Uncertain Future of ‘Chevron Deference’; MACT Policy Reversal

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*Regulatory Roundup* spotlights key changes to the U.S. regulatory landscape.

**The Suddenly Uncertain Future of ‘Chevron Deference’ and its Possible Far-Reaching Impact on the Regulation of Air Pollution**

Talk has increased that the Trump Administration and/or Congress may be moving closer to bringing an end to an important principle of administrative law known colloquially as “Chevron deference”. The possible change of direction extends to the U.S. Supreme Court where anti-Chevron Justice Neil Gorsuch was appointed by the Trump Administration in early 2017. Ultimately, it is the Supreme Court that could bring an end to *Chevron* deference when the right test case presents itself. Ramifications on the U.S. Environmental Protection Agency (EPA) and entities regulated by EPA promise to be far-reaching. Unfortunately, it is impossible to predict whether these ramifications will be positive or negative. In practice, the answer is likely to be highly case-specific.
The concept of Chevron deference came out of the Supreme Court’s decision in *Chevron U.S.A. v. NRDC* (1984). That case involved EPA’s interpretation and application of the U.S. Clean Air Act Amendments of 1977 pertaining to New Source Review and the definition of “stationary source” (specifically, whether the term referred to a single emission unit, a facility “bubble”, or both). While the language of the Clean Air Act was silent on the issue, EPA adopted differing and conflicting applications of the term “stationary source” between 1980 (under the Democratic Carter Administration) and 1981 (under the Republican Reagan Administration). The Supreme Court was tasked with determining the proper definition of “stationary source” under the Clean Air Act. The Court’s decision to defer to EPA rather than substitute its own judgment began the era of Chevron deference.

When subjecting a regulatory agency’s decision to Chevron analysis, courts employ a two-step process. Step one involves asking whether the statute being reviewed clearly addresses the question before the court. If this question is answered in the affirmative, the court will apply the clear statutory language to the facts before it, and the Chevron analysis ends. More often than not, step one in the Chevron analysis does not yield an answer. Step two of the analysis directs the court to ask whether the agency’s interpretation and application of the statutory language at issue is “permissible” and “reasonable”. Significantly, Chevron deference is intended to prevent courts from asking whether the agency’s interpretation and application results in the “best” possible outcome. Deference also prevents courts from substituting their own interpretation and judgment for those of the agency.

The overarching principal of Chevron deference is that Congress intends for the subject matter experts who inhabit regulatory agencies to “fill in the blanks” using their technical expertise when a statute is silent or vague on a particular issue. To some, Chevron properly applied is an embodiment of the constitutional principle of separation of powers. Congress passes legislation, agencies under the executive branch exercise powers granted by that legislation (and fill in any gaps with their technical expertise), while courts play “goalie” to ensure both that legislation is constitutional and that it is reasonably and legally applied to the facts at hand.

To others, however, Chevron is a perversion of the separation of powers, and represents an abdication of the judicial branch’s constitutional mandate to interpret laws passed by Congress. This view is shared by Justice Gorsuch. Gorsuch is also concerned that Chevron deference allows regulatory agencies to change their interpretations of a statute over time—making compliance for regulated entities more complicated and introducing uncertainty.

As evidenced by the controversy in the 1984 case that gave rise to Chevron deference, “interpretive fluidity” is nothing new. The Trump Administration’s recent efforts to repeal and reverse many of the Obama EPA’s regulatory initiatives simply follow Obama’s efforts to reverse the Bush EPA’s policies and initiatives. Whether interpretative fluidity is seen as a defect or benefit of Chevron is in the eye of the beholder. Given the unfortunate hyper-politicization of environmental issues today, interpretative fluidity is a benefit if you agree with the party residing in the White House, and undoubtedly a defect if you are on the outside looking in.

