constituents from the injection zone while these wastes remain hazardous. Both the majority and the EPA ultimately confront the same dilemma in their varying interpretations: if “the wastes” refers only to wastes that migrate from an injection zone, then the phrase “for as long as the wastes remain hazardous” is nonsensical; if “the wastes” includes each part of the wastes within the injection zone, then the EPA cannot allow any hazardous constituents to migrate from the injection zone for as long as the wastes remain hazardous.

B. The History of the No Migration Standard

Because Congress’ use of the term “hazardous constituents” so strongly suggests that it meant to ban more than just the migration of hazardous wastes from the injection zone, the majority is forced to argue that Congress simply did not know what it was talking about. See Maj. op. (“the participants seem most often to have either ignored or misunderstood the distinction between hazardous constituents and hazardous wastes”). In so concluding, the majority overlooks well-established tenets of statutory construction, and misreads clear indications in the legislative history that Congress was, indeed, well aware of the critical distinctions in the terms it used.

We noted recently that it is not the province of courts to “correct” Congress’ drafting of the statute. Nothing in the EPA’s statements suggests that it would embrace or even countenance the majority’s interpretation, under which “the wastes” can refer to each part of the wastes within the injection zone, and yet hazardous constituents can migrate while some parts of the wastes within the injection zone remain hazardous.

4 The EPA understood this dilemma. It stated, the Agency is equating the statutory reference to waste remaining hazardous in RCRA section 3004(d), (e) and (g) with the levels and nature of constituents migrating from the unit. The alternative construction of the statutory language is that EPA must not allow any molecule of hazardous constituents to migrate from the unit while the waste within the unit remains hazardous. 52 Fed.Reg. at 32,453 (col. 3).
oversights. Rather, “we courts assume that Congress always knows the particulars whereof it speaks.” ** *

The only exception we recognize is the “rare case” in which “the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.” ** ** and such a case “must involve, at a minimum, some clear indication of congressional intent, either in the legislative history or in the structure of the relevant statute, that informs the specific language in question.” ** ** Here, ** [t]he history is replete with evidence that Congress well understood the import of using the term “hazardous constituents” rather than “hazardous wastes.”

The term “hazardous constituent(s)” appears in several places in the HSWA. The history of 42 U.S.C. § 6925(j), though lengthy, is quite instructive in that regard. Subsection (j) concerns surface impoundments of hazardous waste that existed on November 8, 1984, the effective date of HSWA (“existing surface impoundments”). Subsection 6924(o) requires new surface impoundments to have double linings, but Congress was concerned that many existing surface impoundments had no lining or a single, leaky lining that allowed hazardous waste to leak into underground sources of drinking water. See 129 Cong.Rec. 27,664 (1983) (remarks of Rep. Breaux). Accordingly, subsection 6925(j) requires that four years after November 8, 1984, existing surface impoundments store no more hazardous waste unless they comply with subsection 6924(o). However, Representative Breaux, who introduced the amendment on the House floor that later became subsection 6925(j), explained that he did not want to be unnecessarily hard on owners of existing surface impoundments. He believed that those owners should not have to alter existing impoundments if they could demonstrate their safety. Accordingly, subsection (j)(4) provides that the Administrator may modify the requirements for an existing surface impoundment if the owner can demonstrate that there will be “no migration of any hazardous constituent [sic] into ground water or surface water at any future time.”

Representative Lott questioned Representative Breaux about the meaning of his amendment. Representative Lott worried that no one could ever make a showing that there would be no migration at all from an impoundment. See 129 Cong.Rec. 27,673 (1983). Representative Breaux countered that “the definition of ‘hazardous constituent’ talks in terms of the concentration of that hazardous toxic chemical.” Id. About a month later Representative Breaux nailed down his interpretation by introducing another floor amendment which provided, “the term ‘hazardous constituent’ does not include those hazardous constituents which ... will not migrate into ground or surface water in concentrations which may adversely affect human health or the environment.” Id. at 30,827. His amendment passed the House.

However, after the bill went to conference, that specific amendment changing the normal definition of “hazardous constituent” was deleted, and the language “no migration of any hazardous constituent into ground or surface water at any future time” left intact. The Conference Report, commenting on this change, stated that “the Conferees explicitly reject the provision contained in [Representative Breaux’s amendment] modifying the definition of hazardous constituent.” ** **

Thus, the history of § 6925(j) shows that in formulating the final text of HSWA, Congress explicitly considered the definition of hazardous constituent as distinct from hazardous wastes. It knew what it meant when it required no migration of hazardous constituents, and it realized fully just how strict this requirement was. The Conference Report’s statement strongly confirms the NRDC’s interpretation that Congress used the term “hazardous constituent” as a term of art to refer to any
substance listed in 40 C.F.R. Part 261 Appendix VIII regardless of concentration, and it specifically rejected EPA’s more lenient interpretation.

The term “hazardous constituents” also appears in 42 U.S.C. § 6924(u), which provides that permits issued after the effective date of HSWA shall require “corrective action for all releases of hazardous waste or constituents” (emphasis added) from a disposal facility, regardless of when waste was placed there. This provision originated in the Senate Bill, and the Senate Report, commenting on it, states that “[t]he requirement for corrective action applies not just to releases of hazardous wastes, but also to releases of hazardous constituents.” S.Rep. No. 284, 98th Cong., 1st Sess. 32 (1983) (emphasis added). This comment shows once again that the term “hazardous constituents” has a precise meaning that differs from the meaning of the term “hazardous wastes,” and that Congress was well aware of the difference.

The majority relies finally on the absence in § 6924’s history of any indication that the congressional conferees intended the final “no migration” standard to be stronger than the standard proposed by either the Senate or the House of Representatives. However, with respect to the point at issue here (whether EPA may allow hazardous constituents to migrate from an injection zone in nonhazardous concentrations), the final HSWA’s “no migration” standard is not in fact any stricter than the standard contained in the Senate Bill, so that the absence of comment in the Conference Report is understandable.

As the majority notes, the Senate version of § 6924’s “no migration” standard read as follows:

> if a specified waste contains significant concentrations of one or more hazardous constituents that is highly toxic, highly mobile, or has a strong propensity to bioaccumulate, a method of land disposal may not be determined to be protective of human health and the environment for such specified hazardous waste, unless ...
>
> there will be no migration of such constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

S.Rep. No. 284, 98th Cong., 1st Sess. 84 (1983) (emphasis added). The majority contends that the term “such constituents” should be interpreted in context to refer to “significant concentrations of one or more hazardous constituents that is highly toxic,” etc., and the Senate Bill therefore prohibited migration only of significant concentrations of hazardous constituents. Simply as a matter of English, this is an impossible interpretation of the term. In the Senate Bill, “such constituents” clearly means “highly toxic, mobile, or bioaccumulative hazardous constituents,” and the Bill therefore says that if a specified waste contains significant concentrations of one or more hazardous constituents that is highly toxic, mobile, or bioaccumulative, then that waste cannot be disposed on the land unless there will be no migration of the highly toxic, mobile, or bioaccumulative hazardous constituents, at any concentration.

The Senate Report explicitly sets forth this interpretation of the Senate Bill. The Report instructs the EPA to carry out a two-step assessment with respect to hazardous wastes. First, the Administrator must consider a waste’s inherent characteristics, and determine whether it contains significant concentrations of one or more hazardous constituents that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate. If it does, it is presumptively prohibited from land disposal. S.Rep. No. 284, 98th Cong., 1st Sess. 14 (1983). The presumption for prohibition may
It is true, as the majority notes, that the conferees dropped without comment the Senate Bill’s requirement that the hazardous constituent involved be highly toxic, mobile, or bioaccumulative before the “no migration” standard applies. However, that deletion is not relevant to this case. What matters is that the Senate Bill already had a “no migration” standard that applied (when it applied) regardless of the concentration of the hazardous constituent involved.

C. The Policy Behind the No Migration Standard

Because the majority accepts the EPA’s interpretation of the “no migration” standard, it does not need to respond to the EPA’s argument that the NRDC’s interpretation would produce an anomalous result: although no hazardous constituents could migrate from the injection zone for as long as the wastes within remained hazardous, once the wastes within the injection zone were no longer hazardous, hazardous constituents could migrate—even at hazardous concentrations. In fact, this result would not be permitted under the statute, and understanding why helps one to understand the purpose behind the “no migration” standard.

