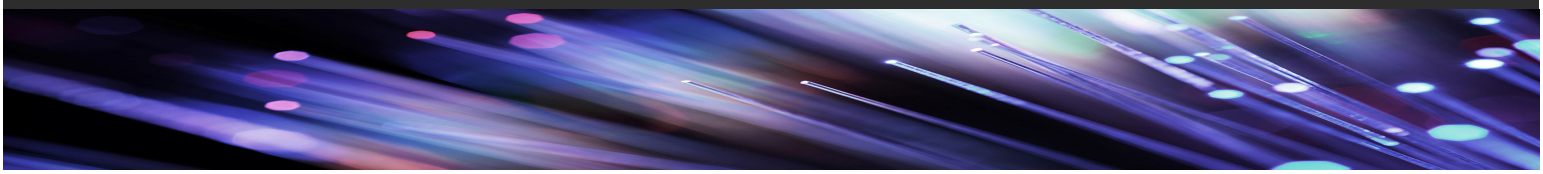
GT GreenbergTraurig

What Environmental Lawyers Should Know About the Limits of 'Auer' Deference



The U.S. Supreme Court recently had the opportunity to overturn Auer deference, Kisor v. Wilkie, No. 18-15, (U.S. June 26, 2019). A 5-4 majority declined to do so, but not without emphasizing the limits of the doctrine.

By Kaitlyn R. Maxwell | July 12, 2019 | The Legal Intelligencer

The U.S. Supreme Court recently had the opportunity to overturn *Auer* deference, *Kisor v. Wilkie*, No. 18-15, (U.S. June 26, 2019). A 5-4 majority declined to do so, but not without emphasizing the limits of the doctrine. *Auer* deference refers to the doctrine that a court should generally defer to an agency's interpretation of agency regulations when the regulations are determined to be ambiguous, see *Auer v. Robbins*, 519 U. S. 452 (1997). The doctrine also may be referred to as Seminole Rock deference, see *Bowles v. Seminole Rock & Sand,* 325 U.S. 410 (1945). This doctrine has been called into question because it essentially allows the regulatory body charged with writing the regulation the final say as to what the regulation means. Environmental lawyers, and anyone else involved in regulatory disputes, will likely want to keep the stated limits—whether new or old—front and center moving forward.

When an agency alleges an entity violated an environmental regulation, that entity is entitled to notice of the violation and a hearing. In the context of environmental decision-making, where the cost of compliance—or alleged noncompliance—can be high and may result in a bet-the-company type liability, it is particularly important for the entity to know what is expected of it. After exhausting administrative remedies and negotiations, entities take comfort in knowing a neutral judicial body will make a determination about the alleged noncompliance and that inquiry most often turns on an interpretation of the relevant regulation. If the language is clear on its face, then the language controls. The more difficult question arises when there is "genuine ambiguity." Who has the final say in what the regulation means?

The court or the agency? The Supreme Court has held deference to agency interpretation may still be appropriate in some instances, but there are limits to prevent a potential abuse of power.

In *Kisor*, a Vietnam War veteran, sought review of the U.S. Court of Appeals for the Federal Circuit's decision upholding the denial of disability benefits by the Department of Veteran's Affairs on the basis of *Auer* deference. The Federal Circuit concluded the VA regulation was ambiguous, and therefore, the agency's construction of its own regulation controlled because the interpretation was not "plainly erroneous" or inconsistent with the regulatory framework. All justices agreed the judgment should be vacated; but there was a difference in opinion as to whether *Auer* deference should be overruled entirely or merely limited in application. Chief Justice John Roberts, providing the swing vote, joined the portion of Justice Elena Kagan's opinion finding *Auer* deference should not be overruled based on the importance of stare decisis.

The majority expressed concerns about the "long line of precedents" and the potential to unsettle many decisions construing regulations. Justice Neil Gorsuch, joined for the most part by Justices Clarence Thomas, Samuel Alito and Brett Kavanaugh, concurred with the judgment, but objected to the majority's willingness to allow *Auer* deference to live on.

