Chapter 3

Administrative Law

The laws that protect wetlands in the United States are administered by the United States Environmental Protection Agency (EPA), the United States Army Corps of Engineers (the Corps), and a variety of other federal, state and local agencies. It is important, therefore, to understand the basic principles of administrative law in order to comprehend the nuances of federal and state wetlands protection laws. This Chapter provides a general introduction to administrative agencies and administrative law. Although the Chapter focuses primarily on federal agencies, state and local agencies are often governed by state laws that closely resemble the federal laws.

I. Nature of Administrative Agencies

Resources

List of Federal Agencies from USA.gov and the Federal Register
Administrative Conference of the U.S. (ACUS)
Office of Management and Budget (White House)
Sourcebook of U.S. Executive Agencies (ACUS)

Administrative agencies are ubiquitous. Think, for a moment, about your typical day. Your alarm clock wakes you to the sounds of your favorite radio station. That station is licensed and regulated by the Federal Communications Commission, a federal administrative agency. As you jump into the shower, the water may be delivered to your home by a municipal or regional water authority, a public utility, which is usually regulated by a state utility commission. The water quality is regulated by federal and state environmental or health agencies.

When you go to the kitchen for breakfast and pour yourself a bowl of cereal, you'll notice that the cereal package includes nutritional labels required by the Food and Drug Administration. In addition, the production of the ingredients in the cereal, and in most of the other foods that you put on your breakfast table, is likely regulated by federal, state and maybe local agricultural and environmental agencies. Those products were produced by businesses that were required to adhere to fair labor standards and workplace safety standards set by federal and state labor departments. The electricity in your home is most likely provided by a utility that is regulated by federal and state energy, environmental and labor agencies, as well as state utility commissions.

If you drive to work, the car that you are driving was also likely produced in a factory that was subject to fair labor and workplace safety standards. In addition, the car was

built to comply with safety and environmental standards set by federal and state transportation and environmental agencies. Indeed, it is hard to identify events in your daily routine that are not touched, in some way, by administrative agency regulation.

Administrative agencies exist at the federal, state and local levels and are often referred to as the "***fourth branch***" of government. As is obvious from the discussion above, agencies exert broad authorities over public and private activities. Moreover, agencies can take a variety of types of actions. First, agencies often create standards, limits or other requirements that apply to the communities that they regulate (***rulemaking***). For instance, an environmental agency may set limits on the amount of lead that can be emitted into the air by a factory or a car. As another example, in the context of wetlands regulation, the EPA and Corps establish rules that outline the requirements for obtaining a permit to fill wetlands under the Clean Water Act. *See* Chapter 6, *infra.*

In addition to setting standards and making rules, agencies apply the law and the rules that they make to specific factual situations on a case-by-case basis (***adjudication***). In the wetlands context, for instance, the Corps decides whether to issue or deny a wetlands permit, and what conditions to include in the permit, by applying the Clean Water Act and its regulations to the developer's proposed activity. *See* Chapter 6, *infra.* Similarly, the Corps or EPA can bring an administrative or judicial enforcement action against a person when the agency determines that the person's activities violate the Clean Water Act and/or the agency's regulations. *See* Chapter 10, *infra*.

In order to create rules and to make decisions on a case-by-case basis, agencies also collect information from the regulated community and other sources. They maintain that information, make much of it available to the public and often create reports based on the information.

Consequently, administrative agencies engage in activities that can be characterized as ***legislative*** (setting standards and establishing other rules), ***judicial*** (applying the law to facts on a case-by-case basis) and ***executive*** (implementing and administering the law). This ***combination of functions*** in federal administrative agencies creates some tensions, because the United States Constitution exclusively assigns these functions to other branches of government. Article I of the Constitution creates the Legislative Branch, and provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I. Similarly, Article III creates the Judicial Branch, and provides that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const., Art. III. Finally, Article II of the Constitution provides that "[t]he executive power shall be vested in a President of the United States." U.S. Const., Art. II. In contrast to those direct statements, there is no provision in the Constitution that explicitly creates or authorizes the creation of administrative agencies or authorizes them to carry out powers delegated to the legislative, judicial or executive branches of government. Similar separation-of-powers concerns can arise under state constitutions, which also do not explicitly provide for

state administrative agencies.

Nevertheless, agencies have flourished throughout the twentieth and twenty-first centuries and courts have generally upheld most delegations of authority to agencies against constitutional challenges, as discussed further below.

II. Limits on Agency Authority

A. Statutory Limits

Agencies are created by statutes. The composition of agencies, their authorities, and any limits on their authorities are set forth in legislation. Congress or a state legislature often initially creates an agency through an "***organic statute,***" but the legislature frequently expands or limits the agency's powers through other statutes that target the specific agency or statutes that apply generically to a group of agencies or to all agencies. For example, EPA was initially created by a Presidential Reorganization Plan that reassigned responsibilities of other federal administrative agencies to EPA, *see* Office of the President, *Reorganization Plan No. 3 of 1970* (July 9, 1970), but Congress subsequently passed dozens of laws that expanded or limited EPA's authority to regulate various activities. As noted throughout this book, the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.,* establishes most of the authorities and limits on authority for wetlands regulation by EPA and the Army Corps.