Section 6924 contains two safety standards that a method of land disposal of hazardous wastes must meet. First, the method must be “protective of human health and the environment for as long as the waste remains hazardous.” This general standard gives EPA the power and the duty to ensure the safety of all methods of land disposal. The “no migration” standard, which requires that there be “no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous,” is a second, more specific requirement that a disposal method must also meet. If a waste disposal method satisfies the “no migration” standard, but for some other reason is unsafe, the EPA must prohibit it under § 6924’s general safety standard.

The following example proves that the general safety standard and the “no migration” standard are separate requirements. Suppose a manufacturer wishes to dispose of a hazardous waste that contains no hazardous constituents (it is a hazardous waste because it displays a hazardous characteristic). Suppose the manufacturer plans to inject the waste into an injection zone from which the waste will migrate while still hazardous. This method of disposal certainly satisfies the “no migration” standard: no matter how one reads the standard, it does not bar the migration of a waste containing no hazardous constituents.

Must the EPA therefore permit the disposal method? Of course not. The EPA has properly concluded, see Brief for Respondent at 58-59, that such a method must be prohibited. Although the

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7 It is true, as the majority notes, that the conferees dropped without comment the Senate Bill’s requirement that the hazardous constituent involved be highly toxic, mobile, or bioaccumulative before the “no migration” standard applies. However, that deletion is not relevant to this case. What matters is that the Senate Bill already had a “no migration” standard that applied (when it applied) regardless of the concentration of the hazardous constituent involved.
method satisfies the no-migration-of-hazardous-constituents standard, it does not satisfy the general safety standard, that disposal methods must be protective of human health and the environment for as long as the waste remains hazardous.

As this example shows, Congress did not need the “no migration” standard to ensure that hazardous wastes not migrate from the injection zone. The general safety standard already does that. The “no migration” standard is an overprotective standard, inserted by Congress to ensure that not even hazardous constituents migrate from a body of waste known to be hazardous. It does not lead to any anomalous results, because the general standard prevents such results from occurring. It reflects Congress’ evident concern that once hazardous constituents are known to be migrating from a body of waste known to be hazardous, the uncertainties involved are too great to allow the EPA to determine that the migration is at an “acceptable” level.

While there is no explicit expression of this specific concern in the legislative history proper, the statute does reflect a concern with “the long-term uncertainties associated with land disposal.” § 6924(d)(1)(A). I note also that eleven members of Congress, including several who were highly influential in the passage of HSWA, wrote a letter to the EPA Administrator Lee M. Thomas during an EPA rulemaking proceeding expressing this concern. They stated:

The requirement for proof of “no migration” is to be interpreted literally....

* * *

We specifically rejected the concept of an acceptable level of migration because of the scientific uncertainties associated with determining what is an “acceptable” level. For example, predicting the character and rate of migration, the fate and transport of the contaminants, and points of present and future human and environmental exposure are subject to significant error. The scientific uncertainty makes reliance on such predictions inconsistent with the statutory presumption against land disposal and in favor of treatment.

* * *

The phrase “as long as the waste remains hazardous” describes the time frame for which EPA must ascertain whether migration from the disposal unit will occur; it does not describe a substantive standard.


Of course, these letters, being merely the post-enactment statements of individual members of Congress, deserve little weight in our task of statutory interpretation. I do not cite them as evidence of the statute’s meaning; such evidence is abundant in the text of the statute and its
legislative history proper. I cite them to show that the strict “no migration” standard that is clearly expressed in the text of the statute is not some wild, counterintuitive result that we should strain to avoid, see Brief for Respondents at 57-59, but rather is the natural result of a belief that migration is an inherently uncertain process.

D. Conclusion

Congress did not use the term “hazardous constituents” idly. Congress understood that the term referred to substances on a certain list regardless of the concentration at which they were present; Congress did not want that meaning varied. Congress clearly understood that “hazardous constituents” was a technical term with a meaning distinct from the term “hazardous wastes.” The EPA’s conclusion notwithstanding, Congress, in enacting the no migration standard banning migration of “hazardous constituents,” did not mean to ban only migration of “hazardous wastes.”

Under Chevron, it is our duty to correct administrative agencies when they disregard the clear mandate of Congress. In this case, Congress has used well-established terms of art to express its meaning with great precision. I respectfully dissent from the majority’s holding that the EPA permissibly interpreted RCRA’s no migration standard.
2. THE STATUTE


(d) Prohibitions on land disposal of specified wastes

(1) Effective 32 months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account—(A) the long-term uncertainties associated with land disposal, (B) the goal of managing hazardous waste in an appropriate manner in the first instance, and (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) * * * unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) Paragraph (1) applies to the following hazardous wastes listed or identified under section 6921 of this title: * * * [Here followed a list of hazardous wastes]

(e) Solvents and dioxins

(1) Effective twenty-four months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition of one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraph (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) * * * unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) The hazardous wastes to which the prohibition under paragraph (1) applies are as follows— * * * [Here followed a list of hazardous wastes]

(f) Disposal into deep injection wells; specified subsection (d) wastes, solvents and dioxins

(1) Not later than forty-five months after November 8, 1984, the Administrator shall complete a review of the disposal of all hazardous wastes referred to in paragraph (2) of subsection (d) of this section and in paragraph (2) of subsection (e) of this section by underground injection into deep injection wells.

(2) Within forty-five months after November 8, 1984, the Administrator shall make a
determination regarding the disposal by underground injection into deep injection wells of the hazardous wastes referred to in paragraph (2) of subsection (d) of this section and the hazardous wastes referred to in paragraph (2) of subsection (e) of this section. The Administrator shall promulgate final regulations prohibiting the disposal of such wastes into such wells if it may reasonably be determined that such disposal may not be protective of human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraphs (A) through (C) of subsection (d)(1) of this section. In promulgating such regulations, the Administrator shall consider each hazardous waste referred to in paragraph (2) of subsection (d) of this section or in paragraph (2) of subsection (e) of this section which is prohibited from disposal into such wells by any State.

(3) If the Administrator fails to make a determination under paragraph (2) for any hazardous waste referred to in paragraph (2) of subsection (d) of this section or in paragraph (2) of subsection (e) of this section within forty-five months after November 8, 1984, such hazardous waste shall be prohibited from disposal into any deep injection well.

(g) Additional land disposal prohibition determination

(1) Not later than twenty-four months after November 8, 1984, the Administrator shall submit a schedule to Congress for—(A) reviewing all hazardous wastes listed (as of November 8, 1984) under section 6921 of this title other than those wastes which are referred to in subsection (d) or (e) of this section; and (B) taking action under paragraph (5) of this subsection with respect to each such hazardous waste.

(5) Not later than the date specified in the schedule published under this subsection, the Administrator shall promulgate final regulations prohibiting one or more methods of land disposal of the hazardous wastes listed on such schedule except for methods of land disposal which the Administrator determines will be protective of human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraph (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment * * * unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(6) * * * (C) If the Administrator fails to promulgate regulations, or make a determination under paragraph (5) for any hazardous waste referred to in paragraph (1) within 66 months after November 8, 1984, such hazardous waste shall be prohibited from land disposal.
SOLID WASTE DISPOSAL ACT AMENDMENTS OF 1983

OCTOBER 28 (legislative day, OCTOBER 24), 1983.-Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 757]

The Committee on Environment and Public Works, to which was referred the bill (S. 757) to amend the Solid Waste Disposal Act to authorize funds for fiscal years 1983, 1984, 1985, 1986, and 1987, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

* * *

[pp. 13-16:]

LAND DISPOSAL LIMITATIONS

This section amends section 3004 of the Act and establishes a program to reduce significantly current dependence on land disposal as a waste management practice by prohibiting the land disposal of certain hazardous wastes. This program is based upon a finding that land disposal in general is the least desirable form of waste management because of the problems associated with assuring long-term containment of hazardous wastes. Therefore, in order to avoid substantial risk to human health
and the environment, reliance on land disposal should be minimized and land disposal of hazardous wastes, particularly in landfills and surface impoundments, should be the least favored method for managing hazardous waste.  

