

Agency Deference Doctrines and the Trump Administration's Regulatory Reform Efforts

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Agency deference issues matter to agriculture

U.S. agriculture is heavily affected by regulatory decisions, actions, and interpretations issued by **federal agencies**. For example:

- Wetlands determinations made by the USDA NRCS;
- Notices of alleged Clean Water Act violations issued by the EPA;
- Food safety rules issued by FDA and by USDA FSIS; and
- USDA RMA Final Agency Determinations governing federal crop insurance.

Persons who challenge a particular agency action confront **the reality that agency action is commonly given considerable deference by courts**.

Judicial Review of Agency Action: Deference Doctrines and Standards of Review

Agency deference doctrines and standards of review – some basics

- Judicial review in federal administrative law follows an “**appellate review**” model:
 - Typically, **judges review the agency’s “record”** and don’t create their own evidentiary record. And they don’t substitute their own findings of fact for those of the agency.
 - When reviewing an agency’s record, federal courts apply varying deference doctrines and other standards of review to determine whether an agency action should be “set aside.”

Agency deference doctrines and standards of review – overview

- **Questions of law:**
 - *Chevron* deference – statutory interpretation
 - *Skidmore* deference – statutory interpretation
 - *Auer/Seminole Rock* deference – interpretation of agency regulations
- **Questions of fact:**
 - “Substantial evidence” review of factual findings in adjudications
- **Overarching standard for reviewing agency action (always in background):**
 - Review for “arbitrary and capricious” agency conduct – review for rationality, reasoned explanations, reasoned changes in course

Questions of Law: the Administrative Procedure Act

“The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action.” 5 U.S.C. § 706.

What does this language mean? For some, the language means de novo review – in other words, “that courts, not agencies, will authoritatively resolve [legal] ambiguities.” *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring).

Nonetheless, courts have long applied various deference doctrines in reviewing agency interpretations.

Chevron deference – review of agency statutory interpretations

“*Chevron* established a familiar **two-step** procedure for evaluating whether an agency's interpretation of a statute [that the agency administers] is lawful.

- At the first step, we ask whether the statute's plain terms ‘directly address[s] the precise question at issue.’
- If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is ‘a reasonable policy choice for the agency to make.’ ”

Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005)
(quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842, 845 (1984))

Chevron deference – is triggered by only some kinds of agency determinations

Chevron deference typically applies to statutory interpretations set forth in **(1) regulations issued after notice and comment and (2) formal agency adjudications**.

Interpretations articulated by less formal processes typically do not receive *Chevron* deference.

“**Interpretations** such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of **which lack the force of law—do not warrant *Chevron*-style deference.**”

Christensen v. Harris County, 529 U.S. 576, 587 (2000)

Chevron deference example

The Clean Water Act requires the use of the “**best** technology available for minimizing adverse environmental impact.”

“Best” may have more than one meaning (does it mean the most *environmentally beneficial* technology or the most *cost-effective* technology, or something else?).

Holding: EPA may consider cost-benefit analysis when determining what technology is “best.”

Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009)

A second *Chevron* deference example

The Endangered Species Act makes it unlawful “to harass, **harm**, pursue, hunt, shoot, wound, kill, trap, capture, or collect” endangered species.

The Secretary of Interior interpreted “**harm**” to “**include habitat modification or degradation** where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”

Holding: Secretary’s regulation is permissible based on *Chevron* deference, because “harm” is susceptible to more than one reasonable interpretation.

Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 US 687, 703-04 (1995)

Some jurists have questioned or criticized *Chevron*.

“[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”

Pereira v. Sessions, 138 S. Ct. 2105 (2018) (Kennedy, J., concurring)

“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. “

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016)
(Gorsuch, J., concurring)

Skidmore deference – may be triggered by more informal agency interpretations

[T]he rulings, interpretations and opinions of the Administrator under this Act, while **not controlling** upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. **The weight of such a judgment in a particular case will depend upon** the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and **all those factors which give it power to persuade**, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)

Skidmore deference example

Holding: For purposes of calculating overtime pay liability under the Fair Labor Standards Act, certain fire hall employees' "on-call" waiting hours are part of their compensable "workweek" hours. The court deferred to the agency's conclusion, "as expressed in the brief *amicus curiae*," that "sleeping and eating time" hours are excluded from the workweek, but that other "on-call" waiting time is included.

Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)

Auer/Seminole Rock deference – how to interpret ambiguous regulations

Agency interpretations of their own regulations are controlling unless "plainly erroneous or inconsistent with the regulation."