As noted above, Congress frequently authorizes, and sometimes requires, agencies to set standards or to promulgate rules that apply generally to persons or entities regulated by the statute. There are several reasons why Congress gives this power, which seems like law-making authority, to agencies. In some cases, the legislature simply does not have the ***time*** to set standards at the level of detail that is necessary to implement the law. For instance, the Clean Water Act imposes limits on hundreds of different types of industries regarding the amount of potentially hundreds of different types of pollutants that they might discharge based on technologies that those industries can use to reduce or eliminate those pollutants. *See* U.S. Environmental Protection Agency, *Water: Industry Effluent Guidelines*. When Congress created the program limiting those pollutants, it delegated to the EPA the authority to establish specific numerical limits on the industries through a rulemaking process, rather than trying to establish those thousands of numerical limits in the statute itself. *See* 33 U.S.C. § 1311.

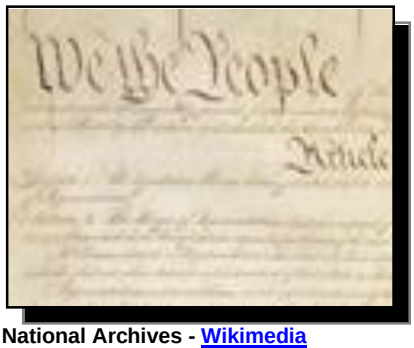
In addition to not having the time to enact detailed standards, Congress also may not have the ***expertise*** to determine what specific numerical standards may be appropriate for specific industries. Although the legislature will likely have some experts on staff, they will not have the resources that are available to an administrative agency, which will also have the experience of implementing the law on a day-to-day basis. Continuing with the Clean Water Act example, because an agency may be better equipped to determine the specific numerical pollutant limits, Congress will often give the agency general directions regarding how to set those numerical limits but allow the

agency to establish the limits through a rulemaking process.

There are a few other reasons why Congress frequently delegates authority to agencies to make rules. To the extent that regulatory restrictions in a law are based on specific technological, economic, or other assumptions that are in existence at the time the restrictions are put in place, those restrictions may no longer be appropriate when the technological, economic or other circumstances change. If Congress were to have set the regulatory restrictions by statute, Congress could only change the restrictions by enacting another statute. When Congress delegates the authority to an agency to set the restrictions through rulemaking, however, the agency can ***respond to changing circumstances*** by changing the requirements through rulemaking, as opposed to waiting for legislative consensus. In theory, the rulemaking process should be faster than the legislative process. In practice, that is not always true.

A final reason why Congress may delegate authority to an agency to make rules, rather than setting the standards directly through legislation, is that Congress may ***lack the political will*** to set the standards itself. Delegating to an agency the authority to set specific standards gives Congress political cover from difficult political issues in implementation of the legislation.

B. Constitutional Limits



National Archives - Wikimedia

While agencies are created by statute, Congress cannot amend the Constitution simply by enacting a statute. Consequently, at the dawn of the era of administrative law, opponents of agency rulemaking frequently asserted that the delegation of rulemaking authority to an agency violated constitutional ***separation of powers principles***, on the basis that Article I vests legislative powers exclusively in Congress. The United States Supreme Court outlined the limits of Congress' authority to delegate rulemaking authority to agencies in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), when the Court held that Congress could constitutionally delegate ratemaking authority as long as it set forth "by legislative act an ***intelligible principle*** to which the person or body authorized to fix rates is directed to conform." Thus, as long as Congress provides a very general standard for the agency to use to set more specific standards, courts will uphold the statutory delegation of rulemaking authority against a constitutional challenge. The Supreme Court has not struck down a federal statute on the grounds that it constituted an excessive delegation of legislative authority since 1935, when it invalidated codes of fair competition established under the National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). Since that time, the Court has upheld broad delegations of authority, including the authority to set "just and reasonable rates", *see* *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944), to set prices that are "fair and equitable", *see* *Yakus v. United States,* 321 U.S. 414 (1944), and to regulate licensing "as public interest, convenience, or

necessity require". *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943). In a more recent decision in the environmental arena, the Supreme Court upheld the Clean Air Act delegation of authority to EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." *See* Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001).

The delegation of ***adjudicative authority*** to agencies has *also* been challenged as a violation of ***separation of powers*** principles. Becausec Article III vests all judicial power in the Article III courts, critics have argued that the delegation of authority to agencies to apply the law to facts on a case-by-case basis to issue or deny permits, to impose penalties, or to take other adjudicative actions violates the Constitution. A discussion of the case law interpreting the constitutional limits on the delegation of adjudicative authority to agencies is beyond the scope of this book. In the wetlands context, however, most final administrative adjudications can be challenged at some point in an Article III court, so the separation of powers issue has not proven problematic in the context of federal wetland regulation.