Based upon these findings, new section 3004(b) directs the Administrator to promulgate regulations prohibiting the land disposal of hazardous wastes, except for those waste and land disposal method combinations that the Administrator determines will be protective of human health and the environment. The section imposes on the Administrator a stringent standard for determining that the continued land disposal of certain wastes is advisable. The presumption will be against land disposal as a waste management technique.

This scheme requires a two-step assessment. The first step involves an examination of the inherent characteristics of a waste. During this step, the Administrator shall consider the persistence, toxicity, mobility, and propensity to bioaccumulate of a particular hazardous waste or toxic constituents in the waste and the potential effect of the waste on the integrity of containment mechanisms (such as clay or synthetic liners or the fabric of an injection well or an injection zone). If a waste contains significant concentrations of one or more hazardous constituents that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate, step one of the assessment results in a presumption that land disposal of that specific waste will be prohibited.

For each waste, these characteristics could be reviewed separately or in combination. For example, a particular waste or constituent may be so extremely toxic that the waste is a candidate for a ban on that basis alone. Another waste may be appropriate for a ban based on a combination of factors, for example because it is highly toxic and mobile. Also, a waste may not be mobile or toxic itself but could render other wastes more toxic or mobile, thus it may be appropriate to ban such a waste.

The Administrator shall also consider concentrations of waste constituents when reviewing a particular waste type. The concentration levels that are “significant” will, of course, differ for various constituents. The Administrator may establish “concentration limits” for waste constituents and then ban the land disposal of wastes which contain these constituents in excess of the stated concentration limits.

Step two of the assessment involves a consideration of wastes identified in step one in combination with the various land disposal technologies. A presumption for prohibition of a waste made in step one may be overcome with respect to a particular method of land disposal if the Administrator determines that the particular method of land disposal of such waste will be protective of human health and the environment. This determination may be made if the Administration finds, to a reasonable degree of certainty, that no migration of the highly mobile, highly toxic, or highly bioaccumulative constituents will occur from the disposal unit or injection zone, for as long as the waste remains hazardous.

Interested members of the regulated community may demonstrate that a method of land disposal will be protective of human health and the environment because there will be no migration for as long as the waste remains hazardous. The requirement for an application by an “interested person” is intended to place the burden on the applicant or industry to prove that a specified waste can be safely contained in a particular type of individual disposal unit or injection zone. * * *

Protection of human health and the environment requires a demonstration that the disposal...
practice in question provide a “reasonable degree of certainty” that the waste can not escape to cause damage to human health of the environment. Wastes chemically decompose in a land disposal facility, although often this decomposition occurs very slowly stretching over centuries. The Administrator is required to find that the nature of the facility and the waste will assure that migration of the wastes will not occur while the wastes still retain their hazardous characteristics in such a way that would present any threat to human health and the environment. Absent such a finding the waste in question is to be banned from that type of disposal. In determining appropriate confinement from which migration shall not be allowed to occur, the terms disposal unit or injection zones should be construed not in terms of the property ownership but in terms of the overall environmental integrity of the disposal practice, keeping in mind, in particular, the potential for contamination of groundwater or surface water resources. Injection of hazardous wastes into deep wells allow dispersion of these wastes in a defined strata deep beneath the surface in a pattern totally without regard to the land ownership of the surface above. The disposal practice must be viewed in terms of its environmental and human health consequences and assure that, to a reasonable degree of certainty, no migration of hazardous constituents can occur for as long as the wastes remain hazardous. The phrase “reasonable degree of certainty” is intended to discount only the unpredictable future events. Certain geologic events such as earthquakes and floods, the likelihood of which can be predicted, should be considered by the Administrator when determining if migration will occur.

These are several key terms used in the step one standard for prohibiting wastes. These terms are “significant concentrations of hazardous constituents,” “highly toxic,” “highly mobile,” and “a strong propensity to bioaccumulate.” Because of their highly technical nature, definition of these terms is left to the Agency. However, the word “highly” or “strong” should not be read to be unduly restrictive. Land disposal is not appropriate for many wastes, particularly wastes containing hazardous constituents significantly in excess of existing ambient standards. The Agency may set up a ranking system for assigning priorities to wastes based on these characteristics and then determine the appropriate cut-off point for determining which wastes are candidates for prohibition. Alternatively, EPA could develop a set of characteristic tests for toxicity, mobility, and propensity to bioaccumulate, similar to the characteristic tests now used to determine whether a waste is hazardous. These characteristic tests would be used for determining which wastes are candidates for land disposal prohibitions.

CONTINUING RELEASES AT PERMITTED FACILITIES

The reported bill adds to section 3004 of the Act a new subsection intended to assure that appropriate corrective action is taken to protect human health and the environment from any past, present or future release of hazardous waste from a permitted hazardous waste facility.

New subsection 3004(g) requires that corrective action be taken in response to all releases of hazardous waste (or constituents of hazardous waste) from any solid waste management unit at
a treatment, storage, or disposal facility seeking a permit, regardless of when the waste was placed in the unit or when the release occurred. * * *

Corrective action is required whether or not the unit at which a release occurred is still in operation. The owner or operator of a hazardous waste management facility will not be allowed to escape the responsibility to take corrective action by closing a unit at which a release has occurred and limiting the permit application for the facility to other units at the site.

* * *

The requirement for corrective action applies not just to releases of hazardous wastes, but also to releases of hazardous constituents, including hazardous constituents from solid waste and hazardous constituents that are reaction by-products.

* * *

[The end of the Senate report reproduced the bill as it stood when the report was written, including the following excerpt:]

STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

SEC. 3004. (a) STANDARDS. -- * * *

(b) LAND DISPOSAL LIMITATIONS.--(1) The Congress finds that certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and that to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized and land disposal, particularly lawful and surface impoundment, should be the least favored method for managing hazardous wastes. Therefore, the Administrator shall, after notice and opportunity for hearings and after consultation with appropriate Federal and State agencies, promulgate regulations prohibiting the land disposal of hazardous wastes, except for methods of land disposal of one or more such wastes which the Administrator determines will be protective of human health and the environment. If the Administrator determines that a method of land disposal of a hazardous waste will be protective of human health and the environment, he shall promptly publish in the Federal Register notice of such determination together with an explanation of the basis for such determination. The Administrator shall take into account the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous waste, and the potential effect of such waste on the integrity of containment mechanisms.

(2) For the purposes of this subsection, if a specified waste contains significant concentrations of one or more hazardous constituents that is highly toxic, highly mobile, or has a strong propensity to bioaccumulate, a method of land disposal may not be determined to be protective of human health and the environment for such specified hazardous waste, unless upon application by an interested person it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of such constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

* * *
3b. LEGISLATIVE HISTORY: THE CONFERENCE REPORT

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two houses on the amendments of the senate to the bill (H.R. 2867) to amend the Solid Waste Disposal Act * * * submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report: * * *

Prohibition on Land Disposal of Specified Wastes

House Bill.—The House Bill provides that, effective 12 months after enactment, the land disposal of a set of hazardous wastes that are specifically listed in the bill (the ‘California list’) is prohibited (32 months for underground injection) unless EPA determines that the prohibition of a particular method of land disposal is not necessary to protect human health and the environment. * * * If EPA fails to make a determination for any listed or identified hazardous waste within the allotted time, that waste is prohibited from land disposal. Regulatory prohibitions of one or more methods of land disposal are to be based on the following considerations: the long-term uncertainties associated with land disposal, the goal of managing hazardous waste in an appropriate manner in the first instance, and the waste’s persistence, toxicity, mobility, and propensity to bioaccumulate. * * *

Senate amendment.—The Senate amendment provides that within 32 months EPA shall prohibit the land disposal of the ‘California list’ wastes, except for methods of land disposal of those wastes that EPA determines will be protective of health and the environment, in which case a notice to that effect shall be published in the federal register together with an explanation. A method of land disposal may not be determined to be protective of human health and the environment if a specified waste contains significant concentrations of one or more hazardous constituents that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate, unless an interested person demonstrates to a reasonable degree of certainty that there will be no migration of such constituents from the disposal unit or injection zone for as long as the waste remains hazardous. * * * EPA shall prohibit the land disposal of hazardous wastes, except for methods of land disposal of those wastes that EPA determines will be protective of health and the environment, in which case a notice to that effect shall be published in the federal register together with an explanation. A method of land disposal may not be determined to be protective of health and the environment if a specified waste contains significant concentrations of one or more hazardous constituents that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate, unless an interested person demonstrates to a reasonable degree of certainty that there will be no migration of such constituents from the disposal unit or injection zone for as long as the waste remains hazardous. * * *

Conference substitute.—The conference substitute adopts provisions from both the house bill and the senate amendment. It provides that, effective 32 months after enactment, the land disposal of the ‘California list’ is prohibited (except for underground injection) unless the administrator determines that the prohibition of a particular method of land disposal is not necessary to protect
human health and the environment.  