Auer v. Robbins, 519 U.S. 452, 461 (1997)
(quotation marks omitted)

Auer/Seminole Rock deference – may be overruled by the Supreme Court (stay tuned)

- Supreme Court heard argument on March 27, 2019, in *Kisor v. Wilkie*.
- The question presented is whether the Court should eliminate *Auer/Seminole Rock* deference.
- The Solicitor General argues that *Auer/Seminole Rock* should be limited, but not overruled in its entirety (see below).

Deference doctrines in agriculture cases – a couple examples

- *Ballanger v. Johanns*, 495 F.3d 866, 872 (8th Cir. 2007) (applying *Chevron* and *Auer/Seminole Rock* deference on review of USDA National Appeals Division (NAD) decision reviewing Farm Services Agency decision holding that landowner had converted wetland and was ineligible for certain farm benefits).
- *Clark v. USDA*, 537 F.3d 934, 941, 943 (8th Cir. 2008) (applying *Skidmore* and *Chevron* deference in similar case)

Deference doctrines in agriculture cases – a couple examples

- *Perfectly Fresh Farms, Inc. v. USDA*, 692 F.3d 960, 967 (9th Cir. 2012) (holding that *Chevron* deference is accorded to USDA Judicial Officer decisions interpreting the Perishable Agricultural Commodities Act (PACA))
- *People for the Ethical Treatment of Animals v. USDA*, 861 F.3d 502, 512 (4th Cir. 2017) (holding that USDA's Animal Welfare Act licensing regulations are entitled to *Chevron* deference)

Questions of fact: the Administrative Procedure Act

“The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . (E) **unsupported by substantial evidence** in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.”

5 U.S.C. § 706(2)

“Substantial evidence” review of agency fact findings in adjudications

“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Accordingly, it must do more than create a suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)

The overarching standard for reviewing agency action (always in background): the APA

“The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be (A) **arbitrary, capricious, an abuse of discretion**, or otherwise not in accordance with the law; . . .”

5 U.S.C. § 706(2)

A short checklist for “arbitrary and capricious” conduct

“Normally, an agency rule would be arbitrary and capricious if the agency has

- **relied on factors which Congress has not intended it to consider,**
- **entirely failed to consider an important aspect of the problem,**
- offered an explanation for its decision that **runs counter to the evidence** before the agency, or
- is so **implausible** that it could not be ascribed to a difference in view or the product of agency expertise.”

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29, 43 (1983)

Review for “arbitrary and capricious” agency conduct – review for rationality

“[T]he agency must examine the relevant data and **articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’**”

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The agency may change policy course (if it does it the right way).

“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)

Note: Technical and scientific determinations are typically reviewed very deferentially

“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”

Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983)

Agriculture example: agency action held arbitrary and capricious

Maple Drive Farms Ltd. P'ship v. Vilsack, 781 F.3d 837, 852 (6th Cir. 2015) (USDA NRCS had acted arbitrarily and capriciously in failing to consider landowner's evidence that wetland conversion had only a minimal effect on wetlands in area); *id.* at 856 (FSA deputy administrator had acted arbitrarily and capriciously in denying penalty-reduction request) ("The deputy administrator ... must anchor his reasoning in the proper law.")

Trump Administration
Regulatory Reform Efforts:
A Few Highlights

Regulatory reform items – overview

1. New Executive Orders
2. Sessions Memo
3. Brand Memo
4. Justice Manual
5. DOJ's brief in *Kisor v. Wilkie*

Trump Administration Executive Orders on Deregulation

Agencies must repeal two regulations for every one regulation; offset new compliance costs by eliminating compliance costs associated with two prior regulations; and meet an “annual cap” of incremental regulatory costs set by the OMB Director.

*Reducing Regulation and Controlling Regulatory Costs,
Executive Order 13771*

See also Executive Order 13777 (implementing E.O. 13771 through agency regulatory reform task forces).

The Sessions Memo

Then-Attorney General Jeff Sessions issued a memo on November 16, 2017, prohibiting DOJ from issuing guidance documents that purport to regulate persons or entities outside the Executive Branch.

The memo provides that it is not enforceable in court.

The Brand Memo

Signed by then-Associate Attorney General Rachel Brand on January 25, 2018, the Brand Memo directs DOJ attorneys to not use agency guidance documents as the legal basis for pursuing affirmative civil enforcement actions, including actions “to recover government money lost to fraud or other misconduct or to impose penalties for violation of Federal health, safety, civil rights or environmental laws.”

The memo provides that it is not enforceable in court.

The Justice Manual

The Justice Manual (formerly the US Attorneys' Manual) largely codifies the Sessions and Brand Memos, extending the latter to criminal enforcement actions.

At the same time, the Manual non-exhaustively enumerates some categories of cases in which DOJ lawyers *may* use agency guidance documents in litigation. (JM 1-20.200)

Note: The Manual provides that it is not enforceable in court.

