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Expanding Agency Authority: Administrative Agencies may Interpret Issues of their own Jurisdictions and Assess Penalties against Asbestos Disposal Sites Disproportionate to their Offenses. Lyon County Bd. of Comm'rs v. U.S. EPA

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EXPANDING AGENCY AUTHORITY: ADMINISTRATIVE AGENCIES MAY INTERPRET ISSUES OF THEIR OWN JURISDICTIONS AND ASSESS PENALTIES AGAINST ASBESTOS DISPOSAL SITES DISPROPORTIONATE TO THEIR OFFENSES

Lyon County Bd. of Comm'rs v. U.S. EPA[1]

I. INTRODUCTION

When the Environmental Protection Agency ("EPA") determined that a landfill had mishandled asbestos on its site in violation of the Clean Air Act ("CAA"), the EPA assessed penalties against the county in which the landfill was located.[2] The landfill appealed the penalty on several grounds.[3] The Eighth Circuit Court of Appeals determined, among other things, that the EPA had the authority to assess penalties against the landfill, and the penalty amount was proper.[4]

This note argues that the Eighth Circuit was too lenient in allowing the EPA to penalize the landfill because in so doing, it permitted the agency to determine the scope of its own authority. Deferring to agencies' interpretations of their own jurisdictions leads to an array of administrative problems, as well as broader societal problems. This note also argues that the penalty imposed on the county was excessive because it was out of proportion with the landfill's offense. The court's holding exposes asbestos disposal sites to limitless liability, thereby decreasing incentive to develop and maintain such sites.

II. FACTS AND HOLDING

On July 20, 1994, the Minnesota Pollution Control Agency ("MPCA") began an asbestos compliance inspection of the Lyon County Landfill, located in Lynd, Minnesota.[5] MPCA investigators noticed ripped

[1] Lyon County Bd. of Comm'rs v. United States EPA, 406 F.3d 981 (8th Cir. 2005).
[2] *Id.* at 982-83.
[3] *Id.*
[4] *Id.* at 986.
[5] *Id.* at 982.

plastic bags with asbestos warning labels at the landfill site.[6] The next day, investigators returned to the landfill site and discovered even more ripped plastic bags with asbestos warning labels.[7] There were visible asbestos emissions coming from the plastic bags.[8] The inspectors took photographs and samples from the bags and surrounding area, which were found to contain between five and thirty-five percent asbestos.[9]

The MPCA notified the EPA of its observations at the landfill.[10] After unsuccessful negotiations with Lyon County, the EPA filed an administrative complaint.[11] The EPA's complaint alleged that Lyon

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* Before referring the case to the EPA for enforcement, the MPCA attempted to negotiate a settlement with Lyon County. *Id.*
[11] *Id.* The EPA filed the administrative complaint under 42 U.S.C. § 7413(d)(1), which provides,

> (1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person
> (A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or
> (B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or
> (C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.
> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

42 U.S.C. § 7413(d)(1) (2005).

County violated 40 C.F.R. § 61.154[12] by not preventing visible asbestos

[12] 40 C.F.R. § 61.154 provides, in pertinent part,

Each owner or operator of an active waste disposal site that receives asbestos-containing waste material from a source covered under §§ 61.149, 61.150, or 61.155 shall meet the requirements of this section:

(a) Either there must be no visible emissions to the outside air from any active waste disposal site where asbestos-containing waste material has been deposited, or the requirements of paragraph (c) or (d) of this section must be met.

(subsection b omitted)

(c) Rather than meet the no visible emission requirement of paragraph (a) of this section, at the end of each operating day, or at least once every 24-hour period while the site is in continuous operation, the asbestos-containing waste material that has been deposited at the site during the operating day or previous 24-hour period shall:

(1) Be covered with at least 15 centimeters (6 inches) of compacted non-asbestos-containing material, or

(2) Be covered with a resinous or petroleum-based dust suppression agent that effectively binds dust and controls wind erosion. Such an agent shall be used in the manner and frequency recommended for the particular dust by the dust suppression agent manufacturer to achieve and maintain dust control. Other equally effective dust suppression agents may be used upon prior approval by the Administrator. For purposes of this paragraph, any used, spent, or other waste oil is not considered a dust suppression agent.