* * *

Section 206-- Continuing Releases at Permitted Facilities

House bill.—the house bill requires that regulations and permits issued after enactment shall require corrective action for hazardous constituent releases from any solid waste management unit at a facility, regardless of when the waste was placed in the unit. Where such corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules for corrective action and assurances of financial responsibility to ensure adequate cleanup of the releases. Senate amendment.-- the senate amendment is essentially the same as the house bill. Conference substitute.-- the conference substitute adopts the senate amendment. The purpose of this provision is to ensure that all facilities which seek a permit under section 3005(c) take all appropriate action to control and cleanup all releases of hazardous constituents from all solid waste management units at the time of permitting the facility. Current EPA regulations do not address all releases of hazardous constituents from solid waste management units at facilities receiving permits under section 3005(c). This could likely result in a situation of EPA issuing a final permit to a facility which is causing ground water contamination from inactive units, without the permit addressing that contamination in any way. The conferees believe that all facilities receiving permits should be required to clean up all releases from all units at the facility, whether or not such units are currently active. This provision provides also that, where corrective action cannot be completed prior to issuance of permit, the cleanup may occur after the date of final permit issuance only if the conditions, schedules, terms, and financial assurances of such cleanup actions are specified as a condition of the permit. To obtain and interpret information may take a considerable amount of time. Rather than delay the issuance of rera permits until sufficient information is acquired to specify in compliance schedules the corrective action required and the financial assurances needed to assure its completion, the bill allows permits to be issued where owners or operators commit in a compliance schedule to obtain the information necessary to determine the extent and cost of corrective action. To do otherwise would prolong the period during which facilities are not subject to the more stringent part 264 standards.

* * *

SECTION 215-- SURFACE IMPOUNDMENT

House bill.—the house bill requires existing interim status surface impoundments, with certain exceptions and modifications, to come into compliance with the minimum technological requirements for new surface impoundments. * * * [T]he house bill allows EPA to exempt from the requirements of the general rule those impoundments, wherever located, if the owner or operator could demonstrate that there would be no migration of any hazardous constituent into ground or surface water at any future time. For the purpose of this provision, the term ‘hazardous constituent’ is defined to exclude those constituents determined at the time of permitting to be incapable of migrating in concentrations that may adversely affect human health and the environment. * * * Senate amendment.—the senate amendment prohibits existing interim status surface impoundments
from receiving, storing or treating hazardous wastes after four years from the date of enactment unless the impoundment is in compliance with the minimum technological requirements for new impoundments. * * * The senate amendment contains specific exemptions for those impoundments: (1) which have at least one liner and for which there is no evidence of leakage, and (2) which are not located within an area of vulnerable hydrogeology. To qualify for this exemption, the senate amendment required the impoundment to meet the applicable liner regulations for new impoundments in effect on the date of enactment and to be in compliance with groundwater monitoring requirements applicable to facilities permitted under section 3005(c). In addition to this exemption, the senate amendment allows EPA (or authorized states) to modify the requirements of the general rule for those impoundments where the owner or operator could demonstrate that the location, design and operation of the impoundment would assure no migration of any hazardous constituent into ground or surface water at any time during the period hazardous waste remained in the impoundment. The senate amendment contains no provision similar to the house definition of hazardous constituent for the purpose of this modification. * * * Conference substitute.—the conference substitute contains elements of both the house bill and the senate amendment, modified as discussed below. Existing surface impoundments must come into compliance with the minimum technological requirements for new surface impoundments, with certain exceptions and modifications. * * * [T]he provision grants EPA the authority to modify the requirements of the general rule as that authority was set forth in the house bill. That is, the owner or operator must demonstrate no migration of any hazardous constituent into groundwater for surface water at any future time. In this formulation, the conferees explicitly reject the provision contained in section 18 of the original house bill modifying the definition of hazardous constituent. * * *

Hazardous Constituents

House Bill.-- the House Bill provides that, in the context of determining the applicability of a waiver from the requirement that surface impoundments receiving hazardous wastes must be lined, the term ‘hazardous constituent’ does not include those hazardous constituents which the owner or operator demonstrates will not migrate into groundwater or surface water in concentrations which may adversely affect human health and the environment. Senate amendment.-- no provision. Conference substitute.-- the conference substitute omits the House provision.

* * *

[Note: The House Report on the original House bill is omitted.]
4. EPA’S DECISION

RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124, 144, 146, and 148

[FRL-3382-7]

Underground Injection Control Program: Hazardous Waste Disposal Injection Restrictions; Amendments to Technical Requirements for Class I Hazardous Waste Injection Wells; and Additional Monitoring Requirements Applicable to all Class I Wells

Tuesday, July 26, 1988

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating its approach to implementing the statutorily mandated prohibitions on the underground injection of hazardous waste. This action is being taken in response to amendments to the Resource Conservation And Recovery Act (RCRA) enacted through the Hazardous and Solid Waste Amendments of 1984 (HSWA). ***

SUPPLEMENTARY INFORMATION: ***

I. Background

A. Statutory Authority

The Hazardous and Solid Waste Amendments of 1984 (HSWA), enacted on November 8, 1984, impose substantial new responsibilities on those who handle hazardous waste.

The amendments prohibit the continued land disposal of untreated hazardous waste beyond specified dates, unless the Administrator determines that the prohibition is not required in order to protect human health and the environment for as long as the wastes remain hazardous (RCRA sections 3004 (d)(1), (e)(1), (f)(2), (g)(5)). Congress established a separate schedule in section 3004(f) for making determinations regarding the disposal of dioxins and solvents and the list of wastes specified in section 3004(d)(2), termed the California list, in injection wells.

***
1. Section 3004(f)

Section 3004(f) addresses the disposal by injection of solvents, dioxins, and California list wastes. Specifically, this section requires the Administrator to promulgate rules prohibiting the disposal of such wastes into wells if it may “reasonably be determined that such disposal may not be protective of human health and the environment for as long as the waste remain hazardous * * *”. If EPA does not determine those instances where disposal would meet this standard, the injection of these wastes is prohibited under section 3004(f)(3).

2. Section 3004(g)

Section 3004(g) of RCRA applies the same standards and procedures to all methods of land disposal. * * *

Section 3004(g)(5) provides that the regulation promulgated by the Administrator must prohibit methods of land disposal except for methods “which the Administrator determines will be protective of human health and the environment for as long as the waste remains hazardous * * * “. Further, the section provides that, except for wastes which comply with the standards promulgated pursuant to section 3004(m), a method of land disposal may not be determined to be protective of human health and the environment, “unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.”

* * *

II. Summary of Today’s Rulemaking: Response to Comments; Part 148

A. Proposed Standard for Demonstrating Protection of Human Health and the Environment

As noted in the proposal, sections 3004 (f) and (g) both require a demonstration that injection is protective of human health and the environment. Under section 3004(g) it is clear that such a demonstration must include a showing of “no migration” of hazardous constituents from the injection zone for as long as the wastes remains hazardous. EPA believes that the “no migration” standard of section 3004(g) helps define what is protective of human health and the environment under section 3004(f). Section 3004(g), by its terms, restricts the injection of certain hazardous wastes into injection wells. In the proposal, EPA noted that the wastes covered under section 3004(f) are just as hazardous to human health and the environment as those under section 3004(g), and concluded that injection of either set of wastes should be subject to the same standard. Thus, the Agency proposed that the demonstration should be similar for all injection wells regardless of the type of injected waste and that the “no migration” standard should apply to all. For this reason, the Agency is using a petition process and standard that is the same for all prohibited hazardous wastes that are injected, whether they fall under subsection (f) or (g).

