

## CASE NOTE

### ADMINISTRATIVE LAW—The Supreme Court’s Impingement of *Chevron*’s Two-Step; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009)

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#### INTRODUCTION

The United States Supreme Court decision in *Entergy Corp. v. Riverkeeper, Inc.* not only continues to call into question the distinction between step one and step two of the *Chevron* doctrine, but more importantly, it invigorates support for a single-step *Chevron* inquiry.<sup>1</sup> In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court introduced a two-step doctrinal framework for courts to apply in reviewing administrative agencies’ construction of statutes.<sup>2</sup> First, a court must ascertain congressional intent on the specific issue.<sup>3</sup> If Congress addressed the specific issue, the analysis ends as both the agency and the court must adhere to the clear intent of Congress.<sup>4</sup> However, if a court finds statutory ambiguity or silence, the court must evaluate the second step: whether the agency’s construction of the statute is permissible.<sup>5</sup>

The Supreme Court invoked the two-step *Chevron* doctrine in *Entergy Corp.* to determine whether § 316(b) of the Clean Water Act (CWA) authorized the Environmental Protection Agency (EPA) to use a cost-benefit analysis in promulgating technology standards for cooling water intake structures.<sup>6</sup> In a disorderly fashion, the majority opinion addressed the second step of *Chevron* prior to the first, observing, “But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”<sup>7</sup> *Entergy Corp.* exemplifies the elusive, inconsistent, and unpredictable state of the *Chevron* doctrine.<sup>8</sup> It is imperative the Supreme

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<sup>1</sup> 129 S. Ct. 1498, 1505–10 (2009); see Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597 (2009) (arguing the two-step *Chevron* doctrine should be collapsed into a single-step inquiry); *infra* notes 92–172 and accompanying text (analyzing *Entergy Corp.* in conjunction with the *Chevron* doctrine).

<sup>2</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 843.

<sup>6</sup> *Entergy Corp.*, 129 S. Ct. at 1505.

<sup>7</sup> *Id.* at 1505 n.4.

<sup>8</sup> See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6, at 175 (4th ed. 2002).

Court explicitly collapse the two steps of the *Chevron* doctrine into a single-step inquiry—“whether the agency’s construction is permissible as a matter of statutory interpretation.”<sup>9</sup>

This case note will discuss *Entergy Corp.* in relation to the *Chevron* doctrine.<sup>10</sup> The background section will first explore the CWA and then will outline the Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>11</sup> Second, the principal case section summarizes the reasoning behind the opinions of the majority, the concurrence in part and dissent in part, and the dissent in *Entergy Corp.*<sup>12</sup> Finally, the analysis section argues the two-step *Chevron* doctrine must be collapsed into a one-step doctrine.<sup>13</sup>

## BACKGROUND

### *Clean Water Act: § 316(b) Cooling Water Intake Structures*

Pursuant to its authority under the Clean Water Act (CWA), the United States Environmental Protection Agency (EPA) promulgates rules to protect the chemical, biological, and physical integrity of the nation’s waters.<sup>14</sup> Section 316(b) of the CWA mandates the EPA “require that the location, design, construction, and capacity of cooling water intake structures reflect *the best technology available for minimizing adverse environmental impact.*”<sup>15</sup> Cooling water intake structures draw water from a nearby source to cool a facility generating electricity or engaging in other commercial processes.<sup>16</sup> As the structures intake water, a serious

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<sup>9</sup> Stephenson & Vermeule, *supra* note 1, at 599.

<sup>10</sup> See *infra* notes 92–172 and accompanying text (examining the importance of *Entergy Corp.* and the *Chevron* doctrine).

<sup>11</sup> See *infra* notes 14–53 and accompanying text (discussing the CWA and *Chevron*).

<sup>12</sup> See *infra* notes 54–91 and accompanying text (presenting the rationale behind the majority, the in-part concurring and dissenting, and the dissenting opinions).

<sup>13</sup> See *infra* notes 92–172 and accompanying text (analyzing *Entergy Corp.* in conjunction with the *Chevron* doctrine).

<sup>14</sup> 33 U.S.C. § 1251(a) (2006).

<sup>15</sup> 33 U.S.C. § 1326(b) (1972) (emphasis added). The CWA includes other standards that control the type of technology required to reduce pollutants from point sources. See *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506–07 (2009) (listing and discussing the other CWA standards and the factors the agency may consider in promulgating regulations for those standards); see also *id.* at 1511 (presenting in a table format the other CWA standards and the factors the agency may consider in promulgation regulations). For a discussion of the other CWA standards and their legislative history, see Patricia Ross McCubbin, *The Risk in Technology Based Standards*, 16 DUKE ENVTL. L. & POL’Y F. 1, 6–23 (2005).

<sup>16</sup> Sara Gersen, *Riverkeeper, Inc. v. United States Environmental Protection Agency: Applying the Clean Water Act’s Best Technology Available Standard to Existing Cooling Systems*, 35 ECOLOGY L.Q. 269, 269–70 (2008). Water sources include lakes, rivers, streams, and other waterbodies. *Id.* at 269.

threat to aquatic life occurs because organisms—fish, shellfish, eggs, larvae, and plankton—may become impinged or entrained into the system.<sup>17</sup>

In 1995, the EPA promulgated new rules for § 316(b) of the CWA based on different types of facilities and divided the facilities into three phases.<sup>18</sup> In establishing rules for Phase II facilities, the EPA conducted a cost-benefit analysis to determine whether to require a closed-cycle recirculating cooling water system.<sup>19</sup> The EPA found the costs associated with retrofitting existing facilities with this system outweighed its environmental benefits.<sup>20</sup> Thus, the Phase II rule promulgated by the EPA did not require Phase II facilities to install a closed-cycle cooling water system.<sup>21</sup> Section 316(b) of the CWA does not list any factors, including costs or benefits, the EPA may consider in establishing the standard; § 316(b) merely requires *the best technology available for minimizing adverse environmental impact*.<sup>22</sup> Consequently, a statutory interpretation issue arose as to whether the EPA may permissibly include a cost-benefit analysis in promulgating rules for § 316(b) of the CWA.<sup>23</sup>

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<sup>17</sup> Reda M. Dennis-Parks, *Riverkeeper, Inc. v. United States Environmental Protection Agency: Finally a Solution the Court Can Live With . . . Almost*, 32 *ECOLOGICAL L.Q.* 689, 691 (2005). Impingement occurs when aquatic life becomes squashed against the intake screens. *Entergy Corp.*, 129 S. Ct. at 1502. Entrainment of the aquatic life happens when the system suctions organisms into the system. *Id.*

<sup>18</sup> *Entergy Corp.*, 129 S. Ct. at 1503. Phase I regulates all new facilities and requires those facilities to build a closed-cycle recirculating cooling water system that extracts less water and therefore causes less harm to the aquatic life. *Id.* Phase III standards apply to new offshore oil and gas extraction and other existing facilities, which the EPA manages on a case-by-case basis. Environmental Protection Agency, Fact Sheet Phase III Final Rule, <http://www.epa.gov/waterscience/316b/phase3/ph3-final-fs.html> (last visited Mar. 13, 2010).

