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The Importance of Creating A Record for Judicial Review of Agency Action

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For at least the past 35 years, federal courts have generally allowed an administrative agency's interpretation of a regulation or statute that it administers to prevail when challenged by a member of the regulated community or any other interested party. The 'agency deference' doctrine has been questioned in recent years, however, and a new case pending review before the Supreme Court may reverse or revise the doctrine as it relates to an agency's interpretation of its own regulation. Whether a court defers to an agency's interpretation of a statute or regulation defines the standard of review with which it will review the Agency's decision. For that reason, whether agency deference remains in place or not, regulated entities should focus on the importance of creating a record for judicial review of agency action.One of the arguments in favor of agency deference is that many administrative agency statutes and regulatory programs are highly technical in nature, requiring the expertise of an implementing agency instead of a court that is unfamiliar with the technical issues and claims. An additional concern is that a number of federal judicial review provisions send challenges to administrative decisions directly to the federal courts of appeals, not district or trial courts (*e.g.*, the Pipeline Safety Act). District courts review evidence and testimony, and find facts, whereas appellate courts focus on reviewing questions of law. A lower court's factual findings are reviewed on a deferential basis.

Below is a brief review of precedent regarding agency deference, the *Kisor* case which was granted cert by the Supreme Court, and the importance of establishing a record for any challenge to final agency action.

Prior Agency Deference Case Law

Controversy over application of the agency deference doctrine has arisen most frequently in cases involving environmental or energy law issues, where both the underlying facts and agency regulations are technical and complex. A court reviewing agency final action uses a *de novo* standard of review for legal issues, deciding for itself whether the statute or regulation at issue clearly addresses the question presented. The court uses a different standard for reviewing the agency's fact finding and decision making, however. That standard is created by the Administrative Procedure Act (APA) and looks to see if the agency's actions were 'arbitrary and capricious, an abuse of discretion or not in accord with law.' 5 U.S.C. § 706. The agency deference doctrine began with courts deferring to an agency on issues where an agency had interpreted a statute or regulation that was not clear on its face (i.e., ambiguous). In those cases, courts have tended to defer to agency interpretations.

In the ***Seminole Rock*** (1945) case, the Supreme Court held that an agency's interpretation of its own regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." The Court reasoned that when Congress delegates authority to an agency to issue regulations, it also delegates authority to interpret regulations. Note that the APA, which established standards of review for agency action, was enacted the year following the *Seminole Rock* decision. *Seminole Rock* did not become the subject of more discussion until decades later, in the ***Chevron v. NRDC*** decision regarding an agency's interpretation of a statute. In *Chevron*, the Supreme Court held that a reviewing court should first look to whether Congress has directly addressed the question and if it has not, to look to whether the agency's interpretation is based on an agency's interpretation of was a "permissible construction" of the statute. In practice where a statute is ambiguous, this typically results in a court deferring to an agency's interpretation.

Another decade later, the Supreme Court addressed the issue of deference with respect to an agency's interpretation of its own regulations in the ***Auer v. Robbins*** case. *Auer* involved the issue of how to interpret and apply a Department of Labor regulation exempting overtime pay to executive, administrative or professional employees, and specifically, the agency's interpretation of the term 'salary basis.' The Supreme Court, citing *Chevron*, concluded that an agency's interpretation of its own regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation." Despite the fact that the Agency's interpretation of the rule in question first appeared in legal briefs, the *Auer* Court held that it was not an impermissible *post hoc* rationalization.

Current Challenges to Agency Deference

A case currently pending oral argument before the Supreme Court – ***Kisor v. Wilkie*** – is being viewed as a likely opportunity for the Court to address and revise the 'agency deference' doctrine. That case, although not an environmental or energy law case, squarely presents a challenge to deference to an agency's interpretation of its own regulation under *Seminole Rock* and *Auer. In Kisor*, a Vietnam War veteran is contesting a denial of claims for PTSD related services by the Veteran Administration (V.A.). *Kisor* relied on his service records to establish PTSD conditions, but the V.A. concluded that service records were not "relevant" under the governing V.A. regulation. The Federal Circuit agreed with the V.A.'s interpretation and the Supreme Court granted cert on the issue of whether *Auer* should be overruled.

The *Kisor* case has attracted numerous amici curiae briefs, and it is being closely watched. Briefs have been filed by various utilities and trade groups, arguing both for and against any revision to the agency deference doctrine. *Kisor* illustrates how a single word of ordinary use – "relevant" – when in the context of an agency's regulation, can be the basis for an administrative agency to create law by fiat. In a recent case involving pipelines, the 5th Circuit found the Pipeline and Hazardous Materials Safety Administration's interpretation of a single word in one of the Agency's regulations – "consider" – was not a permissible and thus its interpretation did not warrant deference. ***ExxonMobil Pipeline Co. v. U.S. DOT, 867 F.3d 564 (2017)*** (see ***Pipelaws.com post from 9.15.17)***. Citing the Supreme Court's decision in *Christopher v. SmithKline Beecham, 567 U.S. 142* (2012), the Fifth Circuit in *ExxonMobil* held that administrative agencies cannot rely on a "vague and open ended regulation that they later interpret as they see fit" and noted that the agency's "*post hoc* litigation derived" interpretation of its regulation deprived the petitioner of fair notice. *Id*.

Interestingly, the government in *Kisor* is arguing that the *Seminole Rock* and *Auer* decisions should be "clarified and narrowed," but not necessarily overruled. Most parties filing briefs agree, and notably few argue that *Chevron* should be overruled or limited. The Department of Justice brief in *Kisor* says that *Chevron* can be read to rely on implicit Congressional intent, thus distinguishing it from the other agency deference cases (making the distinction between 'legislative rules' and 'interpretative rules,' and limiting the challenge to the latter).

The argument in *Kisor* seeks to clarify that while an ambiguity in a statute may be an implicit delegation by Congress to an agency for the agency to interpret, an ambiguity in a regulation should not be given the same deference (noting that an agency can avoid these issues by issuing regulatory interpretations for public notice and comment). The fact that the Supreme Court granted cert indicates that it is likely to make a significant statement regarding agency deference in this case. Several of the Justices appear quite eager to do so. For example, Justice Gorsuch just recently wrote a dissenting opinion in a case that did not even present the agency deference doctrine, simply to note that the parties were avoiding even raising the deference argument, apparently out of concern for the baggage that attends the issues. *BNSF v. Loos* (S.Ct. Docket 17-1082; decided Mar. 4, 2019).

Creating an Administrative Record

Whether the agency deference doctrine remains in place as currently articulated or is revised by the Supreme Court in the *Kisor* case, it remains of critical importance to build a record for review of administrative action. Especially under those statutes where an appeal of agency action goes direct to a federal court of appeals (not a district court), a petitioner should endeavor early on to document the context of agency action and the issues presented. That record should begin at, or before, the initial request for administrative review or hearing is filed. If the agency's decision purportedly rests on an 'implicit expression of Congressional intent,' that presumption should be questioned closely. On the other hand, if the agency's decision is clearly an 'interpretative' act – which includes guidance in all its forms – then the decision should not be afforded deference by the court. In order to make that argument during judicial review, however, the petitioner should ensure that the record fully reflects agency statements and rationale, as well as the petitioner's arguments in opposition. If there will be no judicial fact finding, but only review of the administrative record (as it is with the Pipeline Safety Act), then it is all the more important for the petitioner to think ahead in creating a record for review.