* * *
5. Hazardous Levels at the Unit Boundary

In the proposal, a petition under RCRA §§ 3004 (f) and (g) would satisfy the statutory standard if it showed that before injected fluid crossed the top of an injection zone or a point of discharge, the fluid was no longer hazardous. In its proposal, EPA suggested using health-based limits which have undergone peer review by the Agency and are used in RCRA delisting decisions and for clean closure demonstrations. In the absence of such standards, EPA proposed that the Agency require petitioners to demonstrate that concentrations had been reduced to three orders of magnitude below detection levels.

Although commenters generally expressed support for the use of health-based values to define hazardous levels, some objected to any use of health-based levels. These commenters believe that the statutory phrase in RCRA sections 3004 (e), (d), and (g) that there be “no migration of hazardous constituents while the waste remains hazardous” means that EPA may not allow a single molecule of a constituent listed in 40 CFR Part 261 Appendix VIII to leave an injection zone. The Agency specifically interprets the statutory phrase as requiring consideration of the fate of Appendix VIII constituents which are either injected or derived from injected waste.

EPA, however, believes that Congress, in the use of the term “hazardous” and the phrase “while the waste remains hazardous”, was concerned that injected fluid which leaves the injection zone not be hazardous and thereby not contain Appendix VIII constituents at hazardous levels.

This interpretation is consistent with the language in the 1984 amendments which expressly direct the Agency to “take[e] into account” the “persistence, toxicity, mobility, and propensity to bioaccumulate of . . .” hazardous wastes and their hazardous constituents in making determination with respect to deep well injections. See RCRA sections 3004 (f)(2), (g)(5), and (d)(1)(C). To take toxicity and propensity to bioaccumulate into account the Agency must necessarily consider concentration levels. This interpretation is further consistent with the Senate Report which states that the “no migration of hazardous constituents . . .” for as long as the wastes remain hazardous standard can be satisfied if the Administrator finds “that migration of the wastes will not occur while the wastes still retain their hazardous characteristics in such a way that [sic] would present any threat to human health and the environment.” (S. Rep. No. 98-284 at 15.)

The emphasis on concentration levels, as opposed to single molecules, is deeply established in EPA’s regulations. Ordinarily the term “hazardous constituents” has no regulatory effect unless concentrations are also considered. Thus, the use of the term “hazardous constituents” under EPA’s interpretation of RCRA sections 3004 (d), (e), and (g) is consistent with EPA’s rules and policies for listing and delisting hazardous waste as well as cleanup standards. The listing procedures, in effect prior to 1984, state clearly that solid waste containing any of the constituents listed in 40 CFR Part 261 Appendix VIII might be termed hazardous considering, among other factors, the concentrations of the constituents in the waste (40 CFR 261.11). (See also the delisting rule at 40 CFR 260.22; the clean closure rule (52 FR 8704, March 19, 1987); and the groundwater cleanup rules at 40 CFR 264.94(a) (2) and (3).)

It should be noted that wastes can be rendered nonhazardous in the sense of concentration (see proposal at 52 FR 32453), but there is no chemical reaction that will completely eliminate all molecules of some Appendix VIII constituents. Thus a standard based on single molecules would not reflect the reality of chemical transformations. Moreover, wastes may be rendered nonhazardous by means of chemical transformation, adsorption of heavy metals or some organics, as well as by
several other mechanisms. Immobilization of heavy metals in the injection zone is obviously a desired result. Accordingly, the Agency believes the most logical standard under RCRA sections 3004 (d), (e), (f), and (g) consistent with the environmental concern is whether hazardous fluids ever leave the disposal units and not whether hazardous levels of constituents remain in the unit. Thus, the phrase “while the waste remains hazardous” should not reflect wastes which stay in the unit.

***

The stringent reading that no molecules may leave an injection zone is inconsistent with EPA’s regulatory approach to what is and is not hazardous for regulatory concerns. Commenters have not shown that EPA’s approach violates RCRA and have not offered any other credible approach. Accordingly, EPA maintains in this final rule the approach proposed.

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[The final rule:]

§ 148.20 Petitions to allow injection of a waste prohibited under Subpart B.

(a) Any person seeking an exemption from a prohibition under Subpart B of this part for the injection of a restricted hazardous waste into an injection well or wells shall submit a petition to the Director demonstrating that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This demonstration requires a showing that:

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(ii) Before the injected fluids migrate out of the injection zone or to a point of discharge or interface with USDW, the fluid will no longer be hazardous because of attenuation, transformation, or immobilization of hazardous constituents within the injection zone by hydrolysis, chemical interactions or other means. ***
MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the Armed Forces of the United States. At trial, petitioner’s only defense was that he should have been exempt from military service because he was the ‘sole surviving son’ of a family whose father had been killed in action while serving in the Armed Forces of the United States. The District Court held that he could not raise that defense because he had failed to exhaust the administrative remedies provided by the Selective Service System. Accordingly, petitioner was convicted and sentenced to three years’ imprisonment. The Court of Appeals affirmed, with one judge dissenting. * * * We granted certiorari. * * *

I.

The facts are not in dispute. Petitioner registered with his local Selective Service board shortly after his 18th birthday and thereafter completed his classification questionnaire. On that form he indicated that he was ‘the sole surviving son of a family of which one or more sons or daughters were killed in action * * * while serving in the Armed Forces of the United States * * *.’ On February 25, 1963, petitioner’s local board placed him in Class I-A, available for military service; he made no attempt to appeal that classification.3

On March 23, 1964, he was ordered to report for a pre-induction physical, but failed to do so. *** The board [later] canceled his induction order and reclassified him IV-A, the appropriate classification for a registrant exempted as a sole surviving son. Petitioner remained in that classification until February 14, 1966.

Early in 1966, the local board learned of the death of petitioner’s mother. After checking with the State Director, the board returned petitioner to Class I-A. The board rested this decision on the theory that a IV-A classification became improper when petitioner’s ‘family unit’ ceased to exist on the death of his mother. Petitioner was ordered to report for a pre-induction physical. He failed to report and was declared a delinquent and ordered to report for induction. He again failed to report and, after further investigation, his criminal prosecution followed.

II.

We think it clear that petitioner was exempt from military service as a sole surviving son. *** [The Court explained its view that McKart was a “sole surviving son” within the meaning of the applicable statute even after the death of his last surviving parent.]

*** The local board erred in classifying petitioner I-A and ordering him to report for induction.

III.

The Government maintains, however, that petitioner cannot raise the invalidity of his I-A

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3 A registrant has the right to appear before his local board to contest his classification or to present new information to the board. 32 CFR §§ 1624.1, 1624.2 (1969). The board then determines whether or not to reconsider the registrant’s classification. 32 CFR §§ 1624.2(c), (d) (1969). Following the local board’s decision, the registrant has the right to appeal to the state appeal board. 32 CFR §§ 1624.2(e), 1625.13 (1969). A further appeal may be taken by the registrant to the National Selective Service Appeal Board only if one or more members of the state appeal board dissent from the board’s decision. 32 CFR § 1627.3 (1969).
classification and subsequent induction order as a defense to a criminal prosecution for refusal to report for induction. According to the Government, petitioner’s failure to appeal his reclassification after the death of his mother constitutes a failure to exhaust available administrative remedies and therefore should bar all judicial review. For the reasons set out below, we cannot agree.

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law Treatise § 20.01 et seq. (1958 ed., 1965 Supp.); L. Jaffe, Judicial Control of Administrative Action 424--458 (1965). The doctrine provides ‘that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’ Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. **The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.**

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, ‘(t)he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.’ This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

Some of these reasons apply equally to cases like the present one, where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process. Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging

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people to ignore its procedures.

In Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created. At the heart of the Selective Service System are the local boards, which are charged in the first instance with registering and classifying those subject to the Selective Service laws. ** Upon being classified by the local board, the registrant has a right of appeal to a state appeal board, ** and, in some instances, to the President, **. No registrant is required to appeal. A registrant cannot be ordered to report for induction while his classification is being considered by the local board or by an appeal board. **

At some stage during this process, normally shortly before he is expected to be ordered to report for induction, see 32 CFR § 1628.11 (1969), the registrant is required to complete a pre-induction physical examination. If he passes this examination, he ordinarily will be ordered to report for induction. The next, and last, step is to report to the induction center and submit to induction. At this point, the administrative process is at an end.

If the registrant fails to report for induction, he is, like petitioner in the present case, subject to criminal prosecution. Although the Universal Military Training and Service Act, as it stood at the time of petitioner’s trial, provided that the decisions of the local boards were ‘final,’ it was long ago established that a registrant charged with failure to report can raise the defense that there was ‘no basis in fact’ for his classification. See *Estep v. United States*, 327 U.S. 114, 123 (1946). It is also established that there can be no judicial review at all, with some exceptions, until the registrant has refused to submit to induction and is prosecuted, or else has submitted to induction and seeks release by habeas corpus.

This case raises a different question. We are not here faced with a premature resort to the courts--all administrative remedies are now closed to petitioner. We are asked instead to hold that petitioner’s failure to utilize a particular administrative process--an appeal--bars him from defending a criminal prosecution on grounds which could have been raised on that appeal. We cannot agree that application of the exhaustion doctrine would be proper in the circumstances of the present case.

First of all, it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. The deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review. The statute as it stood when petitioner was reclassified said nothing which would require registrants to raise all their claims before the appeal boards. We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner. Even if there is no such compelling interest when petitioner’s case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System’s ability to perform its functions.

The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion. In this sense, the issue is different from many Selective Service classification
questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards. Petitioner’s failure to take his claim through all available administrative appeals only deprived the Selective Service System of the opportunity of having its appellate boards resolve a question of statutory interpretation. Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why petitioner’s failure to appeal should bar his only defense to a criminal prosecution. There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution.

We are thus left with the Government’s argument that failure to require exhaustion in the present case will induce registrants to bypass available administrative remedies. The Government fears an increase in litigation and a consequent danger of thwarting the primary function of the Selective Service System, the rapid mobilization of manpower. This argument is based upon the proposition that the Selective Service System will, through its own processes, correct most errors and thus avoid much litigation. The exhaustion doctrine is assertedly necessary to compel resort to these processes. The Government also speculates that many more registrants will risk criminal prosecution if their claims need not carry into court the stigma of denial not only by their local boards, but also by at least one appeal board.

We do not, however, take such a dire view of the likely consequences of today’s decision. At the outset, we doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chances with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classifications. And, today’s holding does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court. Moreover, we are not convinced that many in this rather small class of registrants will bypass the Selective Service System with the thought that their ultimate chances of success in the courts are enhanced thereby. In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction. Accordingly, in the present case, where there appears no significant interest to be served in having the System decide the issue before it reaches the courts, we do not believe that petitioner’s failure to appeal his classification should foreclose all judicial review. * * *

Accordingly, we reverse the judgment of the court below and remand the case for entry of a judgment of acquittal.

It is so ordered.

Reversed and remanded.

[The concurring opinions of Justice Douglas and Justice White are omitted.]
DARBY v. CISNEROS
509 U.S. 137 (1993)

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. At issue is the relationship between the judicially created doctrine of exhaustion of administrative remedies and the statutory requirements of § 10(c) of the APA[, 5 U.S.C. § 704].

I

Petitioner R. Gordon Darby is a self-employed South Carolina real estate developer who specializes in the development and management of multifamily rental projects. In the early 1980s, he began working with Lonnie Garvin, Jr., a mortgage banker, who had developed a plan to enable multifamily developers to obtain single-family mortgage insurance from respondent Department of Housing and Urban Development (HUD). Respondent Secretary of HUD (Secretary) is authorized to provide single-family mortgage insurance under § 203(b) of the National Housing Act, 48 Stat. 1249, as amended, 12 U.S.C. § 1709(b). Although HUD also provides mortgage insurance for multifamily projects under § 207 of the National Housing Act, 12 U.S.C. § 1713, the greater degree of oversight and control over such projects makes it less attractive for investors than the single-family mortgage insurance option.

The principal advantage of Garvin’s plan was that it promised to avoid HUD’s “Rule of Seven.” This rule prevented rental properties from receiving single-family mortgage insurance if the mortgagor already had financial interests in seven or more similar rental properties in the same project or subdivision. See 24 CFR § 203.42(a) (1992). Under Garvin’s plan, a person seeking financing would use straw purchasers as mortgage insurance applicants. Once the loans were closed, the straw purchasers would transfer title back to the development company. Because no single purchaser at the time of purchase would own more than seven rental properties within the same project, the Rule of Seven appeared not to be violated. HUD employees in South Carolina apparently assured Garvin that his plan was lawful and that he thereby would avoid the limitation of the Rule of Seven.

Darby obtained financing for three separate multiunit projects, and, through Garvin’s plan, Darby obtained single-family mortgage insurance from HUD. Although Darby successfully rented the units, a combination of low rents, falling interest rates, and a generally depressed rental market forced him into default in 1988. HUD became responsible for the payment of over $6.6 million in insurance claims.

HUD had become suspicious of Garvin’s financing plan as far back as 1983. In 1986, HUD initiated an audit but concluded that neither Darby nor Garvin had done anything wrong or misled HUD personnel. Nevertheless, in June 1989, HUD issued a limited denial of participation (LDP) that

* THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part III of this opinion.
prohibited petitioners for one year from participating in any program in South Carolina administered by respondent Assistant Secretary of Housing. Two months later, the Assistant Secretary notified petitioners that HUD was also proposing to debar them from further participation in all HUD procurement contracts and in any nonprocurement transaction with any federal agency. See 24 CFR § 24.200 (1992).

Petitioners’ appeals of the LDP and of the proposed debarment were consolidated, and an Administrative Law Judge (ALJ) conducted a hearing on the consolidated appeals in December 1989. The judge issued an “Initial Decision and Order” in April 1990, finding that the financing method used by petitioners was “a sham which improperly circumvented the Rule of Seven.” The ALJ concluded, however, that most of the relevant facts had been disclosed to local HUD employees, that petitioners lacked criminal intent, and that Darby himself “genuinely cooperated with HUD to try [to] work out his financial dilemma and avoid foreclosure.” In light of these mitigating factors, the ALJ concluded that an indefinite debarment would be punitive and that it would serve no legitimate purpose; good cause existed, however, to debar petitioners for a period of 18 months.

Under HUD regulations,

“The hearing officer’s determination shall be final unless, pursuant to 24 CFR part 26, the Secretary or the Secretary’s designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the hearing officer’s determination.” 24 CFR § 24.314(c) (1992).

Neither petitioners nor respondents sought further administrative review of the ALJ’s “Initial Decision and Order.”

On May 31, 1990, petitioners filed suit in the United States District Court for the District of South Carolina. They sought an injunction and a declaration that the administrative sanctions were imposed for purposes of punishment, in violation of HUD’s own debarment regulations, and therefore were “not in accordance with law” within the meaning of § 10(e)(B)(1) of the APA, 5 U.S.C. § 706(2)(A).

Respondents moved to dismiss the complaint on the ground that petitioners, by forgoing the option to seek review by the Secretary, had failed to exhaust administrative remedies. The District Court denied respondents’ motion to dismiss, reasoning that the administrative remedy was adequate.

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2 An LDP precludes its recipient from participating in any HUD “program,” which includes “receipt of any benefit or financial assistance through grants or contractual arrangements; benefits or assistance in the form of loan guarantees or insurance; and awards of procurement contracts, notwithstanding any quid pro quo given and whether [HUD] gives anything in return.” 24 CFR § 24.710(a)(2) (1992).