<sup>19</sup> Environmental Protection Agency, Economic and Benefits Analysis for the Final § 316(b) Phase II Existing Facilities Rule (Feb. 2004), <http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm>; see also Gersen, *supra* note 16, at 271–72.

<sup>20</sup> Environmental Protection Agency, Economic and Benefits Analysis for the Final § 316(b) Phase II Existing Facilities Rule, D1-3, Table D1-3 (Feb. 2004), <http://www.epa.gov/waterscience/316b/phase2/econbenefits/final/d1.pdf>.

<sup>21</sup> *Entergy Corp.*, 129 S. Ct. at 1504.

<sup>22</sup> *Id.* at 1511. Compare 33 U.S.C. § 1326(b) (2006) (listing no factors for the EPA to consider in promulgating the regulations), with *id.* § 1314(b)(1)(B) (listing multiple factors the EPA must consider in implementing regulations, including the cost of the technology in comparison with the benefits of the effluent reduction), *id.* § 1314(b)(4)(B) (listing multiple factors the EPA must consider in promulgating regulations, including the “reasonableness of the relationship” between the costs and the benefits of the effluent reduction), and *id.* § 1314(b)(1)(B), (b)(2)(B) (listing multiple factors the EPA must consider in implementing regulations including the costs of achieving the effluent reduction).

<sup>23</sup> See *Entergy Corp.*, 129 S. Ct. at 1505–11.

### *The Chevron Two-Step*

Prior to the United States Supreme Court decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court reviewed an agency's interpretation of a statute either by applying a reasonableness test or, in some cases, applying the Court's own interpretation.<sup>24</sup> When applying either approach, the Court failed to articulate reasoning for why one approach should apply and the other should not.<sup>25</sup> Criticisms by lower courts and scholars for failure to sustain consistency or make clear the reasoning behind these inconsistent judgments plagued the Court during the pre-*Chevron* era.<sup>26</sup>

In its 1984 decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court abandoned its prior approaches and developed the two-step doctrine that continues to dominate judicial review of agencies' interpretation of statutes.<sup>27</sup> The issue in *Chevron* involved the EPA's interpretation of the term "stationary source" in the Clean Air Act Amendments of 1977.<sup>28</sup> The EPA argued "stationary source" included all pollution emitting devices within a plant.<sup>29</sup> In effect, the EPA embraced the "bubble concept," which allowed an existing plant to alter or add a pollution-emitting device if total emissions from the plant did not increase.<sup>30</sup>

On appeal from the United States Court of Appeals for the District of Columbia, the United States Supreme Court outlined a two-step process for courts to use when evaluating agencies' interpretation of statutes.<sup>31</sup> First, the court must look to the statute and determine whether the statutory provision at issue is in fact ambiguous.<sup>32</sup> If Congressional intent is clear, the court and agency must

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<sup>24</sup> PIERCE, *supra* note 8, § 3.1, at 137; *see also, e.g.*, Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 764–70 (discussing the *Hearst Publications* and *Packard Motor Car Co.* cases as pre-*Chevron* decisions). *Compare* Nat'l Labor Relations Bd. v. Hearst Publ'ns, 322 U.S. 111, 131 (1944) (applying a reasonableness test and upholding the National Labor Relation Board's interpretation of the term "employee"), *with* Packard Motor Car Co. v. Nat'l Labor Relations Bd., 330 U.S. 485, 488–90 (1947) (applying its own interpretation of the term "employee" and overturning the National Labor Relation Board's interpretation).

<sup>25</sup> PIERCE, *supra* note 8, § 3.1, at 137.

<sup>26</sup> *Id.* at 137–38; *see also* Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 834–37 (1990) (discussing the U.S. Supreme Court's different approaches to agencies' interpretations of ambiguous statutes prior to the *Chevron* decision).

<sup>27</sup> 467 U.S. 837, 842–43 (1984); *see* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (discussing the influence of *Chevron* and its "quasi-constitutional text").

<sup>28</sup> *Chevron*, 467 U.S. at 840–41.

<sup>29</sup> *Id.* at 840.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 842–43.

<sup>32</sup> *Id.* at 842.

follow the unambiguously expressed intent.<sup>33</sup> Second, if the statutory language is ambiguous or silent, then the court must determine if the agency's interpretation is a permissible construction.<sup>34</sup> If the agency's interpretation is permissible, *Chevron* demands deference to the agency.<sup>35</sup>

In addressing the first step, whether Congress has directly spoken to the issue, courts may invoke "traditional tools of statutory construction."<sup>36</sup> Yet, *Chevron* does not prescribe what constitutes a traditional tool of statutory construction.<sup>37</sup> Furthermore, the United States Supreme Court has used various approaches for determining if ambiguity exists.<sup>38</sup> First, the Court may employ a plain meaning approach.<sup>39</sup> Second, the Court may consider the statutory text and structure, legislative history and intent, and canons of construction.<sup>40</sup> As a result, confusion exists as to how to determine ambiguity at *Chevron's* step one.<sup>41</sup> Nevertheless, if a court finds Congress did not specifically address the issue, the court proceeds to the second step.<sup>42</sup>

The second step of the *Chevron* doctrine seeks to ascertain the permissibility of the agency's construction of the ambiguous or silent statute.<sup>43</sup> The Supreme Court did not specifically state the criteria to determine permissibility.<sup>44</sup> However, the

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<sup>33</sup> *Id.* at 842–43.

<sup>34</sup> *Id.* at 843.

<sup>35</sup> *Id.* at 844.

<sup>36</sup> *Id.* at 843 n.9.

<sup>37</sup> *See id.*

<sup>38</sup> WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE* 149 (3d ed. 2006).

<sup>39</sup> *Id.*; e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1178 (2009) (Thomas, J., dissenting); *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239–40 (2004); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417–18 (1992) (applying plain-meaning approach).

<sup>40</sup> A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 57 (John F. Duffy & Michael Herz eds., 2005) [hereinafter GUIDE]; e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (noting the "text, structure, purpose and history" indicated no ambiguity of the term "age" under the Age Discrimination in Employment Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (determining reasonableness by considering the statute's language, history, and policies); see also DeFranco, *supra* note 26, at 841 (stating canons of construction, the purpose of the statute, conflicting policy considerations, and legislative intent should be evaluated). *But see* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–57 (1994) (discussing the use of legislative history by the Supreme Court in applying the *Chevron* doctrine). There are also other construction maxims not listed in this article. See GUIDE, *supra*, at 57.

<sup>41</sup> FUNK, SHAPIRO & WEAVER, *supra* note 38, at 149–52.

<sup>42</sup> *Chevron*, 467 U.S. at 842–43.

<sup>43</sup> *Id.* at 843.

<sup>44</sup> *See id.* at 845. However, the Court certainly suggested deference is appropriate since the administrative agency is the expert. *Id.* at 844.