(d) Rather than meet the no visible emission requirement of paragraph (a) of this section, use an alternative emissions control method that has received prior written approval by the Administrator according to the procedures described in § 61.149(c)(2).

(e) For all asbestos-containing waste material received, the owner or operator of the active waste disposal site shall:

(1) Maintain waste shipment records, using a form similar to that shown in Figure 4, . . .

(2) As soon as possible and no longer than 30 days after receipt of the waste, send a copy of the signed waste shipment record to the waste generator.

(3) Upon discovering a discrepancy between the quantity of waste designated on the waste shipment records and the quantity actually received, attempt to reconcile the discrepancy with the waste generator. If the discrepancy is not resolved within 15 days after receiving the waste, immediately report in writing to the local, State, or EPA Regional office responsible for administering the asbestos NESHAP program for the waste generator (identified in the waste shipment record), and, if different, the local, State, or EPA Regional office responsible for administering the asbestos NESHAP program for the disposal site. Describe the discrepancy and attempts to reconcile it, and submit a copy of the waste shipment record along with the report.

(subsection 4 omitted)

(f) Maintain, until closure, records of the location, depth and area, and quantity in cubic meters (cubic yards) of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area.

(subsections g & h omitted)

(j) Notify the Administrator in writing at least 45 days prior to excavating or

emissions or taking alternate measures to control emissions, not maintaining comprehensive shipment records detailing the location, depth, and quantity of the material, and not notifying the EPA in advance of the excavation or disturbance of asbestos-containing waste material ("ACWM").[13] The EPA sought a civil penalty in the amount of $58,000.00.[14]

The Administrative Law Judge ("ALJ") found Lyon County liable on all counts and imposed a $45,000.00 penalty.[15] Lyon County appealed to the Environmental Appeals Board ("EAB"), which reversed the ALJ's decision regarding maintaining updated records and failure to make available a map or diagram showing the quantity, depth, and location of the ACWM but affirmed all other counts and reduced the total penalty to $18,000.00.[16] Unhappy with the administrative decision, Lyon County appealed to the district court, which affirmed the EAB's decision.[17] Lyon County then petitioned for review in the Eighth Circuit Court of Appeals.[18]

The Eighth Circuit reviewed four key claims brought by Lyon County. First, Lyon County claimed that the EPA did not have jurisdiction to bring an administrative action.[19] Second, the County contended that the EPA's imposition of liability on the landfill was inappropriate because it did not prove there were visible emissions to the

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otherwise disturbing any asbestos-containing waste material that has been deposited at a waste disposal site and is covered. . . .

40 C.F.R. § 61.154 (2005).

[13] *Lyon County Bd. of Comm'rs*, 406 F.3d at 983. Asbestos-containing waste material ("ACWM") is defined as:

> [M]ill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

40 C.F.R. § 61.141 (2005).

[14] *Lyon County Bd. Of Comm'rs*, 406 F.3d at 983.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

outside air or that the material investigators gathered was actually regulated asbestos containing material ("RACM")[20] or ACWM.[21] Third, Lyon County argued that the EPA abused its discretion by applying its Asbestos Removal and Demolition Policy to the landfill.[22] Finally, Lyon County asserted that the $18,000.00 penalty was improper because it was based on the EPA's calculations of all of the asbestos handled by the County rather than only the portion mishandled.[23]