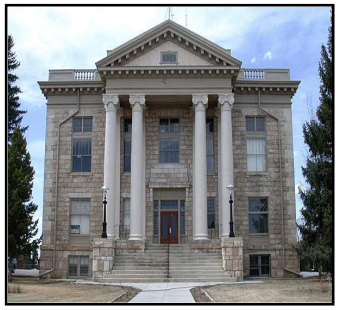
C. Limits Imposed by Other Branches

Although agencies are referred to as the "fourth branch" of government, the other branches can influence agencies actions in a variety of ways. Because the source and limits of agencies' powers are set by statute, ***Congress*** can exert significant influence over agencies by passing laws that reduce or eliminate agencies' powers if Congress opposes actions taken by agencies. Similarly, agencies rely on annual appropriations legislation from Congress to fund their activities, so Congress can exert influence over agencies by decreasing, or threatening to decrease, an agency's budget. In the wetlands context, Congress has frequently attached riders to appropriations legislation that limit the authority of the Corps to implement policies with which Congress disagrees. *See* Chapter 4, *infra.* In addition to those powers, the Senate has the power to approve the appointment of "officers," which can include high ranking agency officials. *See* U.S. Const., Art. II, § 2. The Senate may block or delay appointments of those officials if the Senate opposes the potential candidate or, sometimes, if the Senate opposes the policies that have been adopted by the agency. Even when Congress does not actually exercise any of these powers, it can exert control over agencies by threatening to exercise them. Congress frequently holds oversight hearings, calling agency leaders to testify regarding actions taken by the agency or to testify regarding proposed legislative changes.

The ***President*** also exerts control and influence over agencies, including the Corps and EPA. The White House has ultimate control over the budget, legislative proposals, and litigation positions taken by Executive Branch agencies. Although the agencies can develop budget requests, the requests are coordinated through the White House Office of Management and Budget (OMB) and the White House makes the ultimate decision

regarding the amount of funds to request for each agency. Similarly, agencies cannot work with legislators independently to advance legislative proposals to expand their authorities or eliminate responsibilities. Legislative proposals, like budget requests, must be coordinated through the OMB. OMB also reviews major regulations developed by agencies, as well as regulatory agendas and various guidance documents prepared by agencies. For litigation, Executive Branch agencies are generally represented by the Department of Justice, so the White House also can exert some control over the positions taken in litigation by agencies. The President also has the power to appoint and remove officers of the United States, which includes high ranking agency officials. *See* U.S. Const., Art. II, § 2.

One of the more formal ways that the President controls Executive Branch agencies is through the issuance of Executive Orders. Executive Orders are not laws; instead, they direct agencies, where agencies have discretion, to implement policies, take actions, or follow procedures outlined in the order. Because an Executive Order is not a law, it cannot change existing law, but it can influence the manner in which agencies exercise discretion afforded to them under existing laws. Executive Orders cannot be challenged in court, but some orders have been held to be enforceable in administrative proceedings. Over the years, Presidents have issued several Executive Orders that apply to the development of wetlands regulations and other regulations, including an Executive Order that requires agencies to weigh the costs and benefits of major rules, *see* Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993), and an Executive Order that requires agencies to consider whether their actions may unconstitutionally "take" property. *See* Executive Order 12630, 53 Fed. Reg. 8859 (Mar. 15, 1988).



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The judicial branch also exerts control. Because the courts have the ultimate authority to adjudicate disputes involving the Clean Water Act and other wetlands protection laws, the judicial branch can limit agencies by invalidating their actions if they misinterpret the law, fail to follow procedures required by statutes, regulations, or the Constitution, or make decisions that are unreasonable. Those limits are explored more fully in the judicial review section of this Chapter.

III. Procedural Requirements for Agency Action

Although agencies engage in a variety of different activities, most agency actions can be categorized as either ***rulemaking*** or ***adjudication***. As noted above, adjudication involves the application of law to a specific set of facts, while rulemaking involves establishing a general standard or obligation that applies broadly and prospectively. The Administrative Procedures Act (APA), the federal statute that establishes the procedures that all agencies must follow and that outlines the manner in which agency

actions can be challenged in court, defines a "***rule***" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ..." 5 U.S.C. § 551(4). The Act defines "***adjudication***", as "agency process for formulation of an order", 5 U.S.C. § 551(7), and defines "***order***" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). Although rulemaking and adjudication are distinct categories of agency actions, an agency can generally interpret and clarify ambiguous provisions of a statute ***either*** through rulemaking or in an adjudication, if Congress has given the agency both powers and has not required the agency to use a specific procedure to interpret the statute. *See* *Securities and Exchange Commission v. Chenery,* 332 U.S. 194 (1947).