Court noted the reviewing court does not need to find the agency's interpretation as the only permissible one, or even the interpretation the court would reach itself.<sup>45</sup> The Court further explained that ambiguity within a statute may be either explicit or implicit.<sup>46</sup> Explicit ambiguity indicates Congress expressly granted agencies authority to implement a regulation.<sup>47</sup> Courts must grant deference to agencies regulating an explicit ambiguity, unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute."<sup>48</sup> If the statute contains implicit authority, a reasonable interpretation by an agency controls and a court may not substitute its own interpretation.<sup>49</sup> If a court finds the agency's construction permissible, it must grant deference.<sup>50</sup>

The underlying policies behind the ruling in *Chevron* included agency expertise, political accountability, and congressional intent.<sup>51</sup> *Chevron* commenced a new era of courts' evaluations of ambiguous statutes interpreted by administrative agencies.<sup>52</sup> The *Chevron* era continues to evolve and erode as courts apply the doctrine, as evidenced in *Entergy Corp.*<sup>53</sup>

#### PRINCIPAL CASE

In *Entergy Corp. v. Riverkeeper, Inc.*, the United States Supreme Court considered whether the EPA may utilize a cost-benefit analysis in promulgating rules for § 316(b) of the CWA.<sup>54</sup> The EPA's rule excluded Phase II facilities from the requirement of a closed-cycle cooling water system.<sup>55</sup> The Court held the EPA

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<sup>45</sup> *Id.* at 843 n.11.

<sup>46</sup> *Id.* at 843–44. *Contra* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 779–80 (2007) (arguing the implicit delegation in *Chevron* has been limited by the Supreme Court in subsequent decisions).

<sup>47</sup> *Chevron*, 467 U.S. at 843–44.

<sup>48</sup> *Id.* at 844.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 688–89 (1997). *But see* Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795–809 (2010) (arguing the purposes behind *Chevron* are not adequate); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074–75 (1990) (calling *Chevron* a counter-*Marbury*).

<sup>52</sup> Gossett, *supra* note 51, at 688.

<sup>53</sup> *See generally* Jellum, *supra* note 46, at 743–81 (surveying Supreme Court cases at step one of the *Chevron* doctrine); Kristine Cordier Karnezis, Annotation, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2D 25 (2005) (providing a summary of Supreme Court cases applying the *Chevron* doctrine).

<sup>54</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

<sup>55</sup> *Id.* at 1504; *see supra* notes 18–23 and accompanying text (explaining the Phase II regulation).

permissibly interpreted § 316(b) to allow for the use of a cost-benefit analysis under the second step of the *Chevron* doctrine.<sup>56</sup>

### *Majority Opinion*

Justice Scalia delivered the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.<sup>57</sup> The majority initially recognized that the EPA determined § 316(b) of the CWA permitted the comparison of costs and benefits, and noted that the EPA's interpretation would be granted deference if it was a reasonable interpretation of an ambiguous statute.<sup>58</sup> In applying the *Chevron* doctrine, the majority addressed the second prong of reasonableness without first considering whether § 316(b) of the CWA was ambiguous.<sup>59</sup> The dissent criticized the majority for failing to consider the first step prior to considering the second step.<sup>60</sup> In response, the majority stated, "But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."<sup>61</sup>

To determine the permissibility of the EPA's interpretation, the majority next considered the text of § 316(b).<sup>62</sup> Section 316(b), in relevant part, provides "any standard established . . . shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available for minimizing adverse environmental impact*."<sup>63</sup> The Court looked to the meaning of the words "best" and "minimizing."<sup>64</sup> The majority determined the meaning of "best" included *efficient* technology with the lowest cost per unit of reduction.<sup>65</sup> The majority also found Congress had intended to use the word "minimizing" as a term of degree and not necessarily as meaning the smallest amount.<sup>66</sup> Furthermore, the Court stated that other provisions of the CWA, which mandated the smallest amount of environmental impact, used words such as "elimination"

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<sup>56</sup> *Entergy Corp.*, 129 S. Ct. at 1510.

<sup>57</sup> *Id.* at 1501.

<sup>58</sup> *Id.* at 1505.

<sup>59</sup> *See id.* at 1505–10.

<sup>60</sup> *Id.* at 1518 n.5 (Stevens, J., dissenting).

<sup>61</sup> *Id.* at 1505 n.4 (majority opinion).

<sup>62</sup> *Id.* at 1505.

<sup>63</sup> 33 U.S.C. § 1326(b) (2006) (emphasis added).

<sup>64</sup> *Entergy Corp.*, 129 S. Ct. at 1505–06.

<sup>65</sup> *Id.* at 1506.

<sup>66</sup> *Id.* The Court cited another provision in the CWA as an example. *Id.* The provision states "drastic minimization of paperwork and interagency decision procedures." *Id.* The Court noted if "minimize" means the smallest amount possible as respondents alleged, then "drastic" becomes superfluous. *Id.*

and “no discharge of pollutants.”<sup>67</sup> Therefore, the Court concluded the text of § 316(b) did not exclude the comparison of costs and benefits, which evidenced the reasonableness of the EPA’s interpretation.<sup>68</sup>

The majority next compared § 316(b) of the CWA with other CWA standards for controlling point sources to determine the reasonableness of the EPA’s interpretation.<sup>69</sup> The CWA provides factors for the EPA to consider in promulgating rules for the other standards, but does not provide any factors for § 316(b).<sup>70</sup> The majority concluded the congressional silence in § 316(b) permitted comparison of the costs and benefits.<sup>71</sup> Otherwise, if the EPA could not consider costs and benefits, it could not consider *any* other relevant factors, which is completely illogical.<sup>72</sup> As a result, the majority found the silence in § 316(b) indicated the reasonableness of the EPA’s interpretation.<sup>73</sup>

The majority also addressed the EPA’s actions interpreting and implementing § 316(b) of the CWA over the past thirty years, which allowed for the comparison of costs and benefits.<sup>74</sup> The majority further stated that even the environmental groups, states, and power utilities realized some form of cost-benefit analysis is necessary in the implementation of the standard.<sup>75</sup> For all of the previously stated reasons, the majority held the EPA permissibly relied on a cost-benefit analysis in promulgating § 316(b) under step two of the *Chevron* doctrine.<sup>76</sup>

### *Justice Breyer: Concurring in Part and Dissenting in Part*

Justice Breyer agreed with the majority that the EPA’s interpretation of § 316(b) was permissible under *Chevron* step two.<sup>77</sup> Justice Breyer considered the legislative history of the various CWA standards, and concluded § 316(b) neither

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1506–08 (demarcating the other CWA standards and conducting a comparison of the other CWA standards and § 316(b)).

<sup>70</sup> *Id.* at 1507 (outlining factors the EPA must consider in promulgating regulations for the other CWA standards and stating Congress did not list any factors for the EPA to consider in implementing § 316(b)).