Lyon County did not succeed on any of its claims.[24] Affirming the district court's decision in its entirety, the Eighth Circuit found that the EPA did have jurisdiction to bring an administrative action.[25] When statutory language is ambiguous, the court defers to the interpretation of the agency charged with administering the statute.[26] As to Lyon County's second claim, the court held that the EPA's imposition of liability was correct.[27] When the record establishes that a landfill is an active waste disposal site and inspectors can view emissions, no additional facts are needed to show a violation of the asbestos emission standard under the CAA.[28] Third, the court held that without a specific appendix in the CAA's guidelines for penalties regarding active waste disposal sites, it is not an abuse of discretion to consult the Asbestos Removal and

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[20] Regulated asbestos containing materials ("RACM") are defined as:

> (a) Friable asbestos material, (b) Category I non-friable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

40 C.F.R. § 61.141.

[21] *Lyon County Bd. Of Comm'rs*, 406 F.3d at 985. Lyon County based its second argument on the fact that the material found could not have been the source of visible emissions because the found material was nonfriable. *Id.* Nonfriable asbestos-containing material is "any material containing more than one percent asbestos . . . that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141.

[22] *Lyon County Bd. Of Comm'rs*, 406 F.3d at 986.

[23] *Id.* In addition, Lyon County argued that the material would not have been subject to regulation if the inspectors had found it at a demolition site. *Id.*

[24] *Id.* at 987.

[25] *Id.* at 985.

[26] *Id.*

[27] *Id.* at 986.

[28] *Id.*

Demolition Policy.[29] Finally, the court held that the penalty assessed against Lyon County was appropriate.[30] When there is potential harm caused by mishandling asbestos, a penalty under the CAA may depend on the total amount of asbestos involved in the operation.[31]

III. LEGAL BACKGROUND

A. Administrative agencies receive deference when interpreting the statutory scope of their jurisdiction

Judicial deference is traditionally given to administrative agencies in interpreting statutes, which they are charged with administering. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[32] the Supreme Court delineated an often-cited two-step approach to determine whether an agency's interpretation should be upheld.[33] First, courts must decide whether the statutory language is clear.[34] If there is no ambiguity, the court announces the clear meaning of the statute.[35] If the statutory language is unclear, the court moves to the second prong of the test. In the second prong, the court determines whether the agency's interpretation of the statute is reasonable.[36] As long as the interpretation is based on a permissible construction of the statute, the court gives deference to the agency's interpretation.[37]

Since *Chevron*, many courts have held that the two-step approach should be applied to agencies' interpretations of their own jurisdiction.[38] Recently, in *Equal Employment Opportunity Commission v. Seafarers International Union*,[39] the Fourth Circuit held that deference should be

[29] *Id.* at 986-87.
[30] *Id.* at 987.
[31] *Id.* at 986-87.
[32] 467 U.S. 837 (1984).
[33] *Id.* at 842-43.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 843.
[37] *Id.* at 843-44.
[38] *Lyon County Bd. of Comm'rs*, 406 F.3d at 983. *See* Equal Employment Opportunity Comm'n v. Seafarers Int'l Union, 394 F.3d 197, 201-02 (4th Cir. 2005), Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994).
[39] 394 F.3d 197 (4th Cir. 2005).

given to the Equal Employment Opportunity Commission ("EEOC") to delimit the bounds of its own jurisdiction.[40] EEOC brought suit alleging that the Seafarers International Union had violated its regulation extending the Age Discrimination in Employment Act ("ADEA") protections to apprenticeship programs.[41] In analyzing whether it was appropriate for an agency to interpret its own authority, the court noted that the Supreme Court has never held that *Chevron* deference should not apply in these types of situations.[42] The court also noted that several court decisions supported the application of *Chevron* deference.[43] Ultimately, the court determined there was no reason to depart from granting the agency deference.[44] Applying *Chevron*, the court held that the EEOC's extension of the ADEA to apprenticeship programs was reasonable and that it did not contravene Congressional intent.[45]