Within the broad category of ***rulemaking***, an agency's rules can be divided into ***legislative rules*** (sometimes called *"substantive rules*") and ***non-legislative rules***. When Congress, in a statute, authorizes an agency to makes rules that have the force of law and the agency adopts rules pursuant to that statutory authority, following the required administrative procedures (generally known as "notice and comment" rulemaking), the rules are ***legislative rules.*** For example, the Clean Water Act authorizes EPA to issue any regulations that are necessary to carry out the agency's functions under the Act, *see* 33 U.S.C. § 1361(a), and authorizes the Corps to adopt regulations to implement the Section 404 permit program. *See* 33 U.S.C. § 1344. Thus, when EPA adopts rules to clarify the meaning of the statutory term "waters of the United States," which is not defined in the Clean Water Act, EPA's rules are ***legislative rules***. Similarly, the Corps' section 404 permitting regulations, the 404(b)(1) Guidelines adopted by EPA, with the Corps, and the compensatory mitigation regulations adopted by EPA and the Corps are ***legislative rules.***

While agencies with legislative rulemaking authority can adopt legislative rules, there are times when an agency does not have legislative rulemaking authority or when an agency has that authority but prefers not to exercise it. In those situations, agencies can still interpret a statute through a ***non-legislative rule.*** Agencies may choose to interpret statutes through non-legislative rules for a variety of reasons. First, as will be discussed below, agencies must follow certain procedures when adopting legislative rules, but are subject to very few procedural requirements when adopting non-legislative rules. Because the legislative rulemaking procedures may be time consuming, an agency may decide to issue a non-legislative rule in order to announce its interpretation of the law more quickly. An agency might also decide to use a non-legislative rule because the agency is still uncertain about its interpretation of the statute and would like to retain the flexibility to change that interpretation without going through a legislative rulemaking process, which it would be required to do if it wanted to change a legislative rule. In addition, because a non-legislative rule is often not a "final agency action," an agency can also generally avoid legal challenges to the rule in court.

Non-legislative rules are issued in a variety of forms, *including interpretative rules, policy statements, guidance documents*, and *enforcement manuals*, among others. In the wetlands context, the Corps issues many legal and policy interpretations in the form of Regulatory Guidance Letters. The delineation manual discussed in Chapter 1 is another example of a non-legislative rule. In addition, important wetlands legal and policy directives of EPA, the Corps, and other federal agencies are included in Memoranda of Agreement and Memoranda of Understanding discussed throughout this book. Federal administrative agencies, across the board, have increasingly interpreted statutes through guidance documents and other non-legislative rules because of the advantages outlined above.

While an agency can save time, avoid litigation, and retain flexibility by interpreting a statute through a non-legislative rule, legislative rules have ***two distinct advantages*** over non-legislative rules. First, legislative rules have the ***force of law*** and agencies do not have to independently justify the basis for the rule when applying it to a specific factual setting. Non-legislative rules, on the other hand, are not binding on the agency or the regulated community. An agency must justify the basis for the legal or policy interpretation adopted in the non-legislative rule when applying it to a specific factual setting. The second important advantage that legislative rules have is that courts will accord an agency more ***deference*** when reviewing the statutory interpretation adopted by the agency in a legislative rule than in a non-legislative rule. The different standards of judicial review that apply to legislative and non-legislative rules are discussed in the judicial review section of this Chapter.

Advantages of Legislative v. Non-Legislative Rules

Legislative Rules	Non-Legislative Rules
Force of Law	Fewer Procedures (Quicker)
Greater Judicial Deference	Easier to Change (More Flexible)
	Harder to Challenge in Court

A. Rulemaking Procedures

The procedures that agencies must follow when adopting rules or making decisions through adjudication are set by the APA, which applies to all federal

Resources

OIRA - Rulemaking Primer
OMB's Reginfo website (Track regulations)
Regulations.gov (Online rulemaking)
Regulation Room (Cornell e-rulemaking project)
Congressional Research Service report on Rulemaking and Judicial Review (2011)
Congressional Research Service report re: number of rules issued by agencies (2013)

agencies, but can be modified by specific statutes, such as the Clean Water Act. The APA requires agencies to follow either ***formal rulemaking procedures*** or ***informal ("notice and comment") rulemaking procedures*** when adopting legislative rules, *see* 5 U.S.C. § 553, but it exempts ***non-legislative rules*** from those procedural requirements. *Id.* § 553(b)(3)(A). ***Formal rulemaking*** involves a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. *See* 5 U.S.C. §§ 556 - 557. An agency must adopt rules through formal rulemaking only when the statute that authorizes the agency to make rules requires the agency to make the rules "on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 553(c). Courts rarely interpret statutes to require formal rulemaking and have not interpreted the Clean Water Act to require formal rulemaking for the regulations adopted by the Corps or EPA.