<sup>71</sup> *Id.* at 1508.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1509. The majority referred to several cases including *Alaska Department of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004), and *Barnhart v. Walton*, 535 U.S. 212, 219–20 (2002).

<sup>75</sup> *Entergy Corp.*, 129 S. Ct. at 1510. The environmental groups, states, and power utilities observed the statute did not mandate the EPA to force the industry to protect one fish for billions of dollars. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1515 (Breyer, J., concurring in part and dissenting in part).



requires nor forbids the use of comparison of costs and benefits.<sup>78</sup> However, he determined Congress intended to restrict the EPA's use of the analysis to a standard of "reasonable" under the circumstances.<sup>79</sup>

Justice Breyer ultimately dissented from the majority's holding because he believed the case should be remanded to the EPA for consideration of its permit variance under the rules for § 316(b).<sup>80</sup> Under the rules, a facility may be granted a permit variance if it can show the costs of installation are "significantly greater than" the benefits.<sup>81</sup> The EPA's prior standard required a showing of costs "wholly disproportionate" to the benefits.<sup>82</sup> Since Justice Breyer did not think the EPA adequately explained the new standard, he would remand for it to do so or apply the "wholly disproportionate" standard.<sup>83</sup>

### *Dissenting Opinion*

Justice Stevens, joined by Justices Souter and Ginsburg, issued a dissenting opinion.<sup>84</sup> The dissent argued that Congress intended to prohibit the EPA's use of a cost-benefit analysis in promulgating § 316(b) of the CWA.<sup>85</sup> Justice Stevens criticized the use of a cost-benefit analysis because it typically finds the costs outweigh the environmental benefits.<sup>86</sup> For this reason, the dissent argued that Congress clearly indicates when the EPA is permitted to utilize the cost-benefit method.<sup>87</sup>

The dissent next addressed the CWA standards and legislative history.<sup>88</sup> The dissent argued Congress specified in the other CWA standards whether the EPA was permitted to use a cost-benefit analysis and § 316(b)'s silence indicated the EPA may not use a cost-benefit analysis.<sup>89</sup> The dissent also found it "puzzling"

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<sup>78</sup> *Id.* at 1512–13.

<sup>79</sup> *Id.* A standard of "reasonableness" includes not necessarily a full drawn cost-benefit analysis, but one which does take into consideration the costs of a decision. *Id.* at 1514–15.

<sup>80</sup> *Id.* at 1515.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1515–16.

<sup>84</sup> *Id.* at 1516 (Stevens, J., dissenting).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1516–17.

<sup>87</sup> *Id.* The Court relied on *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 467–69 (2001) (finding that the EPA could not use cost-benefit analysis in implementing a Clean Air Act regulation for a section that was silent on the matter, where other sections gave the EPA authority to consider costs). *Entergy Corp.*, 129 S. Ct. at 1517–18 (Stevens, J., dissenting).

<sup>88</sup> *Id.* at 1518–22; *see id.* at 1511 (majority opinion) (providing a table listing the other CWA standards).

<sup>89</sup> *Id.* at 1518–22 (Stevens, J., dissenting).

the majority skipped the first step of *Chevron* and proceeded to the second step.<sup>90</sup> Consequently, the dissent found § 316(b) unambiguous under step one of the *Chevron* doctrine and that the EPA therefore acted impermissibly.<sup>91</sup>

#### ANALYSIS

The United States Supreme Court should explicitly collapse the two-step *Chevron* doctrine into a single-step inquiry: “whether the agency’s construction is permissible as a matter of statutory interpretation.”<sup>92</sup> In *Entergy Corp. v. Riverkeeper, Inc.*, the Supreme Court held the EPA’s use of a cost-benefit analysis permissible under § 316(b) of the CWA.<sup>93</sup> However, in reaching this conclusion, the Court furthered the uncertainty that has emerged in applying the two steps of the *Chevron* doctrine to agencies’ interpretation of statutes.<sup>94</sup>

The majority’s analysis in *Entergy Corp.* began with step two of the *Chevron* doctrine by asking whether the EPA’s interpretation of § 316(b) of the CWA was permissible.<sup>95</sup> This appears mismatched with the traditional *Chevron* two-step.<sup>96</sup> The root of this issue is captured by the banter between the majority and the dissent; the dissent was “puzzled” by the majority, which addressed the second step of the *Chevron* doctrine prior to the first step.<sup>97</sup> Justice Scalia’s poignant response noted, “But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”<sup>98</sup>

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<sup>90</sup> *Id.* at 1518 n.5.

<sup>91</sup> *See id.* at 1520–21.

<sup>92</sup> Stephenson & Vermeule, *supra* note 1, at 599.

<sup>93</sup> *Entergy Corp.*, 129 S. Ct. at 1510.

<sup>94</sup> *See infra* notes 146–53 and accompanying text (discussing the inconsistency of the Supreme Court’s application of the *Chevron* doctrine).

<sup>95</sup> *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009). The Court stated the EPA’s construction of § 316(b) of the CWA—allowing a comparison of the costs associated with the technology in relation to the environmental benefits—governed, so long as it is a reasonable interpretation, not even the only interpretation or the one the court would choose. *Id.* Section 316(b) of the CWA mandates the EPA to “require that the location, design, construction, and capacity of cooling water intake structures reflect *the best technology available for minimizing adverse environmental impact.*” 33 U.S.C. § 1326(b) (1972) (emphasis added).

<sup>96</sup> *Entergy Corp.*, 129 S. Ct. at 1518 n.5 (Stevens, J., dissenting); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (providing step one, then step two).

<sup>97</sup> *Entergy Corp.*, 129 S. Ct. at 1518 n.5 (Stevens, J., dissenting).

<sup>98</sup> *Id.* at 1505 n.4 (majority opinion); *see also supra* notes 57–76 and accompanying text (discussing the majority’s analysis).

### *Two-Step or One-Step?*

As a practical matter, the *Chevron* doctrine contains only one single step, not two.<sup>99</sup> When scrutinized closely, *Chevron*'s two steps beg the same question: "whether the agency's construction is permissible as a matter of statutory interpretation."<sup>100</sup> Courts' applications of the *Chevron* doctrine demonstrate the redundancy of the two-step analysis and the necessity to consolidate the doctrine into a single-step inquiry.<sup>101</sup>

### *Step One Applied*

In a court's application of step one, the analysis of step two becomes unavoidably intermingled.<sup>102</sup> The underlying purpose behind step one is to determine whether ambiguity exists in the statutory language.<sup>103</sup> The language within statutes usually contains ambiguity, although it may vary in degree.<sup>104</sup> No precise method of analysis to determine ambiguity exists under step one.<sup>105</sup> Therefore, courts generally look to traditional tools of statutory construction, such as the plain meaning of the text, dictionaries, and the statute's structure,

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<sup>99</sup> Stephenson & Vermeule, *supra* note 1, at 597–98 (arguing *Chevron*'s two-step analysis should be combined into a single inquiry); see Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988) (noting *Chevron*'s two steps could be conflated into one, because "if the intent of Congress is clear, a nonconforming interpretation would necessarily be unreasonable"); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 344 n.5 (1996) (stating the *Chevron* test may be combined into a single step with the same results as application of the two-step test); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1284 (1997) (suggesting if the issue is whether an agency decision conflicts with an unambiguous statute, the court should not use two steps, but a unified inquiry at step one); see also Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 809 (2008) (citing examples of cases combining the *Chevron* doctrine into a single step); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (finding in 1995 and 1996, all of the U.S. Courts of Appeals opinions applying the *Chevron* doctrine combined the two steps into a single step twenty-eight percent of the time).