In *Coalition for Fair and Equitable Regulation of Docks v. Federal Energy Regulatory Commission*,[46] the Eighth Circuit considered whether the Federal Energy Regulatory Commission ("FERC") had the authority to give itself the power to regulate the use of certain lands by anyone or whether FERC's regulatory power was limited to the land's licensee.[47] Using the *Chevron* deference, the court gave substantial weight to the FERC's interpretation of the Federal Power Act, determining that the FERC did not exceed its authority in extending its regulatory power.[48]

Other courts have determined that *Chevron* deference should not be given to an agency's interpretation of its own jurisdiction. In *Midland Coal Co. v. Director, Office of Workers' Compensation*,[49] the Seventh Circuit held that the scope of an agency's jurisdiction is a matter within the special expertise of the courts.[50] In this case, a coalmine operator's estate sought reconsideration of a Benefits Review Board decision to deny

[40] *Id.* at 201-02.
[41] *Id.* at 199.
[42] *Id.* at 201.
[43] *Id. See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844-47 (1986) (applying *Chevron* deference when an agency extended its jurisdiction to common-law counterclaims).
[44] *Id.*
[45] *Id.* at 207.
[46] 297 F.3d 771 (8th Cir. 2002).
[47] *Id.* at 778.
[48] *Id.* at 777-78.
[49] 149 F.3d 558 (7th Cir. 1998).
[50] *Id.* at 561.

benefits associated with black lung disease.[51] The Seventh Circuit decided that the Benefits Review Board did not have jurisdiction to hear motions for reconsideration because "deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts."[52]

Supreme Court justices have remained divided on the issue of whether agencies should receive deference in interpreting the limits of their jurisdiction. In *Mississippi Power & Light Co. v. Mississippi ex. rel. Moore*,[53] Justice Stevens, writing for the majority, explained,

> It is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority."[54] And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.[55]

Mississippi Power & Light Co. suggests that judicial deference to agency interpretations of statutes is preferred, even in jurisdictional cases.

In a dissenting opinion, Justice Brennan, joined by Justices Marshall and Blackmun, argued that courts are not obligated to defer to agency interpretations of their own jurisdiction for three reasons.[56] First, statutes confining agencies' jurisdiction are not entrusted to agencies;

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[51] *Id.* at 560.
[52] *Id.* at 561.
[53] 487 U.S. 354 (1988).
[54] *See* NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 830 n.7 (1984).
[55] *Miss. Power & Light Co.*, 487 U.S. at 381.
[56] *Id.* at 386.

rather, they conflict with agencies' interests in expanding their own power.[57] Second, agencies do not have special expertise in interpreting statutes regarding jurisdiction.[58] Third, Congress did not implicitly aim to fill gaps in statutes limiting agencies' jurisdiction.[59] For these reasons, Justice Brennan disagreed with the majority's decision, which determined that giving deference to an administrative interpretation of its statutory jurisdiction would be appropriate.[60] The disagreement within the Supreme Court and between lower courts on this issue shows that the question of whether agencies have the authority to interpret the statutory scope of their jurisdiction is not yet settled.

B. Visible emissions are enough to establish a CAA violation

"Visible emissions" is a term of art which means "emissions containing particulate asbestos material that are visually detectable without the aid of instruments."[61] 40 C.F.R. § 61.154 mandates that there must be no visible emissions to the outside air at active waste disposal sites.[62] All violations of 40 C.F.R. § 61.154 are violations of the CAA.[63] Still, courts have entertained disputes about what constitutes a visible emission and exactly how much evidence is needed to establish a CAA violation.