If an agency is not required to follow formal rulemaking procedures when adopting legislative rules, the agency must follow the APA's ***informal rulemaking procedures***. For informal rulemaking, the APA requires agencies to begin the process by publishing a ***notice of proposed rulemaking*** in the Federal Register, including the terms or substance of the proposed rule, a reference to the legal authority for the rule, and a statement of the time, place and nature of public rulemaking proceedings. *See* 5 U.S.C. § 553(b). The agency is not required to hold public hearings, although it can, but the agency *is* required to provide interested persons an ***opportunity to comment*** on the proposed rule. *Id.* § 553(c). Unlike formal rulemaking, therefore, there is no formal record for the agency's decision and the agency can rely solely on written submissions in formulating its rule. At the end of the comment period, the agency reviews the public input and decides whether to make any changes to the proposed rule based on the comments that the agency received. When the agency has finalized the rule in light of the public input, the APA requires the agency to provide a "***concise general statement of [the] .. basis and purpose***" of the rules, which the agency publishes with the final rule in the Federal Register. *Id.* Agencies do not have to change rules based on the public input, but they must consider the comments, respond to the major comments and identify the "major issues of policy" that they considered in formulating the rule. *See United States of America v. Nova Scotia Food Products Corp.,* 568 F.2d 240 (2d Cir. 1977).

Today, significant portions of the notice-and-comment process take place online, and interested persons are able to view comments submitted by other persons during the comment period, as well as significant amounts of information that the agency relied on in preparing a proposed rule that would not have been as readily accessible before agencies began to carry out the notice and comment process online. *See* Regulations.gov.

While the APA establishes procedures for ***legislative*** (or substantive) ***rules***, it does not require agencies to follow any specific procedures when adopting ***non-legislative rules***. Agencies generally develop such guidance with very little input from the public or notice to the public. Although the APA does not require agencies to follow

procedures in ***developing*** non-legislative rules, the Freedom of Information Act (FOIA) requires federal agencies to ***publish***, in the Federal Register, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." *See* 5 U.S.C. § 552(a)(1)(D). In addition, FOIA requires agencies to ***make available to the public*** other statements of policy or interpretations that haven't been published in the Federal Register, as well as "administrative staff manuals and instructions to staff that affect a member of the public." *Id.* § 552(a)(2).

Congress can impose additional procedural requirements on the development of legislative or non-legislative rules by agencies and, when it does, the rulemaking process is referred to as ***hybrid rulemaking***. However, the Clean Water Act does not require EPA or the Corps to follow additional procedures beyond the APA's when adopting regulations and guidance under the statute.

APA Procedural Requirements for Rulemaking		
Legislative Rules - Formal Rulemaking	Legislative Rules - Informal Rulemaking	Non-Legislative Rules
trial-type hearing before an ALJ; decision "on the record" 5 U.S.C. § 556, 557	notice; opportunity for comment; publication of final rule with a concise general statement of the basis and purpose 5 U.S.C. § 553	publish or make available 5 U.S.C. § 552

Research and Drafting Exercise

Most federal agencies post proposed and final rules, as well as guidance documents and other important public information on their websites. In addition, many federal agencies post proposed rulemakings and documents that support the proposed rulemakings online and allow interested persons to comment online through Regulations.gov Those agencies also make the final rules, supporting documents and comments available on Regulations.gov Guidance documents and other agency materials are also posted on Regulations.gov

1. In 2014, EPA and the Corps of Engineers issued a notice of proposed rulemaking to re-define "waters of the United States" under the Clean Water Act. The proposal was posted on Regulations.gov on April 21, 2014. Search Regulations.gov to find the EPA docket for the proposed rule. When you find it, click on the "Open Docket Folder" link. This lists all of the documents that were posted that are associated with the rulemaking. Who were the agency contacts for the rule?

2. Review the proposed rule and identify: (a) the legal authority for the rule adopted by EPA; (b) the length of the comment period; (c) the proposed definition of "waters of the United States" that would be included in 33 C.F.R. § 328.3(a); (d) whether EPA or the Corps prepared an environmental impact statement or an environmental assessment for the proposed rulemaking.

3. In the supporting documents for the proposed rule, review the economic analysis prepared for the rule and identify the total low and high estimated incremental annual indirect costs and benefits of the proposed rule (per Exhibit 16). Does EPA estimate that benefits of the rule will be greater than the costs?

4. To get a flavor for the nature of public comments submitted in notice and comment rulemaking, search for the docket for the Federal Motor Carrier Safety Administration's (FMCSA) rule restricting the use of cellular phones by drivers of commercial vehicles. (FMCSA-2010-0096). When you find that docket, click on the "Open Docket Folder" link and browse through some of the comments submitted to FMCSA for the rule. Compare, for instance, the comments submitted by Robert Paul Smith or Wildon Clyde Renn III, and those submitted by Edison Electric Institute or the Alliance of Automobile Manufacturers. Review the "Tips for Submitting Effective Comments" on the Regulations.gov page. After reviewing those tips, do you think that the comments of Mr. Smith or the Edison Electric Institute are likely to be more effective?

5. Draft a comment on a proposed rulemaking that you find on Regulations.gov and identify the rulemaking for which the comment is being submitted. DO NOT SUBMIT THE COMMENT ONLINE!! Think about the "Tips for Submitting Effective Comments" as you draft your comment.

B. Adjudication Procedures

Just as the APA establishes minimum procedural requirements for federal agency rulemaking, it also establishes minimum procedural requirements for ***adjudication***. As with rulemaking, the APA creates distinct procedural requirements for ***formal adjudication*** and for ***informal adjudication.*** *See* 5 U.S.C. § 554. The APA requirements for ***formal adjudication*** are similar to the requirements for formal rulemaking and include a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. *See* 5 U.S.C. §§ 554, 556 - 557.