In an effort to end Chevron, Republicans in Congress have proposed various pieces of legislation over the past several years, including the Separation of Powers Restoration Act of 2016 and the Regulatory Accountability Act of 2017. Both pieces of legislation (which left the House, but failed to pass the Senate) would have required courts to “decide all relevant questions of law [and] interpret constitutional and statutory provisions”. Either Act if signed into law would have put an end to Chevron as a governing principle of administrative law.

For many, the political safeguard that Chevron provides lies in the very fact that control of the White House and EPA changes hands every 4–8 years. Federal judges, on the other hand, enjoy lifetime appointments to the bench. While judges at all levels are expected to be apolitical, the reality is that the judicial appointment process has become highly politicized (with both parties at fault) in recent years.

While Chevron has clearly been a less-than-perfect solution for nearly 35 years, it has nonetheless been a serviceable approach to resolving administrative controversies. Should Chevron deference end, the result could be that one party’s views on the environment controls EPAs approach to regulatory policy-making and enforcement for many years “from beyond the grave” by reflecting the political views of whichever President appointed the judge (or judges) in question to their lifetime on the federal bench.

**EPA’s Long-Awaited Reversal of its MACT ‘Once In, Always In’ Policy**

On January 25, 2018, EPA announced the reversal of its highly contentious 23-year-old “Once In, Always In” policy pertaining to major source Maximum Achievable Control Technology (MACT) applicability. EPA had maintained since 1995 that a facility subject to a major source MACT standard on that standard’s initial compliance date was forever stuck complying with the MACT, regardless of subsequent reductions in hazardous air pollutant (HAP) potential to emit or synthetic minor limits that may have rendered the facility non-major (i.e., dropping HAP potential to emit below 10 tons per year for a single HAP, or 25 tons per year for any combination of HAPs).

Proponents of “Once In, Always In” touted the policy as critical to maintaining nationwide HAP emissions reductions attributable to MACT standards, and in preventing
“backsliding”. Assume, for example, that the MACT floor for an existing source in a certain standard mandated installation of control equipment with 99-percent control efficiency. Assume also that the existing source in question emitted 10 tons per year of the target HAP prior to the MACT’s initial compliance date. After MACT, the source in question would emit 0.1 tons per year of the target HAP (10 tons per year less 99%). That same source, however, would be capable of avoiding MACT major status by accepting a federally-enforceable synthetic minor permit limit of 9.9 tons per year. No longer subject to MACT, the hypothetical source would now be able to emit 99 times more HAP than it was allowed to emit while it was subject to MACT.

Questions of backsliding aside, the practical question is “who can benefit from this policy change now?” The vast majority of MACT standards were promulgated in the late 1990s and early 2000s. Target industries spent untold billions of dollars to engineer, design, purchase, and install air pollution control retrofits to meet MACT compliance deadlines. Many sources not “major” for criteria pollutant emissions were forced to obtain Title V permits simply due to their HAP major status. How much, if any, of this can be undone?

Regulated entities who have the most to gain from EPA’s reversal might be those who could easily take synthetic minor HAP limits, avoid onerous MACT compliance obligations (e.g., leak detection and repair requirements commonly found in MACTs applicable in the petroleum and chemical industries), and perhaps save on air pollution control operating expenses. In addition, some facilities who have been subject to MACT for 10 or more years may have MACT mandated air pollution control equipment that is nearing the end of its projected useful life. These facilities may find that synthetic minor limits on HAP emissions to get out of MACT are more cost effective than huge capital expenditures on replacement systems.

Those who are thinking of taking advantage of EPA’s policy reversal should be wary of potential synthetic minor permit appeals by citizens groups and environmental organizations such as the Sierra Club. As would be expected, the end of “Once In, Always In” has been greeted negatively by environmentalists as a continuation of the Trump Administration’s perceived attacks on the environment. While difficult to quantify, the possibility of negative publicity and reputational damage should be factored into any economic analysis of the benefits of seeking to get out of applicable MACTs.

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