In *United States v. Midwest Suspension and Brake*,[64] the government brought suit against a business that rehabilitated brake shoes for violating asbestos emissions standards under the CAA.[65] Along with other evidence, the government presented testimony of witnesses who said they observed a plume being discharged as a dumpster was unloaded at a landfill.[66] The Eastern District of Michigan held that this observance

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] United States v. Midwest Suspension & Brake, 824 F. Supp. 713, 716 (E.D. Mich. 1993) (citing 40 C.F.R. § 61.141 (1987)).
[62] 40 C.F.R. § 61.154.
[63] *Midwest Suspension & Brake*, 824 F. Supp at 729.
[64] 824 F. Supp 713 (E.D. Mich. 1993).
[65] *Id.* at 716.
[66] *Id.* at 729.

constituted a visible emission because only the *emission itself* must be visible without the aid of instruments.[67] The asbestos *content of an emission* does not have to be visible in order for it to constitute a *visible emission*.[68]

The Ninth Circuit addressed the visible emissions issue in *United States v. Technic Services, Inc.*,[69] where an asbestos remediation corporation and its secretary were convicted of violating the CAA asbestos emissions standards.[70] At trial, the government presented evidence of large clouds of dust inside a building, which were caused by workers' handling of asbestos-containing material, as well as large holes in the walls and ceiling of the building where the dust was generated.[71] The Ninth Circuit used the plain meaning of the term to determine that "visible" means "capable of being seen."[72] The government did not have to show that emissions were actually seen.[73] Hence, testimony that someone actually saw asbestos emissions outdoors was not required.[74] The court upheld the convictions because it found sufficient evidence for the jury to infer that emissions were visible in the outside air.[75]

Courts have loosely interpreted the CAA's mandate against visible emissions of asbestos to the outside air. As the above cases illustrate, only emissions, not actual asbestos content, must be visible to establish a violation.[76] Further, a jury may infer that emissions are visible if they are capable of being seen.[77]

C. A CAA penalty for the total amount of asbestos involved in the operation is not excessive

In assessing the appropriate penalty for CAA violations, the trend

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[67] *Id.* at 728-29.
[68] *Id*, at 728-30.
[69] 314 F.3d 1031 (9th Cir. 2002).
[70] *Id.* at 1036.
[71] *Id.* at 1039.
[72] *Id.* at 1040.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1039.
[76] *See supra* notes 61-74 and accompanying text.
[77] *See supra* note 74 and accompanying text.

has been to consider both real and potential damages. In *United States v. Nevada Power Corp.*,[78] the court decided that it must apply the three factors established by the Supreme Court in *Solem v. Helm*,[79] when assessing whether civil penalties for CAA violations are disproportionate to the crimes committed.[80] Following the framework laid down in *Solem*, the court must

> 1) accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue; 2) examine the gravity of the defendant's conduct and the harshness of the imposition of civil penalties; and, [whether] the civil penalties are penal in nature, 3) compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct.[81]

The court further explained that when determining the amount of harm caused by a defendant's conduct, it is appropriate to take into account whether harm was inflicted, threatened or risked.[82] In *Nevada Power Co.*, the court gave deference to the administrative agency to calculate the correct penalty.[83] The court determined that the penalty was not disproportionate to the violation because the potential harm was greater than the realized harm.[84]

In *State v. Texas Pet Foods, Inc.*,[85] the state brought action against

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[78] No. CV-S-87-861-RDF, 1990 WL 149660 (D. Nev. 1990).
[79] 463 U.S. 277 (1983).
[80] *Nevada Power Corp.*, 1990 WL 149660, at *4-*5. The Eighth Amendment to the U.S. Constitution forbids barbaric punishments and the imposition of sentences that are disproportionate to the crime committed. *See* U.S. CONST. amend. VIII. In *Solem v. Helm*, the U.S. Supreme Court adopted broad guidelines that courts may use when determining whether civil penalties are disproportionate. *See Solem*, 463 U.S. at 284 (laying out the guidelines for determining whether a punishment is excessive); *see also* Browning-Ferris v. Kelco Disposal, 492 U.S. 257 (1989) (applying the *Solem* factors to damages in a civil suit).
[81] *Nevada Power Corp.*, 1990 WL 149660, at *5.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] 591 S.W.2d 800, 802 (Tex. 1979).