<sup>100</sup> Stephenson & Vermeule, *supra* note 1, at 599; accord Lawson, *supra* note 99, at 314 n.5.

<sup>101</sup> See *infra* notes 102–64 and accompanying text (discussing applications of the *Chevron* doctrine by the Supreme Court and courts of appeals).

<sup>102</sup> See Stephenson & Vermeule, *supra* note 1, at 599–600.

<sup>103</sup> PIERCE, *supra* note 8, § 3.6, at 169 ("A court's task in applying step one is to determine the existence, or nonexistence, of ambiguity in the relevant language of an agency-administered statute.").

<sup>104</sup> *Id.* § 3.1, at 137; see, e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part) (finding the majority of statutes have a degree of ambiguity).

<sup>105</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (directing courts to use "traditional tools of statutory construction" to determine Congress's intent, but failing to define "traditional tools of statutory construction").

history, and purpose.<sup>106</sup> By employing traditional tools of statutory construction, the court will find a range of statutory meanings intended by Congress.<sup>107</sup> The range of statutory meanings includes statutory interpretations that the court would consider reasonable, and also includes the court's preferred interpretation.<sup>108</sup> The court will then determine if the statute is ambiguous by considering whether the agency's interpretation falls within this range, which is step two of the analysis—whether the agency's construction of the statute is permissible.<sup>109</sup> If the court finds the agency's construction within the range, it must uphold the agency's interpretation.<sup>110</sup> But if the court finds the agency's interpretation outside the range, then the agency's interpretation conflicts with the clearly expressed Congressional intent.<sup>111</sup> Consequently, a court cannot decide step one without utilizing the analysis of step two.<sup>112</sup>

Many of the Supreme Court's opinions exemplify the redundancy of the *Chevron* doctrine at step one.<sup>113</sup> For example, in *MCI Telecommunications Corp. v. AT&T*, the Court decided the Federal Communications Commission (FCC)

<sup>106</sup> See *supra* notes 36–42 and accompanying text (discussing the various methods courts employ to analyze step one).

<sup>107</sup> Stephenson & Vermeule, *supra* note 1, at 601 (discussing the range of permissible interpretations determined by the court, which the statute allows). “*Chevron* supposes that interpretation is an exercise in identifying the statute's range of reasonable interpretations,” not finding only one single meaning. *Id.*; see also Beermann, *supra* note 51, at 817–18 (noting in *Chevron*, the Court did not adhere to the “directly spoken to” language of *Chevron*'s first step, indicating there is not only one single meaning).

<sup>108</sup> Stephenson & Vermeule, *supra* note 1, at 601 (discussing the range of permissible interpretations determined by the court, which the statute allows); see *Chevron*, 467 U.S. at 843 n.11 (finding the agency's construction does not have to be the only permissible construction or even the construction the court would reach).

<sup>109</sup> Stephenson & Vermeule, *supra* note 1, at 601 (noting the court must uphold the agency's construction if it is within the range of permissible interpretations); PIERCE, *supra* note 8, § 3.6, at 169 (“The question for the court [at step one] is whether the agency's construction of the language is within the range of meanings that could be plausibly attributed to the relevant statutory language.”); see also *Chevron*, 467 U.S. at 843 (providing the second step of the *Chevron* doctrine).

<sup>110</sup> Stephenson & Vermeule, *supra* note 1, at 601.

<sup>111</sup> *Id.* If the agency's interpretation falls outside of the range, it may also be considered a step-two decision. *Id.* at 601. The court could find ambiguity within the statute and then rule the agency's interpretation falls outside the range, therefore making it an impermissible interpretation. *Id.* at 601–02; see *infra* notes 126–43 and accompanying text (discussing the redundancy of the *Chevron* doctrine at step two).

<sup>112</sup> Stephenson & Vermeule, *supra* note 1, at 599–602.

<sup>113</sup> Compare *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (decided at step one), *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499–500 (1998) (same), *Sullivan v. Stroop*, 496 U.S. 478, 482–83 (1990) (same), and *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (same), with *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484–85 (2001) (decided at step two), and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999) (same). Confusion exists as to whether *Whitman* is a decision decided at step one or step two. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 499 n.123 (4th ed. 2006).

exceeded its authority by deciding all nondominant long distance carriers may optionally file tariffs.<sup>114</sup> The issue involved the ambiguity of the term “modify” under the Telecommunications Act, which grants the FCC the ability to “modify” the requirements of the Act.<sup>115</sup> The FCC argued the term “modify” included “a basic or important change in,” citing only *Webster’s Third New International Dictionary*.<sup>116</sup> The FCC concluded its decision to allow the nondominant long distance carriers to optionally file tariffs only “modified” the requirements.<sup>117</sup> The Court looked to numerous dictionaries to find the term “modify” unambiguous with one single meaning—a “moderate change.”<sup>118</sup> However, in determining this lack of ambiguity, the Court compared the FCC’s interpretation of “modify”—“a basic or important change in”—with the other dictionary definitions.<sup>119</sup> As a result, the Court blended the two steps by determining the ambiguity of the term “modify” (step one) by using the FCC’s interpretation (part of step two’s reasonableness analysis).<sup>120</sup>

The Supreme Court also decided *Immigration & Naturalization Service v. Cardoza-Fonseca* at step one of the *Chevron* doctrine.<sup>121</sup> Under the Immigration and Nationality Act, the Attorney General may grant asylum under § 243(h) if “it is more likely than not that the alien would be subject to persecution,” or under § 208(a) if the alien has a “well-founded fear” of persecution.<sup>122</sup> The Immigration and Naturalization Service (INS) in litigation held § 243(h) and § 208(a) required the same standard of proof—more likely than not.<sup>123</sup> The Supreme Court considered the plain meaning of the statutory language, found it did not contain ambiguity, and concluded the INS’s interpretation of the statute failed to meet step one of *Chevron*.<sup>124</sup> Certainly, the decision can also be deemed a step-two reversal, because the Supreme Court could have found ambiguity and decided the INS’s interpretation of § 243(h) and § 208(a) was an impermissible interpretation.<sup>125</sup>

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<sup>114</sup> 512 U.S. 218, 234 (1994); see Beermann, *supra* note 51, at 820 (discussing *MCI* as an example of the plain meaning approach).

<sup>115</sup> *MCI*, 512 U.S. at 225.

<sup>116</sup> *Id.* at 225–26.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 227–28.