3 According to HUD regulations, “[d]ebarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government’s protection and not for purposes of punishment.” 24 CFR § 24.115(b) (1992).
inadequate and that resort to that remedy would have been futile. *** In a subsequent opinion, the District Court granted petitioners’ motion for summary judgment, concluding that the “imposition of debarment in this case encroached too heavily on the punitive side of the line, and for those reasons was an abuse of discretion and not in accordance with the law.” ***

The Court of Appeals for the Fourth Circuit reversed. Darby v. Kemp, 957 F.2d 145 (1992). It recognized that neither the National Housing Act nor HUD regulations expressly mandate exhaustion of administrative remedies prior to filing suit. The court concluded, however, that the District Court had erred in denying respondents’ motion to dismiss, because there was no evidence to suggest that further review would have been futile or that the Secretary would have abused his discretion by indefinitely extending the time limitations for review.

*** [W]e granted certiorari. ***

II

Section 10(c) of the APA bears the caption “Actions reviewable.” It provides in its first two sentences that judicial review is available for “final agency action for which there is no other adequate remedy in a court,” and that “preliminary, procedural, or intermediate agency action ... is subject to review on the review of the final agency action.” The last sentence of § 10(c) reads:

“As except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration ***, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.” 80 Stat. 392-393, 5 U.S.C. § 704.

Petitioners argue that this provision means that a litigant seeking judicial review of a final agency action under the APA need not exhaust available administrative remedies unless such exhaustion is expressly required by statute or agency rule. According to petitioners, since § 10(c) contains an explicit exhaustion provision, federal courts are not free to require further exhaustion as a matter of judicial discretion.

Respondents contend that § 10(c) is concerned solely with timing, that is, when agency actions become “final,” and that Congress had no intention to interfere with the courts’ ability to impose conditions on the timing of their exercise of jurisdiction to review final agency actions. Respondents concede that petitioners’ claim is “final” under § 10(c), for neither the National Housing Act nor applicable HUD regulations require that a litigant pursue further administrative appeals prior to seeking judicial review. However, even though nothing in § 10(c) precludes judicial review of petitioners’ claim, respondents argue that federal courts remain free under the APA to impose appropriate exhaustion requirements.9

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9 Respondents also have argued that under HUD regulations, petitioners’ debarment remains “inoperative” pending review by the Secretary. See 48 Fed.Reg. 43304 (1983). But this fact alone is insufficient under § 10(c) to mandate exhaustion prior to judicial review, for the agency also must require such exhaustion by rule. Respondents concede that HUD imposes no such exhaustion requirement. Brief for Respondents 31.
We have recognized that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality:

“[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.” *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985).*

Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for “[o]f ‘paramount importance’ to any exhaustion inquiry is congressional intent.” * * * We therefore must consider whether § 10(c), by providing the conditions under which agency action becomes “final for the purposes of” judicial review, limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review.

It perhaps is surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question. Professor Davis noted in 1958 that § 10(c) had been almost completely ignored in judicial opinions, see 3 K. Davis, Administrative Law Treatise § 20.08, p. 101 (1958); he reiterated that observation 25 years later, noting that the “provision is relevant in hundreds of cases and is customarily overlooked.” 4 K. Davis, Administrative Law Treatise § 26.12, pp. 468-469 (2d ed. 1983). Only a handful of opinions in the Courts of Appeals have considered the effect of § 10(c) on the general exhaustion doctrine. * * *

This Court has had occasion, however, to consider § 10(c) in other contexts. For example, in *ICC v. Locomotive Engineers*, 482 U.S. 270 (1987), we recognized that the plain language of § 10(c), which provides that an agency action is final “whether or not there has been presented or determined an application” for any form of reconsideration, could be read to suggest that the agency action is final regardless whether a motion for reconsideration has been filed. We noted, however, that § 10(c) “has long been construed by this and other courts merely to relieve parties from the requirement of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute—see, e.g., 15 U.S.C. §§ 717r, 3416(a)), but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal” (emphasis in original). *Id.*, at 284-285. * * *

While some dicta in these cases might be claimed to lend support to respondents' interpretation of § 10(c), the text of the APA leaves little doubt that petitioners are correct. Under § 10(a) of the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (emphasis added). Although § 10(a) provides the general right to judicial review of agency actions under the APA, § 10(c) establishes when such review is available. When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is “final for the purposes of this section” and therefore “subject to judicial review” under the first sentence. While federal courts may be free to apply, where
appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, § 10(c), by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.

The last sentence of § 10(c) refers explicitly to “any form of reconsideration” and “an appeal to superior agency authority.” Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available. If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense. To adopt respondents’ reading would transform § 10(c) from a provision designed to “‘remove obstacles to judicial review of agency action,’” Bowen v. Massachusetts, 487 U.S., at 904, into a trap for unwary litigants. Section 10(c) explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well. * * *

III

* * * [The Court examined the legislative history of 5 U.S.C. § 704 and concluded that nothing in it changed the Court’s reading of the statute.]

IV

We noted just last Term in a non-APA case that

“appropriate deference to Congress’ power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.” McCarthy v. Madigan, 503 U.S., at 144.

Appropriate deference in this case requires the recognition that, with respect to actions brought under the APA, Congress effectively codified the doctrine of exhaustion of administrative remedies in § 10(c). Of course, the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA. But where the APA applies, an appeal to “superior agency authority” is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become “final” under § 10(c).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes and Questions

1. Prior to this case, as is demonstrated by the opinion of the Fourth Circuit, it was fairly routine for courts to require parties to exhaust available administrative remedies before seeking
judicial review, even if those remedies did not appear on their face to be required. By what diabolically clever strategy did Darby’s counsel get around this practice?

2. Read 5 U.S.C. § 704 very carefully. Exactly when does it apply? Exactly what does it require an agency to do in order to require parties to appeal within an agency before seeking judicial review? If an ALJ at an agency rules against your client, and you want to know whether you must take an internal agency appeal before seeking judicial review, what sources of law do you have to check?
AIR COURIER CONFERENCE OF AMERICA v.
AMERICAN POSTAL WORKERS UNION
498 U.S. 517 (1991)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.
This case requires us to decide whether postal employees are within the “zone of interests” of the group of statutes known as the Private Express Statutes (PES), so that they may challenge the action of the United States Postal Service in suspending the operation of the PES with respect to a practice of private courier services called “international remailing.” We hold that they are not.
Since its establishment, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in the PES, 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606. The monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission. ** It prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and service to patrons in all areas, including those that are remote or less populated. **

A provision of the PES allows the Postal Service to “suspend [the PES restrictions] upon any mail route where the public interest requires the suspension.” 39 U.S.C. § 601(b). In 1979, the Postal Service suspended the PES restrictions for “extremely urgent letters,” thereby allowing overnight delivery of letters by private courier services. 39 CFR § 320.6 (1990); 44 Fed.Reg. 61178 (1979). Private courier services, including members of petitioner-intervenor Air Courier Conference of America, relied on that suspension to engage in a practice called “international remailing.” This entails bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses. Believing this international remailing was a misuse of the urgent-letter suspension, the Postal Service issued a proposed modification and clarification of its regulation in order to make clear that the suspension for extremely urgent letters did not cover this practice. 50 Fed.Reg. 41462 (1985). The comments received in response to the proposed rule were overwhelmingly negative **. Because of the vigorous opposition to the proposed rule, the Postal Service agreed to reconsider its position and instituted a rulemaking “to remove the cloud” over the validity of the international remailing services. 51 Fed.Reg. 9852, 9853 (1986). After receiving additional comments and holding a public meeting on the subject, on June 17, 1986, the Postal Service issued a proposal to suspend operation of the PES for international remailing. Id., at 21929-21932. Additional comments were received, and after consideration of the record it had compiled, the Postal Service issued a final rule suspending the operation of the PES with respect to international remailing. Id., at 29637.

Respondents, the American Postal Workers Union, AFL-CIO, and the National Association of Letter Carriers, AFL-CIO (Unions), sued in the United States District Court for the District of Columbia, challenging the international remailing regulation pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 702. They claimed that the rulemaking record was inadequate to support a finding that the suspension of the PES for international remailing was in the public interest. Petitioner Air Courier Conference of America (ACCA) intervened. On December 20, 1988, the District Court granted summary judgment in favor
Title 18 U.S.C. § 1696 provides:

"Private express for letters and packets"

"(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city,
allowing private conveyance of letters if done on a one-time basis or without compensation, and 39 U.S.C. § 601(a), allowing letters to be carried out of the mails if certain procedures are followed, indicate that the congressional concern was not with opportunities for postal workers but with the receipt of necessary revenues for the Postal Service.