In contrast to the requirements for ***formal adjudication***, the APA includes minimal requirements for ***informal adjudication***. If an agency is denying a written application, petition or request of a person, the statute requires the agency to give the person "prompt notice" and "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The APA does not include any other procedural requirements for informal adjudication, but FOIA requires agencies to "make available for public inspection and copying" any "final opinions ... as well as orders, made in the adjudication of cases." *Id.* § 552(a)(2)(A).

Agencies must follow the APA's ***formal adjudication*** procedures whenever a statute requires the agency to make a decision in adjudication "on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 554(a). Although formal adjudication is much more common than formal rulemaking, courts have not interpreted the Clean Water Act to require the Corps or EPA to use formal adjudication procedures when taking most actions involving wetland regulation under the Clean Water Act, including issuing or denying permits, vetoing permits, or approving or denying a state's request to assume federal permitting authority. However, the agencies ***must*** use formal adjudication procedures when they are imposing Class II penalties, the most severe form of administrative penalties that the Clean Water Act authorizes. *See* 33 U.S.C. § 1319(g)(2)(B).

Hypotheticals

1. 33 U.S.C. § 1361 provides that "The [EPA] Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under [the Clean Water Act.]" If EPA planned to issue rules, under the Clean Water Act, to define the undefined statutory term "waters of the United States", would the agency be required to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing those rules?

2. 33 U.S.C. § 1317(b)(1) provides that "The [EPA] Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for ... [sewage treatment plants]. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. ..." Does the statute require EPA to use formal rulemaking procedures or notice and comment rulemaking when promulgating pretreatment standards?

3. 33 U.S.C. § 1344(a) provides that "The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Does the statute require the Secretary to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing permits?

4. 33 U.S.C. 1344(i), which focuses on federal oversight of states that have taken over administration of the Clean Water Act Section 404 permitting program, provides that "Whenever the Administrator determines after public hearing that a State is not administering a program approved under ... this section, in accordance with this section, the Administrator shall so notify the State, and if appropriate corrective action is not taken within a reasonable time, ... the Administrator shall ... withdraw approval of such program until the Administrator determines such corrective action has been taken..." Does the statute require EPA to use formal adjudication procedures when determining that a State is not administering a permitting program in accordance with Section 404 of the Clean Water Act? Does the statute require EPA to use formal adjudication procedures when determining that the State has taken corrective action and may take over administration of the permitting program again?

IV. Judicial Review of Agency Action

A. Prerequisites for a judicial challenge

In order to challenge an agency action in court, a litigant must generally demonstrate, at a minimum, that: (1) the action is ***reviewable***; (2) the court has ***jurisdiction*** to hear the litigant's challenge and grant the requested relief; (3) the government has ***waived sovereign immunity*** and authorized the suit; and (4) the litigant has ***standing*** to sue.

In addition to establishing minimum procedural requirements for federal agencies, the ***APA*** creates the general framework for judicial review of federal agency actions. It provides that a "final agency action for which there is no other adequate remedy in a court ..[is] subject to judicial review", 5 U.S.C. § 704, and "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. As a result, "***final agency actions***" are presumptively ***reviewable*** in court. Chapter 10 of this book outlines the actions of the Corps and EPA that are "final agency actions" that are reviewable under the APA. The APA's judicial review provisions, including the presumption of reviewability, do not apply when a ***statute precludes judicial review*** or when an ***agency action is committed to agency discretion by law***, *see* 5 U.S.C. § 701(a), but neither of those exceptions have significantly limited judicial review of the EPA's or the Corps' actions in implementing the federal wetlands protection program. Those exceptions are examined in more detail in Chapter 10 of this book.

The APA does not grant ***subject matter jurisdiction*** to any court to hear the challenges that it makes reviewable, so litigants must rely on another statute to demonstrate jurisdiction. If the statute that authorizes the agency to take the action that a litigant wants to challenge does not include a provision that grants jurisdiction to a court to hear challenges to that action, litigants can frequently rely on 28 U.S.C. § 1331 (the ***general federal question*** jurisdiction statute) or other general jurisdictional statutes to establish jurisdiction for their lawsuit. The general federal question jurisdiction statute provides "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* Although the Clean Water Act includes a judicial review provision that explicitly authorizes courts to review EPA actions outside of the wetlands context, litigants must generally rely on 28 U.S.C. § 1331 to establish jurisdiction to challenge actions of EPA and the Corps in administering the federal wetlands protection program. However, if a litigant is challenging the government's action as an unconstitutional "taking" of property, federal statutes grant jurisdiction to the Court of Federal Claims or federal district courts (depending on the amount in controversy) to hear those challenges. *See* 28 U.S.C. §§ 1346, 1491. Takings claims are discussed at length in Chapter 11 of this book.

