Supreme Court Revisits and Revises ‘Auer Deference’ with Implications for Environmental Law

by Anthony B. Cavender, Ashleigh Acevedo, and Rebecca Lee

The U.S. Supreme Court decided many important administrative and regulatory law cases during the 2018–2019 term, but perhaps its most significant decision, *Kisor v. Wilkie, Secretary of Veterans Affairs*, was decided late in the term on June 26, 2019. The court’s decision in *Kisor* should affect the judicial review of many federal regulatory actions, including environmental matters governed by the U.S. Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act (RCRA), which could have significant consequences on the regulated community.

*Kisor* involves “Auer deference,” a decisional doctrine created by the court in 1997, which allows courts to defer to—and usually approve—a federal agency’s reasonable interpretation of its own “genuinely ambiguous regulations.” The *Kisor* case concerned the U.S. Department of Veterans Affairs’ interpretation of an ambiguous veterans benefit rule that had been affirmed by both the U.S. Court of Veterans Appeals and the Federal Circuit. However, the court vacated and remanded the ruling.

*Auer* deference’s lineage can be traced to an older Supreme Court administrative law decision, *Bowles v. Seminole Rock & Sand Co.*, issued in 1945, concerning the interpretation of a World War II price control regulation. The 1997 *Auer* case (*Auer v. Robbins*) involved another routine agency action—the Secretary of Labor’s interpretation of federal overtime

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rules. Consequently, Auer deference has had particular utility for the courts inasmuch as they review thousands of such decisions made every year by federal agencies and executive departments.

As noted by Justice Gorsuch in his long concurring opinion, the federal “administrative state” is governed by the Code of Federal Regulations (CFR), which in 2018, “filled 242 volumes and was about 185,000 pages long”. Auer has eased the burden of reviewing many controversies regarding these rules because when it is clear to the court that the agency had the legislative authority to issue the rule, the only question for the court to decide is whether the agency reasonably interpreted its own regulation. However, over the years, some members of the court questioned the propriety of this doctrine because, in practice, it cedes much of the courts’ constitutional power to decide cases to the federal bureaucracy. In addition, some argue that this doctrine conflicts with the judicial review provisions embedded in the Administrative Procedure Act (APA).

Auer deference is not be confused with another decisional doctrine, Chevron deference, which relates to an agency’s interpretation of the statutes it implements and enforces. The court in Chevron held that a court’s review of an agency’s interpretation of the statute the agency administers should proceed, first, by employing the traditional tools of statutory construction to determine, whether Congress has directly spoken to the precise question at issue, and if not (because the law is silent or ambiguous), then the court must determine “whether the agency’s answer is based on a permissible construction of the statute.”

The Decision in Kisor v. Wilkie
As explained by Justice Kagan, Auer deference is rooted in the presumption that Congress would want the agency, as author of an ambiguous regulation, to interpret its own rules. The court’s reasoning lies in the assumption that the author of the regulation in question is in the best position to interpret its intent and meaning. Justice Kagan presented three rationales to support the court’s reasoning. First, rule-making agencies are privy to specialized technical knowledge that allow them to best weigh the costs and benefits of a certain interpretation. Second, the court acknowledges an agency’s unique ability to conduct factual investigations, consult with affected parties, and consider the historical handling of the rule in past situations. Finally, the court reiterates that if the agency is the one body to interpret the rule, the ambiguity would be resolved uniformly rather than by the dreaded “piecemeal litigation.”

After establishing that the court would not overturn Auer, it imposed limitations on the doctrine’s applicability by acknowledging certain circumstances in which Auer deference should not apply. The Chief Justice summarized the tenets of the revised Auer doctrine: the underlying regulation must be genuinely ambiguous; the agency’s interpretation must be reasonable and must reflect its authoritative judgement; and the agency must take account of reliance interests and avoid unfair surprise.

According to the court, a regulation is ambiguous if the reviewing court makes a diligent effort to uncover the regulation’s meaning but cannot do so. The court leaves the framework of “independent inquiry” open to interpretation...
but outlines certain guidelines to provide a starting point. First a court should exhaust its “constructionist toolbox.” That is, the court should carefully consider the text, structure, history, and purpose of a regulation before resorting to deference. If genuine ambiguity remains, the agency's reading must still fall within reasonable bounds of interpretation. The court must then make a final inquiry into whether the character and context of the agency's interpretation entitles it to controlling weight.

The court emphasizes that the agency's interpretation of its own rule must be its authoritative or official position. Furthermore, the interpretation must in some way reflect the agency's substantive expertise. After all, the guiding premise of the doctrine is that the agency has some specialized knowledge that places it in a better position to proffer its interpretation than the court. Finally, the agency's interpretation cannot create an unfair surprise to regulated parties. The interpretation must be a fair and measured reading of how the agency has imposed the rule in the past and stay in line with how the regulated parties have generally interpreted it.

However, what seemed to be the most compelling reason to uphold Auer deference was the court's fidelity to stare decisis, and its reluctance to upset the settled expectations and outcomes that the long line of precedent made possible by Auer. These are important “reliance interests” that must be protected. The court concludes its opinion by remarking that Congress is well aware that Auer deference exists, and if this deference should be overturned, Congress has the ability to change the law.

**Auer Deference Going Forward**

Kisor's continued impact on environmental regulation could be significant. Apart from the large body of federal health and welfare regulation located in CFR titles 20 and 42, the bulk of regulatory items listed in the biennial Unified Federal Regulatory Agenda are largely environmental issues. For example, the U.S. Environmental Protection Agency's agendas, released as part of overall federal agenda, consistently lists many proposed and projected federal environmental regulations required by the Clean Water Act, the Clean Air Act, RCRA, Superfund, the Safe Drinking Water, and the Federal Pesticide law.

Accordingly, Kisor presages a gradual shift away from traditional Auer deference. Agency deference is not guaranteed, and lower courts that do not rigorously follow the new thresholds to deferring to agency interpretation will be chastened. Consequently, Auer deference is not invalidated, merely limited.

The court expects the lower courts will apply the new limits with rigor. This increased scrutiny may cause the courts and the agencies to proceed with caution, and the pace of regulation may slow while the agencies and the courts accommodate the “new” Auer deference standard.

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