<sup>119</sup> *Id.* at 224–28.

<sup>120</sup> See Stephenson & Vermeule, *supra* note 1, at 599–600.

<sup>121</sup> 480 U.S. 421, 430–32 (1987).

<sup>122</sup> *Id.* at 423.

<sup>123</sup> *Id.* at 425.

<sup>124</sup> *Id.* at 446–49. The Supreme Court noted § 208(a) allows for a subjective component, while § 243(h) only allows for an objective component. *Id.* at 431.

<sup>125</sup> PIERCE, *supra* note 8, § 3.6, at 170 (noting the Court’s decision in *Cardoza-Fonseca* could be considered a *Chevron* step-two reversal because the INS’s interpretation was not a permissible construction of the statute).

*Step Two Applied*

Application of step two by courts further demonstrates the superfluity of the two steps.<sup>126</sup> In applying step two, the agency's construction of the statute will be deemed impermissible if it clearly conflicts with the statute that has been determined in step one to be ambiguous on the matter at issue.<sup>127</sup> The court will compare the agency's interpretation with the statutory text to find whether the agency's interpretation deserves deference.<sup>128</sup> As a result, a court only applies step two by employing step one.<sup>129</sup> Therefore, Justice Scalia's footnote correctly noted if the agency's interpretation conflicts with Congressional intent, it must be deemed unreasonable.<sup>130</sup>

*Entergy Corp.* exemplifies the fact that applying step two inherently incorporates step one.<sup>131</sup> The majority held the EPA's decision to use a cost-benefit analysis for § 316(b) permissible under step two of the *Chevron* doctrine.<sup>132</sup> However, imagine if the Court found the EPA's interpretation unreasonable or impermissible. The Court would compare the agency's interpretation with Congressional intent and find that the agency's interpretation is excluded by Congressional intent and is therefore impermissible.<sup>133</sup> In effect, this finding would show Congress did actually speak to and possess intentions regarding the precise issue at hand.<sup>134</sup>

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<sup>126</sup> Stephenson & Vermeule, *supra* note 1, at 600; *see infra* notes 127–43 and accompanying text (demonstrating the redundancy of step two with step one).

<sup>127</sup> Stephenson & Vermeule, *supra* note 1, at 600; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

<sup>128</sup> Stephenson & Vermeule, *supra* note 1, at 600; *e.g.*, *Holly Farms Corp. v. Nat'l Labor Relations Bd.*, 517 U.S. 392, 401–05 (1996) (evaluating the agency's interpretation with the statutory language “on the farm” to determine whether the agency's interpretation was reasonable); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–703 (1995) (comparing generally the agency's interpretation with the Endangered Species Act); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414–20 (1993) (assessing the reasonableness of the agency's decision by comparing the agency's interpretation with the statutory language).

<sup>129</sup> Stephenson & Vermeule, *supra* note 1, at 600.

<sup>130</sup> *See id.* at 597–98.

<sup>131</sup> *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505–08 (2009).

<sup>132</sup> *Id.* at 1510.

<sup>133</sup> *See* Stephenson & Vermeule, *supra* note 1, at 599–600. In discussing *Chevron*, the United States Court of Appeals for the Eleventh Circuit noted, “[T]here must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways. Those two requirements are obviously intertwined.” *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009).

<sup>134</sup> Stephenson & Vermeule, *supra* note 1, at 600; *see also Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (finding step one requires traditional tools of statutory construction, which are also pertinent to step two, concluding the exact point where an agency decision may be invalidated is unclear and noting that the *Chevron* Court never specified which step it was applying).

Instead, the Court could find Congress did speak to the issue and consequently hold the agency's construction inconsistent with step one rather than invalidate the construction at step two.<sup>135</sup>

Illustrating this principle, in 1999 the United States Supreme Court for the first time found an agency's interpretation impermissible under step two in *AT&T v. Iowa Utilities Board*.<sup>136</sup> The FCC promulgated an order under the Telecommunications Act of 1996 requiring incumbent local exchange carriers to open a minimum of seven of their network elements to other carriers.<sup>137</sup> The Supreme Court found the FCC's order neglected to consider several of the statute's requirements.<sup>138</sup> First, the FCC did not consider whether it was "necessary" for the other carriers to access the incumbent carriers' networks.<sup>139</sup> Second, the FCC failed to consider whether the other carriers would be "impaired" from entering the market without access to the incumbent carriers' networks.<sup>140</sup> Consequently, the Supreme Court found the FCC's interpretation of the statute unreasonable, but did not cite *Chevron*.<sup>141</sup> The Court could have determined no ambiguity existed within the statutory language and the FCC failed to follow unambiguous congressional intent, thus deciding the case at step one.<sup>142</sup> Decisions rendered at the second step of *Chevron* exemplify that the two steps really beg the same question.<sup>143</sup>

### *Importance of the One-Step Analysis*

Explicit standards for evaluating either step one or step two of the *Chevron* doctrine do not exist. For step one, *Chevron* urges courts to use traditional tools of statutory construction, but does not delineate the types of devices that constitute

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<sup>135</sup> Stephenson & Vermeule, *supra* note 1, at 600.

<sup>136</sup> 525 U.S. 366, 392 (1999).

<sup>137</sup> *Id.* at 387–88. The provision of the Telecommunication Act at issue in *AT&T Corp.* states:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—(A) access to such network elements as are proprietary in nature is *necessary*; and (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2) (1994) (emphasis added).

<sup>138</sup> *AT&T Corp.*, 525 U.S. at 387–88.

<sup>139</sup> *Id.* at 388–92.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 392. The Court does employ language similar to *Chevron* step two and many commentators consider this a step-two decision. GUIDE, *supra* note 40, at 89 n.138.

<sup>142</sup> Stephenson & Vermeule, *supra* note 1, at 601.

<sup>143</sup> *Id.* at 600.

traditional tools of statutory construction.<sup>144</sup> More importantly, the Court does not specifically articulate a standard of permissibility—what is and is not a permissible construction of the ambiguous statute—for step two.<sup>145</sup>

The United States Supreme Court continually uses inconsistent and elusive applications of the *Chevron* doctrine in reviewing cases of statutory interpretation by agencies.<sup>146</sup> The Court applies the *Chevron* doctrine with varying force and at times ignores the doctrine completely.<sup>147</sup> Additionally, the Court describes the *Chevron* doctrine in different and conflicting manners.<sup>148</sup>

Generally, courts focus on step one of the inquiry and seldom invalidate the agency's interpretation on step two.<sup>149</sup> In particular, the Supreme Court only

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<sup>144</sup> GUIDE, *supra* note 40, at 57.

<sup>145</sup> Levin, *supra* note 99, at 1260. *Chevron* distinguishes between express delegation of authority given to an administrative agency by Congress and interpretative authority not expressly given by Congress. 88 C.J.S. *Pub. Admin. Law & Procedure* § 220 (2009). Courts review express delegation of authority to an agency under the standard of arbitrary, capricious, or manifestly contrary to the statute. *Id.*; *see also Chevron*, 467 U.S. at 843–44. Interpretative or implicit authority is at issue in this case note, while express delegation of authority is not.