The Justice Manual

The Manual provides that DOJ lawyers may use agency guidance

- (a) as evidence of scienter, notice, knowledge, or *mens rea*
- (b) as evidence of professional or industry standards or practices and of duties, customs, or practices with respect to government agencies
- (c) as evidence of scientific or technical processes
- (d) as evidence of a party's compliance (or failure to comply) with guidance
- (e) to provide legal or factual context

DOJ's brief in *Kisor v. Wilkie* – *Auer* is problematic, but don't overrule it completely.

DOJ argues that *Auer* should be limited, not overruled completely:

Defer to the agency only if (1) the court determines (after exhausting traditional tools of construction) that the regulation is truly ambiguous, if (2) the agency's interpretation is reasonable, and if "[3] the interpretation was issued with fair notice to regulated parties; [4] is not inconsistent with the agency's prior views; [5] rests on the agency's expertise; and [6] represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees."

A final note: remember the states

- Each state has its own administrative law system. The systems in some states are quite different from the federal system.
- Many states do not have *Chevron* deference, for example.

Thank you.

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U.S. Agriculture and Deference to USDA Decision-making:
Recent and Emerging Issues

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Introduction

- This portion of the presentation is presented from the perspective of an Attorney who regularly represents farmers in their appeals from determinations of the Farm Service Agency (FSA), Natural Resources Conservation Service (NRCS), and Risk Management Agency (RMA).
- Such disputes take a variety of paths towards resolution but one thing is clear, Courts provide significant deference to administrative determinations by USDA. A review of USDC opinions should settle any dispute as to this fact.

Appeals from USDA Agency Decisions

- Most of my Cases begin initially at the National Appeals Division (NAD)
- For a USDA Program Participant, deference begins at the administrative level . . .
 - Burden of proof. The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.
 - 7 CFR § 11.8(e)

Judicial Review

- Begins After Administrative Appeals are Exhausted
- 7 U.S.C. § 6999 provides for Judicial Review of all final determinations of the United States Department of Agriculture's National Appeals Division by United States District Courts

The Boiler-Plate Standard of Review

- A review of "the Standard of Review" cited by any U.S. District Court or Appellate Court will reveal the usual language:
 - Arbitrary & Capricious
 - Substantial Evidence
- Judicial Review of agency action does not mean "that we must rubber-stamp the agency decision as correct," and, "rather, the reviewing court must assure itself that the agency decision was based on a consideration of the relevant factors (and that the agency) has exercised a reasoned discretion."

Standard of Review

- You will note that the standard language covering review of Agency Determinations does not include a discussion of whether the Agency reached the correct conclusion as to fact or law.
- Reported Cases often include language indicating a “thorough review” that must be given agency decision-making, BUT . . .
 - There exist very few successful challenges at the D.C. level.
 - Underlying pleadings indicate many arguments are disregarded by the Courts
 - Check out Pacer- Deference is Real

Deference Given To USDA by Courts

- Seems to be Greater than that Given to Other Agencies
 - While there is case-law indicating that certain Agencies should not be granted Chevron Deference as to their interpretation of Certain Agency Procedures, Appellate Courts have given substantial deference to USDA Agency’s interpretations of Agency handbooks and Procedures.
- *Bottoms Farm Partnership v. Perdue*, 895 F.3d 1070 (8th Cir., 2018).
 - -Substantial Deference must be given to the FCIC’s interpretation of the special provisions of crop insurance which were not codified as Federal Regulation. *Citing Rain and Hail Ins. Service, Inc. v. Federal Crop Ins. Corp.*, 426 F.3d 976, 979-80 (8th Cir. 2005). (giving substantial deference to the Agency’s interpretation because of the agency’s delegated authority).
 - FCIC interpretation did not involve: (a) the interpretation of a statute the agency was charged to administer; (b) the interpretation by the agency of a regulation promulgated by the agency; or, (c) the interpretation of a rule adopted by the agency in the exercise of authority delegated by Congress to make rules carrying the force of law. – *Skidmore Deference?*

District Court Review

- It does not appear that most District Courts get caught up in the proper level of Deference
- Much more discussion of the Administrative Procedure Act and Statutory bases for review.
 - A Federal District Court may “set aside agency action, findings, and conclusions” that the Court determines to be
 - Arbitrary and Capricious or
 - Unsupported by Substantial Evidence
 - See 5 U.S.C. 706 (2)

“Arbitrary and Capricious” vs. “Substantial Evidence”

- Are these terms interchangeable and do they signal the application of the same standard in review of an Agency Decision?
- I would suggest that the several Courts have muddied the application of these Statutory bases for reversal of an Agency determination

Substantial Evidence

- “Substantial Evidence” is most often the proper basis for review of a factual dispute appealed to a District Court from a decision by the USDA NAD
- NAD Appeals are reviewed on “the Record” pursuant to statute. 7 U.S.C. § 6999.