The general federal question jurisdiction statute does not waive the government's ***sovereign immunity***, but the ***APA*** waives sovereign immunity to the extent that a litigant is seeking declaratory and injunctive relief, as opposed to money damages. *See* 5 U.S.C. § 702. In the wetlands context, litigants that are challenging actions of the Corps or EPA are generally seeking declaratory or injunctive relief, rather than money damages, so the APA waiver of sovereign immunity is sufficient for their challenges. When litigants are challenging federal agency actions as a "taking" of their property, the statutes that grant the court jurisdiction to hear those claims waive sovereign immunity of the government for the money damages authorized by those statutes.

As noted above, in addition to demonstrating reviewability, jurisdiction, and a waiver of sovereign immunity, litigants must demonstrate that they have ***standing*** to sue. Chapter 10 of this book discusses the standing requirement, as well as other limits on judicial review, including mootness, ripeness, and statutes of limitation.

B. Standards for judicial review

Although Congress can vary the standards for review of agency actions, the APA establishes standards that generally apply to judicial review of agency actions under that statute. Specifically, the APA provides that a reviewing court shall:

> (2) 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 law;
> > (B) contrary to constitutional right, power, privilege, or immunity;
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> > (D) without observance of procedure required by law;
> > (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; or
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

5 U.S.C. § 706.

The standard that applies most frequently on judicial review of an agency's action is the ***arbitrary and capricious standard***. The standard applies to all factual determinations made by agencies outside of formal hearing procedures, as well as policy determinations made by agencies. It is a narrow standard of review, which focuses on whether the agency decision "was based on a consideration of relevant factors and whether there has been a clear error of judgment..." *See* *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). As a result, if an agency does not explain its decision, ignores relevant factors in reaching its decision, or makes a decision that seems clearly unreasonable in light of the information considered by the agency, a court will find that the agency's action is arbitrary and capricious. When an agency is making determinations "within its special expertise, at the frontiers of science", the Supreme Court has counseled that a reviewing court "must generally be at its most deferential." *See* *Baltimore Gas & Electric Co. v. Natural Resources Defense Council,* 462 U.S. 87, 103 (1983).

Although the standard is quite deferential, courts reviewing an agency's policy determinations occasionally apply a more rigorous, less deferential version of the

standard, referred to as “hard look” arbitrary and capricious review. For instance, in *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), the Supreme Court held that an agency decision is 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, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

Regardless of whether a reviewing court is applying a “hard look” standard or the traditional arbitrary and capricious standard, the court will not substitute its judgment for the agency and will normally not make a decision in place of the agency when the court determines that the agency’s decision is arbitrary and capricious. *See Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943). Instead, in those cases, the reviewing court will routinely remand the dispute back to the agency to resolve. *Id.*

While the arbitrary and capricious standard is ubiquitous in judicial review of agency action, it does not generally apply to review of an agency’s legal interpretation of a statute. The following landmark administrative law decision addresses that issue.

Resources for the Case

Unedited Opinion (From Justia)
Oral Argument (from the Oyez Project)
Google Map of all the Cases in the Coursebook

Chevron v. Natural Resources Defense Council

467 U.S. 837 (1984)

JUSTICE STEVENS delivered the opinion of the Court.

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In the Clean Air Act Amendments of 1977, * * * Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. * * * The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing

[2] " (i) 'Stationary source' means any building, structure, facility, or installation which

plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. * * * Respondents[3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).[4] The Court of Appeals set aside the regulations. * * * The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." * * * In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." * * * Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, * * * the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. * * * Since the purpose of the permit program its "raison d'etre," in the court's view -- was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. * * * It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, * * * and we now reverse.

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emits or may emit any air pollutant subject to regulation under the Act."

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel."

40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

[3] National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

[4] Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions, * * * we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, * * * as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

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[7] Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. * * *

[9] The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. * * * If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.

[11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. * * *

Morton v. Ruiz, 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. * * * Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. * * *

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, * * * and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. *See, e.g., National Broadcasting Co. v. United States*, 319 U. S. 190; *Labor Board v. Hearst Publications, Inc.,* 322 U. S. 111; *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793; *Securities & Exchange Comm'n v. Chenery Corp*., 332 U. S. 194; *Labor Board v. Seven-Up Bottling Co.*, 344 U. S. 344. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

United States v. Shimer, 367 U. S. 374, 367 U. S. 382, 383 (1961). * * *

In light of these well-settled principles, it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether, in its view, the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make. * * *

VII

* * * We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. * * *

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference, because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. * * * We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. * * * Indeed, its reasoning is supported by the public record developed in the rulemaking process, * * * as well as by certain private studies. * * *

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations [*864] and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute. * * *

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.[38]

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[38] Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6), and, in order to do so, it must satisfy the § 173 conditions,

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: the regulatory scheme is technical and complex, * * * the agency considered the matter in a detailed and reasoned fashion, * * * and the decision involves reconciling conflicting policies. * * * Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U. S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.