<sup>146</sup> PIERCE, *supra* note 8, § 3.6, at 175–89; Levin, *supra* note 99, at 1260; *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (noting *Chevron* deference is appropriate when Congress granted an agency the power to make a rule carrying the force of law); *see Czarnezki, supra* note 99, at 774–76. *Compare Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42–43 (1990) (refusing to grant *Chevron* deference), *with id.* at 43–47 (White, J., dissenting) (disagreeing with the majority and applying *Chevron* deference); *compare Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 380–83 (1988) (applying the *Chevron* framework and granting deference), *with id.* at 386–90 (Brennan, J., dissenting) (declining to apply the *Chevron* doctrine). *But see Smiley v. Citibank*, 517 U.S. 735, 739–45 (1996) (granting deference under *Chevron* by all Justices).

<sup>147</sup> PIERCE, *supra* note 8, § 3.6, at 175–89; *e.g.*, *Nat'l Cable & Telecomm. Serv. v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (holding only precedent clearly precluding the agency's interpretation will prevent deference); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (citing constitutional issues as the reason for not applying *Chevron* deference); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990) (finding previous Supreme Court precedent overrides the *Chevron* doctrine); *see Sunstein, supra* note 27, at 191 (noting the initial inquiry of whether the *Chevron* doctrine applies is “*Chevron* step zero”). *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 980–85 (1992) (surveying Supreme Court cases involving a question of deference).

<sup>148</sup> PIERCE, *supra* note 8, § 3.6, at 175–89; *see* Beermann, *supra* note 51, at 817–22 (discussing the different approaches the Court applies at step one); *see also supra* notes 36–42 and accompanying text (addressing the various approaches the Supreme Court has used on step one of the *Chevron* doctrine). *Compare Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (finding the first step of the *Chevron* analysis is “whether Congress has directly spoken to the precise question at issue”), *with K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291–92 (1988) (stating first step of the *Chevron* doctrine uses the plain meaning of the statute) *and Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501–02 (1998) (applying the “canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning” in determining ambiguity under step one).

<sup>149</sup> Czarnezki, *supra* note 99, at 775; Lawson, *supra* note 99, at 314; *see, e.g.*, *United States v. Geiser*, 527 F.3d 288, 299 (3d Cir. 2008) (finding the term “persecution” unambiguous at step



twice invalidated an agency's construction of a statute relying solely on step two of the doctrine.<sup>150</sup> Since step one inherently involves step two, the practicality and efficacy of applying step two as its own independent step becomes questionable.<sup>151</sup> In addition, if the Supreme Court continues to make critical decisions relying solely on step one, many will believe the case is over when the Court finishes the analysis of step one.<sup>152</sup> Often courts' opinions decided at step one may be written as step-two opinions.<sup>153</sup>

The Supreme Court's failure to provide guidelines for step two of the *Chevron* doctrine has caused not only tremendous inconsistency within its own jurisprudence, but also for the lower courts applying the doctrine.<sup>154</sup> Two approaches dominate the second step analysis in the lower courts, as no established criteria for permissibility exist.<sup>155</sup> First, some courts find an agency's interpretation

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one); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 390–97 (1st Cir. 2000) (holding the Federal Election Campaign Act of 1971 ambiguous on whether it covers corporate donations to nonpartisan debates, but concluding the agency's interpretation was permissible); *Mosquera-Perez v. I.N.S.*, 3 F.3d 553, 555–59 (1st Cir. 1993) (focusing on step one and determining § 1253(h)(2)(B) of the Immigration and Nationality Act as ambiguous, but finding the agency's interpretation was not unreasonable, arbitrary, or capricious); *CSX Transp. v. United States*, 867 F.2d 1439, 1442–44 (D.C. Cir. 1989) (applying step one and concluding “any rate” is unambiguous); *Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1371–72 (D. Wyo. 1997) (finding ambiguity in the term “population” under step one and finding the agency's interpretation as permissible under step two).

<sup>150</sup> *Czarnecki*, *supra* note 99, at 775. The two Supreme Court opinions are *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001), and *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 392 (1999). *Czarnecki*, *supra* note 99, at 775 n.35. Prior to 1997, the Court had never solely used step two to invalidate an action. *Levin*, *supra* note 99, at 1261.

<sup>151</sup> *Levin*, *supra* note 99, at 1262 (questioning whether step two of the *Chevron* doctrine “serves any useful purpose”).

<sup>152</sup> *Id.* (stating litigants and lower courts may believe if the Court moves to step two they are “home free”). Courts have applied *Chevron* well over one hundred times. *Pierce*, *supra* note 8, § 3.6, at 168. Only two cases have been decided solely at step two. *See LUBBERS*, *supra* note 113, at 499 n.123. As a result, two out of one hundred provides a two percent chance of being overturned solely at step two.

<sup>153</sup> *Stephenson & Vermeule*, *supra* note 1, at 600; *Levin*, *supra* note 99, at 1282–83; *see supra* notes 118–30 and accompanying text (discussing the *MCI* and *Cardoza-Fonseca* step-one opinions and how the Supreme Court could have decided them at step two); *e.g.*, *Saysana v. Gillen*, 590 F.3d 7, 13–18 (1st Cir. 2009) (finding statutory language unambiguous at step one, but continuing the analysis and concluding even if the language were ambiguous, the agency's interpretation would be unreasonable at step two).

<sup>154</sup> *See Lawson*, *supra* note 99, at 342. *Compare Stiver v. Meko*, 130 F.3d 574, 577 (3d Cir. 1997) (noting the distinction between implicit and explicit statutory gaps, finding the agency's interpretation as a reasonable accommodation, and thus permissible), *with Northpoint Tech., Ltd. v. F.C.C.*, 412 F.3d 145, 151 (D.C. Cir. 2005) (stating a permissible construction of a statute uses the same analysis as the arbitrary, capricious, or manifestly contrary to the statute standard). *See infra* notes 154–64 and accompanying text (discussing the various approaches circuit courts of appeals apply at step two).

<sup>155</sup> *GUIDE*, *supra* note 40, at 86; Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 38 (2002).

permissible if it is reasonable and may also consider whether the interpretation harmonizes with the statute's plain language, purpose, and origin.<sup>156</sup> Second, other courts will only find an agency's interpretation of a statute impermissible if it is not arbitrary or capricious.<sup>157</sup>

*Natural Resources Defense Council, Inc. v. EPA* demonstrates the division among the lower courts on the approach to determine permissibility under step two of the *Chevron* doctrine.<sup>158</sup> In that case, the EPA promulgated a rule for storm-water discharges, excluding the requirement of obtaining a permit for certain discharges of sediments.<sup>159</sup> The majority opinion noted the failure of the EPA to follow its previous decisions in the area.<sup>160</sup> Consequently, the court found the EPA's new rule arbitrary and capricious under the second step of *Chevron*.<sup>161</sup> The dissent criticized the majority for relying on the EPA's prior approach and instead applied a reasoned analysis test.<sup>162</sup> The dissent argued the EPA gave a reasoned explanation for the change in its ruling and therefore satisfied the second

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<sup>156</sup> 88 C.J.S. *Pub. Admin. Law & Procedure* § 220 (2009); e.g., *Pac. Nw. Generating Coop. v. Dep't of Energy*, 580 F.3d 792, 806 (9th Cir. 2009) (determining a reviewing court owes deference to a reasonable agency interpretation filling an implicit statutory gap left by Congress); *Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 308 (5th Cir. 1998) (finding an agency's interpretation permissible if not irrational and reasonably related to the statutory purpose).