Substantial Evidence Once Meant . . .

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion

Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (Fed. 11th Cir., 2002). See also *Universal Camera v. Nat. L. Rel. Bd.*, 340 U.S. 474, 477, (1951).

Evidence is not substantial if it is overwhelmed by other evidence

Ellison v. Sullivan, 929 F.2d 534, 536 (10th Cir.1990)

Evidence Not Substantial if it constitutes mere conclusion

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994).

Substantial Evidence Once Meant . . .

- There is a line of case-law that indicated a consideration of the reasonableness of the conclusion by the Agency was proper.
- Certainly a consideration of the weight of the evidence was contemplated by Appellate Courts.

The Emerging View in the 11th Circuit

- **“The substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or reweighing the evidence.”**
 - -*Spring Creek Farming Co. v. Federal Crop. Ins. Corp.*, 653 Fed. Appx. 728 (11th Cir. 2016) citing *Stone & Webster Const., Inc. v. U.S. Dep’t of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012).
 - Case where there was an undisputed yield loss, actual witnesses testified to the presence of drought, and numerous drought claims were paid in the County, yet RMA denied the claim on the basis that they did not believe drought was a cause of loss common to the area. District Court and Appellate Court affirmed

“Substantial Evidence” in USDA Cases

- “The more technical and complex the regulatory area is, the more the Courts defer to the Expertise of the Agency as a matter of public policy.”
 - *Dawson Farms. v. Risk Mgmt. Agency*, No. 09-67, 2011 WL 3862195 (D.N.D. Aug. 31, 2011) quoting *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).
- “The substantial evidence test is similar to the arbitrary and capricious standard, but it applies to factual findings.”
 - *Spring Creek Farming Co. v. Federal Crop. Ins. Corp.*, 653 Fed. Appx. 728 (11th Cir. 2016).
- “Arbitrary and Capricious” and “Substantial Evidence” are the same standard and used interchangeably.

On a more positive note

- A review of USDA NAD Determinations and Appeals to US District Court’s reveal that there are themes upon which an Appellant may prevail. What appears to be important is
 - Defining the factors relevant to proper decision-making
 - Limiting *post hac* rationalization by the Agency and Agency Counsel
 - A good record is key
 - Highlighting Contradictions in Agency Guidance/Regulations
 - Showing Disparate Treatment of Similarly Situated Appellants

What are the Relevant Decision-Making Factors?

- Under the arbitrary and capricious standard, we must consider whether an agency's decision "was based on a consideration of the relevant factors."
 - *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir., 2006).
- *Mages v. Johanns*, 431 F.3d 1132 (8th Cir. 2005).
 - Mages did not challenge USDA factual interpretations but instead argued against an adverse determination of eligibility.
 - The 8th Circuit held the Agency to its written regulatory requirements as the decision-making factors.

Post Hoc Rationalization

- Record Review means record review
- In reviewing an Agency action, the law is clear that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Gatewood v. Outlaw*, 560 F.3d 843 (8th Cir., 2009) [citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156](#), 168 (1962).

Highlighting Agency Contradictions

- USDA publishes a wealth of information
 - Regulations, Handbooks, Bulletins, etc.
 - These documents have differing priorities in application
- Agency regulations on which individuals are entitled to rely must also bind the Agency. *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942).

Disparate Treatment of Program Participants

- The Eleventh Circuit has held Agency denial of program participation benefits to be arbitrary and capricious when other similarly situated producers are allowed to receive those same Federal Farm Program Benefits.
 - *Mahon v. U.S. Dept. of Agriculture*, 486 F.3d 1247 (11th Cir. 2007).
- **“this court is convinced that the Agency acted arbitrarily and capriciously by treating similarly situated producers differently, and by ignoring evidence which supported the Mahon's claims.”**

Accardi Doctrine

- The "Accardi doctrine . . . provides that when an agency fails to follow its own procedures and regulations, that agency's actions are generally invalid." *Nader v. Blair*, 549 F.3d 953, 962 (4th Cir. 2008) (citing United States ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).
- The *Accardi* Doctrine stands for the proposition that a Federal Agency must follow its own regulations and procedures when adjudicating the rights of others. This Doctrine has been referred to as "the long-settled principle that the rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency." *Montilla v. I.N.S.*, 926 F.2d 162 (C.A.2, 1991) citing *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942).

Questions?

- Thank you.
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