a poultry plant operator seeking assessment of monetary penalties for past violations of the CAA.[86] At trial, the jury found that the majority of the plant's violations concerned its operation of a sixth poultry cooker without the required air pollution control operating permit.[87] Texas Pet Foods, Inc. argued that the penalties imposed were excessive because the sixth cooker was rarely operated.[88] The court decided that the state only had to prove that the sixth cooker was part of the operation and that it was capable of producing a product, not that it actually did produce it.[89]

As these and other cases illustrate, courts have responded favorably to claims of CAA violations by loosely interpreting visible emissions requirements and allowing penalties to be assessed according to potential, as well as real, damages. Courts are divided on the issue of whether agencies are entitled to deference in interpreting the parameters of their own jurisdiction. Nonetheless, the *Lyon County* decision is in line with precedent allowing broad agency deference in enforcing the CAA.

IV. INSTANT DECISION

In *Lyon County*, the Eighth Circuit determined that the district court was correct in granting *Chevron* deference to the EPA when the EPA determined the scope of its own jurisdiction.[90] Lyon County pointed out the statutory language in 42 U.S.C. § 7413(d)(1) mandating that an administrative action brought more than twelve months after an alleged CAA violation was only permissible if the Administrator and Attorney General determined that a longer period of violation was appropriate.[91] The County argued that the phrase "longer period of violation" meant the violation itself must have occurred for more than twelve months in order for the EPA to have authority.[92] The EPA argued that a "period of violation" referred to the period from the violation's occurrence to the administrative proceeding's commencement.[93] The Eighth Circuit

[86] *Id.* at 802.
[87] *Id.*
[88] *Id.* at 805.
[89] *Id.*
[90] *Lyon County Bd. of Comm'rs*, 406 F.3d at 985.
[91] *Id.* at 984.
[92] *Id.*
[93] *Id.* at 984-85.

acknowledged that both definitions were reasonable.[94] It explained that the *Chevron* doctrine orders courts to "defer to an agency's reasonable interpretation of a statute it is charged with administering if the statute is ambiguous, or the interpretation is consistent with the plain meaning of the statute."[95] Since Congress did not clearly explain the meaning of "period of violation" and the EPA's definition of the term was plausible, the court gave deference to the EPA's interpretation.[96]

The court rejected Lyon County's assertion that the EPA should not receive deference in interpreting the question of its own jurisdiction.[97] The court pointed out that other jurisdictions had allowed administrative agencies to interpret such questions.[98] It recognized that the Eighth Circuit had not yet adopted a rule pertaining to whether agencies should receive deference in interpreting the scope of their own jurisdiction and decided to align itself with the Fourth Circuit and the D.C. Circuit in permitting such deference in the current case.[99]

The court also rejected Lyon County's claim that the EPA should not have imposed liability because the EPA did not prove there were visible emissions or that the material investigators obtained was RACM.[100] The court first explained that it would defer to agencies' administrative penalty decisions unless the decision involved an abuse of discretion, or "there [was] not substantial evidence in the record, taken as a whole, to support the finding of a violation."[101] Next, the court determined that there was no abuse of discretion because substantial evidence, such as tests showing that the material was RACM and was capable of emitting visible emissions, was produced to support the EPA's finding of a violation.[102] The court also explained that the threshold-triggering amounts set out in 40 C.F.R. § 61.145 are not part of the requirements for active waste disposal sites, such as the Lyon County Landfill, and therefore, the EPA did not have to consider them in order to show a

[94] *Id.* at 985.
[95] *Id.* at 983 (citing *Chevron*, 467 U.S. at 844-45).
[96] *Lyon County Bd. of Comm'rs*, 406 F.3d at 985.
[97] *Id.* at 983.
[98] *Id.*
[99] *Id.* at 983-84.
[100] *Id.* at 985.
[101] *Id.* at 985 (citing 42 U.S.C. § 7413(d)(4) (2005)).
[102] *Lyon County Bd. of Comm'rs*, 406 F.3d at 986.