<sup>157</sup> 88 C.J.S. *Pub. Admin. Law & Procedure* § 220; e.g., *Riverkeeper, Inc. v. E.P.A.*, 358 F.3d 174, 184 (2d Cir. 2004) (determining an agency's construction of a statute is impermissible under the second step of *Chevron* if it is "arbitrary, capricious, or manifestly contrary to the statute"); *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003) (asserting when the question is about the reasonableness of an agency's action, the arbitrary and capricious standard applies); *Nat'l Ass'n of Regulatory Util. Comm'rs v. I.C.C.*, 41 F.3d 721, 726–27 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the Administrative Procedure Act (APA), . . . in determining whether agency action is arbitrary and capricious (unreasonable)."); see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding a court should consider the following to determine whether an agency's action is arbitrary and capricious: whether the agency used factors Congress did not intend for it to consider, the agency completely failed to address an important part of the issue, the agency gave an explanation that is contrary to the evidence, or the action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *PIERCE*, *supra* note 8, § 3.6, at 173–74 (stating many circuit courts of appeals apply the *State Farm* reasonableness standard for the second step).

<sup>158</sup> 526 F.3d 591, 602–11 (9th Cir. 2008); see *AM. BAR ASS'N, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2007–2008*, at 94–96 (Jeffery S. Lubbers ed., 2009) (discussing the confusion that exists between step two of the *Chevron* doctrine and arbitrary and capricious review in *Natural Resources Defense Council, Inc. v. E.P.A.*).

<sup>159</sup> *Natural Res. Def. Council*, 526 F.3d at 593–94.

<sup>160</sup> *Id.* 605–07.

<sup>161</sup> *Id.* at 606.

<sup>162</sup> *Id.* at 608–09 (Callahan, J., dissenting).

step of *Chevron*.<sup>163</sup> This split decision shows the confusion that exists among lower courts with step two of the *Chevron* doctrine and the “arbitrary and capricious” review standard.<sup>164</sup>

Instead of clarifying step two, the Court should eliminate the two-step process and consolidate it into one single inquiry: “whether the agency’s construction is permissible as a matter of statutory interpretation.”<sup>165</sup> As previously stated, the Supreme Court and lower courts persistently apply differing standards for each step of the *Chevron* analysis.<sup>166</sup> Judicial economy requires the different courts to utilize the same standard; otherwise, courts may reach differing results on the same issue.<sup>167</sup> The single-step inquiry provides the framework for courts to maintain flexibility while ensuring a standard all courts will apply consistently.<sup>168</sup>

Furthermore, all of the underlying purposes behind the *Chevron* doctrine—agency expertise, political accountability, and congressional intent—remain with the single-step inquiry.<sup>169</sup> For example, in *Entergy Corp.*, the Court further advanced the purpose of political accountability by granting deference to the EPA’s interpretation of § 316(b) of the CWA.<sup>170</sup> Under the one-step analysis, administrative agencies may still be held politically accountable for their controversial decisions and retain the flexibility to alter their regulatory decisions.<sup>171</sup> Thus, while the use of cost-benefit analysis by administrative agencies

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<sup>163</sup> *Id.* at 609–11.

<sup>164</sup> See GUIDE, *supra* note 40, at 86.

<sup>165</sup> Stephenson & Vermeule, *supra* note 1, at 600; see also Levin, *supra* note 99, at 1284.

<sup>166</sup> See *supra* notes 102–64 and accompanying text (discussing the application of the *Chevron* doctrine by the Supreme Court and the circuit courts of appeals).

<sup>167</sup> PIERCE, *supra* note 8, § 3.6, at 175; see Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 240–41 (2009) (discussing judicial economy in relation to uniform standards of review for appellate courts); *supra* notes 102–64 and accompanying text (discussing the application of the *Chevron* doctrine by the Supreme Court and the circuit courts of appeals).

<sup>168</sup> Stephenson & Vermeule, *supra* note 1, at 604.

<sup>169</sup> See *id.* at 605–09; *supra* note 51 and accompanying text (discussing the underlying purposes behind the *Chevron* doctrine).

<sup>170</sup> See Harvard Law Review Ass’n, *Clean Water Act: Judicial Review of Cost-Benefit Analysis*, 123 HARV. L. REV. 342, 351 (2009).

<sup>171</sup> See *id.*; Stephenson & Vermeule, *supra* note 1, at 608–09; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–18 (1989) (noting one advantage of the *Chevron* doctrine is an agency’s ability to change its decision compared to static judicial precedent on statutory interpretation and another advantage is an agency experiences political accountability through pressure by the Executive, Congress and its constituencies to interpret a statute “correctly”).

remains controversial, the EPA may be held politically accountable and alter its decision to use a cost-benefit analysis in the regulation of § 316(b) of the CWA under the single-step inquiry.<sup>172</sup>

### CONCLUSION

In *Entergy Corp. v. Riverkeeper, Inc.*, the United States Supreme Court held the EPA's use of a cost-benefit analysis in setting standards for § 316(b) of the CWA permissible.<sup>173</sup> In reaching its decision, the Court employed the two-step *Chevron* doctrine.<sup>174</sup> However, the Court, in effect, blurred the line between the two steps to the point where the steps encompass only one question: "whether the agency's construction is permissible as a matter of statutory interpretation."<sup>175</sup> This decision stands as a clear example of the need to collapse the two-step framework into one single step.<sup>176</sup> As Justice Scalia stated, "But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."<sup>177</sup>

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<sup>172</sup> See Harvard Law Review Ass'n, *supra* note 170, at 342–52; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1510 (2009) (holding the EPA's use of cost-benefit analysis permissible, but not requiring the EPA to use cost-benefit analysis). See generally Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002) (advocating against the use of cost-benefit analysis in environmental protection); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (arguing in favor of administrative agencies employing cost-benefit analysis).

<sup>173</sup> See *supra* notes 57–76 and accompanying text.

<sup>174</sup> See *supra* notes 57–76 and accompanying text.

<sup>175</sup> Stephenson & Vermeule, *supra* note 1, at 600; see *supra* notes 92–172 and accompanying text.

<sup>176</sup> See *supra* notes 92–172 and accompanying text.

<sup>177</sup> *Entergy Corp.*, 129 S. Ct. at 1505 n.4.