Nor does the history of this legislation—such as it is—indicate that the PES were intended for the benefit of postal workers. When the first statutes limiting private carriage of letters on post roads were enacted in 1792, the Post Office offered no pickup or delivery services. *** Statutory authority to employ letter carriers was not enacted until two years later and was largely ignored until the late 1820's. *** The 1792 restrictions on private carriage protected the Government’s capital investment in the post roads, not the jobs of as yet virtually nonexistent postal employees. In 1825 and 1827, Acts were passed prohibiting the private carriage of letters through the use of stages or other vehicles, packet boats, or other vessels, *** and foot and horse posts, ***. Postal employees cannot have been within the zone of interests of either the 1824 or 1827 Acts; those Acts targeted transportation of mail which even then was contracted out to private carriers. ***

Congress’ consideration of the 1845 Act was the only occasion on which the postal monopoly was the subject of substantial debate. The 1845 statute, entitled “An Act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department,” 5 Stat. 732, was the result of three circumstances, none of which involved the interests of postal employees. First, the Post Office Department continued to run substantial deficits in spite of high postage rates. *** Second, high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them. *** Third,

Title 39 U.S.C. § 601 provides:

“Letters carried out of the mail

“(a) A letter may be carried out of the mails when--
“(1) it is enclosed in an envelope;
“(2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;
“(3) the envelope is properly addressed;
“(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
“(5) any stamps on the envelope are canceled in ink by the sender; and
“(6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.
“(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.”
inauguration of the “penny post” in England quadrupled use of the mails, and it was thought that a substantial reduction in American postal rates would have the dual virtues of driving private expresses out of business and increasing mail volume of the Post Office. This, in turn, would help reduce the Post Office’s deficit. ** **

The legislative history of the sections of the Act limiting private carriage of letters shows a two-fold purpose. First, the Postmaster General and the States most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market intelligence and news of international affairs that had not yet reached the general populace through the slower mails. ** ** Second, it was thought to be the duty of the Government to serve outlying, frontier areas, even if it meant doing so below cost. ** ** Thus, the revenue protection provisions were not seen as an end in themselves, nor in any sense as a means of ensuring certain levels of public employment, but rather were seen as the means to achieve national integration and to ensure that all areas of the Nation were equally served by the Postal Service.

The PES enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. If competitors could serve the lower cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business, thereby increasing its average unit cost and requiring higher prices to all users.11 ** ** The postal monopoly, therefore, exists to ensure that postal services will be provided to the citizenry at large, and not to secure employment for postal workers.

The Unions’ claim on the merits is that the Postal Service has failed to comply with the mandate of 39 U.S.C. § 601(b) that the PES be suspended only if the public interest requires. The foregoing discussion has demonstrated that the PES were not designed to protect postal employment or further postal job opportunities, but the Unions argue that the courts should look beyond the PES to the entire 1970 PRA in applying the zone-of-interests test. The Unions argue that because one of the purposes of the labor-management provisions of the PRA was to stabilize labor-management relations within the Postal Service, and because the PES is the “linchpin” of the Postal Service, employment opportunities of postal workers are arguably within the zone of interests covered by the PES. The Unions rely upon our opinion in *Clarke v. Securities Industry Assn.*, 479 U.S. 388(1987), to support this contention.

*Clarke* is the most recent in a series of cases in which we have held that competitors of regulated entities have standing to challenge regulations. *Clarke*, supra; *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In *Clarke*, we said that “we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress’ overall purposes in the National Bank Act.” ** ** This statement, like all others in our opinions,

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11 The PES are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury. *See, e.g., Adams v. Pan American World Airways, Inc.*, 264 U.S.App.D.C. 174, 828 F.2d 24 (1987) (former airline employees denied standing to assert antitrust claim against airline that allegedly drove their former employer out of business). ** **.
must be taken in the context in which it was made. In the next paragraph of the opinion, the Court pointed out that 12 U.S.C. § 36, which the plaintiffs in that case claimed had been misinterpreted by the Comptroller, was itself “a limited exception to the otherwise applicable requirement of [12 U.S.C.] § 81,” limiting the places at which a national bank could transact business to its headquarters and any “branches” permitted by § 36. Thus the zone-of-interests test was to be applied not merely in the light of § 36, which was the basis of the plaintiffs’ claim on the merits, but also in the light of § 81, to which § 36 was an exception.

The situation in the present case is quite different. The only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for their standing, is that both were included in the general codification of postal statutes embraced in the PRA. The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. We said in *Lujan* that “the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint.” *** To adopt the unions’ contention would require us to hold that the “relevant statute” in this case is the PRA, with all of its various provisions united only by the fact that they deal with the Postal Service. But to accept this level of generality in defining the “relevant statute” could deprive the zone-of-interests test of virtually all meaning.

Unlike the two sections of the National Bank Act discussed in *Clarke*, supra, none of the provisions of the PES have any integral relationship with the labor-management provisions of the PRA. When it enacted the PRA, Congress made no substantive changes to those portions of the PES codified in the Criminal Code, 18 U.S.C. §§ 1693-1699; Congress readopted without change those portions of the PES codified in the Postal Service Code, 39 U.S.C. §§ 601-606; and Congress required the Postal Service to conduct a 2-year study and reevaluation of the PES before deciding whether those laws should be modified or repealed. ***

None of the documents constituting the PRA legislative history suggest that those concerned with postal reforms saw any connection between the PES and the provisions of the PRA dealing with labor-management relations. The Senate and House Reports simply note that the proposed bills continue existing law without change and require the Postal Service to conduct a study of the PES. The Court of Appeals referred to the PES as the “linchpin” of the Postal Service, which it may well be; but it stretches the zone-of-interests test too far to say that because of that fact those who a different part of the PRA was designed to benefit may challenge a violation of the PES.

It would be a substantial extension of our holdings in *Clarke*, supra, *Data Processing*, supra, and *Investment Co. Institute*, supra, to allow the Unions in this case to leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the PES. We decline to make that extension, and hold that the Unions do not have standing to challenge the Postal Service’s suspension of the PES to permit private couriers to engage in international remailing. We therefore do not reach the merits of the Unions’ claim that the suspension was not in the public interest. The judgment of the Court of Appeals is

*Reversed.*

[The opinion of Justice Stevens, concurring in the judgment, is omitted.]
Notes and Questions

1. True or false: According to the Court in this case, when a plaintiff sues under the APA and claims that a government action violates a particular statute, the plaintiff will meet the “zone of interests” test only if the Congress that passed the statute intended the statute to benefit parties such as the plaintiff.

2. If you think the answer to the previous question is “false,” then state, as clearly as you can, what relationship must exist between the plaintiff and the statute under which the plaintiff is suing in order for the plaintiff to satisfy the “zone of interests” standing test.
HAVENS REALTY v. COLEMAN, 455 U.S. 363 (1982): In this case, described briefly at pp. 1052-53 of your casebook, the plaintiffs sued over racial steering that was alleged to violate the Fair Housing Act of 1968. The plaintiffs included white and black “testers”; i.e., persons who entered realty offices and asked for housing information, even though they were not really seeking housing. The plaintiffs also included HOME, a nonprofit organization that promoted fair housing. As you know from the casebook, the Supreme Court held that the black “tester” plaintiff had standing on the ground that she had been denied truthful housing information, even though she was not really seeking housing. As to HOME itself, the Court said:

In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual: Has the plaintiff “‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction”? * * * In the instant case, HOME’s complaint contained the following claims of injury to the organization:

“Plaintiff HOME has been frustrated by defendants’ racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant’s [sic] racially discriminatory steering practices.” * * *

If, as broadly alleged, petitioners’ steering practices have perceptibly impaired HOME’s ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests, see Sierra Club v. Morton, 405 U.S., at 739. We therefore conclude, as did the Court of Appeals, that in view of HOME’s allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right. * * *

Notes and Questions

What follows from the Court’s decision in this case? Could the Sierra Club have gotten standing in Sierra Club v. Morton by making an argument based on this case? What would it have needed to argue?