violation of the asbestos emission standard.[103] For these reasons, the Eighth Circuit affirmed the district court's ruling that Lyon County was subject to liability for violating the CAA on all counts.[104]

After determining that Lyon County was liable, the court addressed Lyon County's arguments that the penalty assessed against it was too harsh.[105] The court dismissed the County's claim that the material found at the landfill should not have been subject to regulation because, as explained above, test results identified the material as RACM capable of releasing visible emissions.[106] The court also rejected the County's second argument that the ALJ should not have applied a demolition and renovation penalty policy to the landfill.[107] The court held that the ALJ's application of this policy was reasonable, considering there was no specific index related to penalties for active waste disposal sites.[108] Lastly, the court disagreed with Lyon County's contention that the penalty was excessive because it was based on the total amount of asbestos at the landfill, rather than just the amount it mishandled.[109] Despite the fact that only a small amount of asbestos were handled improperly, the court held that a penalty under the CAA may depend on the total amount of asbestos involved in an operation.[110] The court reasoned this was due to the considerable potential for harm caused by incorrect removal and disposal.[111]

The Eighth Circuit was not persuaded by any of Lyon County's arguments. It concluded that the EPA's assertion of jurisdiction over the landfill's CAA violations was correct, the EPA's imposition of liability on the landfill was proper, and the penalty assessed against Lyon County was appropriate.[112] Therefore, it affirmed the district court's decision in its entirety.[113]

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[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 987.
[113] *Id.*

V. COMMENT

The *Lyon County* court made two decisions that are particularly significant in that they have the capacity to produce a host of negative consequences. First, the court granted an administrative agency deference in determining the statutory scope of its jurisdiction.[114] Second, it affirmed the assessment of a penalty disproportionate to a violator's offense.[115]

The *Lyon County* court used the *Chevron* doctrine to determine that an agency may interpret statutory language relating to the scope of its own jurisdiction because agencies are allowed to interpret ambiguous statutory language so long as they do so in a reasonable fashion.[116] Applying *Chevron* to the jurisdiction issue seems rational, considering that any interpretation is required to be reasonable. However, this decision has the potential to create some difficulties. As the dissenting opinion in *Mississippi Power and Light Co.* pointed out, statutes limiting agency jurisdiction provide a necessary check on agencies' natural, and undesirable, tendency to seek to expand their jurisdiction.[117] This fundamental conflict makes agencies a poor choice for interpreters of jurisdictional provisions.[118] If agencies are given deference in determining the scope of their own jurisdictions, they will naturally seek to expand their authority, and the results could be problematic on countless levels.

As Justice Breyer explained in *Breaking the Vicious Circle: Toward Effective Risk Regulation*, agencies often acquire tunnel vision in carrying out their goals to the point that they accomplish more harm than good.[119] While agencies intend to carry out tasks sensibly, their intense focus on accomplishing particular objectives often inhibits their ability to consider all factors, weigh alternatives, and assess collateral costs of the stringent standards they are prone to set.[120] Moreover, agencies have an

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[114] *Id.* at 985.
[115] *Id.* at 987.
[116] *Id.* at 983.
[117] 487 U.S. at 387 (Brennan, J., dissenting).
[118] *Id.*
[119] STEVEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (Harvard University Press 1993).
[120] *Id.* (Breyer lists several examples of agencies' tunnel vision, one of which was involved in United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990)). Breyer explains,

innate tendency to work toward expanding the scope of their authority in order to achieve their objectives despite the fact that such expansion is both illegitimate and troublesome for the system as a whole.

Administrative agencies' tendency to interpret their own jurisdictional bounds expansively causes a variety of problems. For example, overbroad interpretations of their authority could cause agencies to intrude on the powers of other agencies, resulting in overlapping regulations. Allowing agencies to increase their own authority in this way could lead to confusion and a myriad of disputes over which laws govern.