The majority acknowledged the "far-reaching influence of agencies" and the potential for abuse of power. As a result, the majority "reinforced" the limits of *Auer* deference and emphasized that courts must play a "critical role" in interpreting rules. Those limitations include consideration of the following:

First, *Auer* deference does not come into play unless "a regulation is genuinely ambiguous." If the regulation is clear on its face, there is "no plausible reason for deference;" the regulation means what it means. Deference to agency interpretation when the regulation is unambiguous would have the effect of creating a de facto new regulation, and that, the majority finds, would go too far. Importantly, the majority applied principles of *Chevron* deference here—deference to agency interpretation of ambiguous statutes, *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1984). That is, before concluding a regulation is ambiguous, the court must "exhaust all the 'traditional tools' of construction."

Kavanaugh, who joined Gorsuch's concurring opinion, wrote separately to assert that the majority's application of footnote 9 of *Chevron*—the traditional tools of construction—means "the court will almost always reach a conclusion about the best interpretation of the regulation at issue." In his view, after applying the traditional tools of construction, "courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations." And, applying footnote 9, in most cases, will get courts to the same place they would be if *Auer* deference had been overruled. Roberts and Kavanaugh made a point of emphasizing that the majority's opinion does not address the appropriateness of *Chevron* deference. In their view, judicial deference to agency interpretation of their own rules is distinct from agency interpretation of statutes enacted by Congress. Arguably, the justices are mindful of the late Justice Scalia's stance on the distinction between Chevron and *Auer*—"Congress cannot enlarge its own power through *Chevron*," whereas an agency could potentially expand its own power through *Auer* by enacting regulations in vague terms to allow for future "flexibility" in interpretation, as in *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part, dissenting in part) (stating "he who writes a law must not adjudge its violation"). Which of the limits, if any, set forth by the court here can be applied to *Chevron* deference?

Second, if there is genuine ambiguity, the court must determine if the agency's interpretation is "reasonable." According to the majority, that means the interpretation must be within the "zone of ambiguity" the court identifies using its interpretative tools. Again, looping in a comparison to *Chevron* deference, the majority states that agency construction of its own rules is not afforded greater deference

than agency construction of statutes. Both *Auer* and *Chevron* require the agency's reading to be "within the bounds of reasonable interpretation," and an agency may fail this requirement.

Third, the court must independently analyze whether the agency interpretation should be afforded controlling weight. There is no bright-line test, but the majority identified "markers" for a court's review. The regulatory interpretation must be made by the agency in an "authoritative" or "official position;" "implicate its substantive expertise;" and reflect a "fair and considered judgment" in order to be afforded *Auer* deference. Roberts suggests these markers are not so different from the points raised by Gorsuch.

Notably, there was no majority for the portion of Kagan's opinion finding courts do not violate Section 706 of the Administrative Procedures Act (APA) by applying *Auer*, that *Auer* does not circumvent the rulemaking requirements of Section 553 of the APA, and that *Auer* does not violate the separation of powers set forth in the U.S. Constitution. These challenges, not unlike the doctrine itself, appear to live on for another day. Gorsuch, joined by Thomas, Alito and Kavanaugh, made it clear that they view *Auer* deference to be inconsistent with the APA and the U.S. Constitution.

By emphasizing the limitations, the majority potentially kept the door open—or at least partially ajar—for parties challenging the appropriateness of deferring to agency interpretation of regulations. What will state courts that loosely apply their own form of *Auer* deference for state agency interpretation of state regulations make of this most recent opinion? See, e.g., *Delaware River Keeper Network v. Secretary of Pennsylvania Department of Environmental Protection,* 870 F.3d 171, 181 (3d Cir. 2017) ("Pennsylvania specifically recognizes *Auer*-style deference for its agencies.")

Will the "markers" also guide review of state interpretations? Some may say these limitations are nothing new—just a more defined word of caution to courts applying *Auer* deference. Others, like Gorsuch, argue the majority's opinion retools *Auer* deference into a "paper tiger," making it only a matter of time before the question is raised again. In the meantime, entities that disagree with agency interpretations of regulations likely will push courts to think critically about the limitations identified by the majority to prevent any rubberstamp approval.

About the Author:

Kaitlyn R. Maxwell practices in the environmental group of Greenberg Traurig with a focus on environmental litigation. Contact her at maxwellk@gtlaw.com.