The Eighth Circuit's decision to allow the EPA's penalty calculation to stand opens the door to a variety of societal problems as well. The court held that when there is potential harm caused by mishandling of asbestos, a penalty under the CAA may depend on the total amount of asbestos involved in the operation.[121] It would be possible for a disposal site that processes an enormous amount of asbestos properly to mishandle a miniscule amount, subjecting the site to great liability because of the ostensible possibility of harm if all of the asbestos was mishandled. Such a penalty conflicts with one of the fundamental tenets of the American legal system: to be just, punishments should be proportional to offenses.[122] The instant decision presents a strong likelihood of inequity and exposes waste disposal sites that handle asbestos to potentially limitless liability despite the magnitude of their offenses.

There is a significant public interest in maintaining asbestos disposal sites. Exposing them to untold liability for small infractions will

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> [The case arose] out of a ten-year effort to force cleanup of a toxic waste dump in southern New Hampshire. The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of highly diluted PCBs and "volatile organic compounds" (benzene and gasoline components) by incinerating the dirt. How much extra safety did this $9.3 million buy? The forty-thousand-page record of this ten-year effort indicated . . . that, without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt daily for 70 days each year without significant harm. Burning the soil would have made it clean enough for the children to eat small amounts daily for 245 days per year without significant harm. But there were no dirt-eating children playing in the area, for it was a swamp.

Id. at 11-12.

[121] *Lyon County Bd. of Comm'rs*, 406 F.3d at 987.

[122] *See* U.S. CONST. amend. VIII.

likely inhibit the ability of existing sites to operate, as well as decrease the incentive to develop more disposal sites. In *Pittman v. Dow Jones & Co., Inc.*,[123] the District Court for the Eastern District of Louisiana explained that imposing limitless liability on entities such as newspapers conflicts with public policy goals.[124] When newspaper readers brought suit for damages against a newspaper for inaccurate reporting, the *Pittman* court held, "[c]ourts seem to be sensitive to the devastating liability notion since to ignore such arguments could have the effect of discouraging the publication of ads dealing with valuable public information to enable people to make informed choices."[125] The court recognized that the public interest served in punishing news organizations for inaccurate reporting must be balanced against the equally important interest in allowing such organizations to continue to disseminate information.[126] Similarly, the public interest in ensuring that RACM is properly handled must not overwhelm the public interest in encouraging the development and preservation of active waste disposal sites. It is crucial that such sites continue to operate, and subjecting them to limitless liability for any infractions, no matter how minor, discourages continued operation. Balancing competing public interests requires limiting landfills' liability to a degree that reflects disapproval of specific wrongdoing and does not unjustly immobilize them.

IV. CONCLUSION

The *Lyon County* court confronted the multi-faceted issue of whether the EPA should be given deference in determining the breadth of its own jurisdiction. The Court joined other circuits and some U.S. Supreme Court justices in determining that the EPA should receive such deference. This decision, though well reasoned on some levels, creates the potential for problems including illegitimate administrative agency enlargement and overlapping regulations.

In *Lyon County*, the Eighth Circuit also virtually eliminated the limits on penalty assessments against active waste disposal sites by

[123] 662 F.Supp 921 (E.D. La. 1987).
[124] *Id.* at 922.
[125] *Id.*
[126] *Id.*

determining that penalties could be calculated based on the total amount of asbestos the sites take in rather than just the amount they mishandle. This holding has the potential to cause serious problems if active waste disposal sites determine that it is not worth it for them to continue to handle RACM. RACM must be put somewhere, and no disposal site can operate without eventually making miniscule errors. The *Lyon County* holding has the potential to emasculate the current system of asbestos disposal.

Finally, the *Lyon County* holding regarding the EPA's penalty calculation disregards the American legal system's deep-seated conviction that punishments should be proportional to crimes. It raises fundamental issues of fairness in condoning punishment for a crime that may have, but did not, occur.

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