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including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a preexisting plant." * * *

"The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ." *United States v. Shimer*, 367 U.S. at 383.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Questions and Comments

1. **The Bubble:** Under the Clean Air Act, at the time of the decision, construction of a new major "stationary source" or "modification" of a major "stationary source" in an area of a state that was not meeting air quality standards ("nonattainment") required a permit and compliance with stringent technology-based air pollution limits. Not every change in a stationary source, however, constituted a "modification." A change only constituted a "modification" if it resulted in the emission of a new pollutant or an increase in emissions of existing pollutants. Therefore, as noted in footnote 38 above, therefore, by defining "stationary source" to include an entire plant, an industrial facility could avoid the permitting and new technology requirements of the statute by replacing existing parts of a factory that are emitting pollution with new parts, as long as the new parts emitted the same or less pollution as the existing parts, since the facility would not be "modifying" a source. If, however, each part of the facility that emitted pollution were defined as a separate "source," the construction of a new part would be construction of a "stationary source" which could (if it were a major stationary source) trigger the permitting and new technology requirements, regardless of whether any other portions of the facility were being retired. Why do you think that NRDC opposed the bubble concept, and why did Chevron favor it?

2. **The Two Step**: The Court created a two-step test that is frequently used to review agencies' legal interpretations of statutory terms. At step one, Justice Stevens suggests that courts must ask "whether Congress has directly spoken to the precise question at issue." Is the Court applying a clear statement test at step one? If so, is the Court's review limited to the language of the statute, or can it consider the legislative history or purpose of the statute as well?

3. **Step Two:** If a court determines, at step one, that the statute is silent or ambiguous, then *Chevron* directs the court to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." Subsequent cases routinely rephrase step two to provide that courts should defer to the agency's interpretation as long as it is reasonable. In practice, courts almost always uphold agency interpretations at step two. Consequently, most of the battles in *Chevron* cases are fought based on statutory construction principles at

step one.

4. **Agency Change in Position:** The Court noted that EPA did not always interpret the term "stationary source" to encompass the "bubble concept" and that the agency had previously interpreted the term to apply to separate units within a plant. Does the agency's change in position make its decision unreasonable at step two? Would the result have been the same if the agency had changed its interpretation several times prior to adopting the regulations that were challenged in this case? Would the result have been the same if the agency did not explain why it had changed its interpretation of the term "stationary source"?

5. **Reason for Deference:** In crafting a decision for a unanimous Court, Justice Stevens identified several different reasons why deference to an agency's interpretation is warranted, including: (a) Congress intended that the agency should resolve the issue; (b) agencies have specialized expertise to resolve the issue; and (c) agencies are politically accountable through the democratic process. In determining how far *Chevron* applies outside of the context in which the case arose, courts have struggled to determine whether one rationale carries more weight than others.

6. **Reach of *Chevron***: *Chevron* involved the review of an agency's interpretation of a statutory term when the agency had interpreted the term as a legislative rule through notice-and-comment rulemaking. Sixteen years later, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that courts should generally not apply *Chevron* when reviewing an agency's interpretation of a statute through a non-legislative rule, such as a guidance document, policy statement, or interpretative rule. The following year, in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court held that *Chevron* did not apply to review of a letter ruling issued by the U.S. Customs Service. The Court provided some general guidance regarding when *Chevron* should apply. Specifically, the Court indicated that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the ***force of law***, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-227 (emphasis added). The Court suggested that an agency could show the necessary delegation of authority "in a variety of ways, as by an agency's power to engage in adjudication or notice and comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. A year later, in *Barnhart v. Walton,* 535 U.S. 212, 222 (2002), the Court confused the analysis more, suggesting that in determining whether *Chevron* applies, courts should also consider "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time." Although the Court's *Chevron* jurisprudence is very complex, it is probably safe to assume that when a court is reviewing a legislative rule adopted by an agency

through formal or informal rulemaking, or is reviewing a decision that an agency has made through formal adjudication, the court will apply *Chevron*. It is also probably safe to assume that in *most cases,* when a court is reviewing an agency's non-legislative rule, the court will not apply *Chevron* (although the Court has left the door open to the possibility that *Chevron* might apply in a specific case). It is hard to reach a similar broad conclusion regarding whether a court will apply *Chevron* to a decision made by an agency in the context of informal adjudication. The answer will lie in the ultimate clarification of the Court's decisions in *Mead* and *Barnhart.*

7. **Skidmore**: If a court reviewing an agency's legal interpretation does not use the *Chevron* analysis, that does not mean that the court will review the statutory interpretation question de novo. Agencies are still accorded deference under an earlier Supreme Court decision, although the deference is weaker than *Chevron* deference. In *Skidmore v. Swift*, the Supreme Court, reviewing a decision of the Administrator of the Department of Labor's Wage and Hour Division, held that:

> the 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.

323 U.S. 134, 140 (1944).

8. **Agency interpretations of agency regulations**: *Chevron* involved judicial review of an agency's interpretation of a statute. However, agencies occasionally adopt regulations that are ambiguous and need to be interpreted further. When a court reviews an agency's interpretation of its own regulations, rather than the interpretation of a statute, courts accord the agency an even greater level of deference than *Chevron* deference. In *Auer v. Robins,* 519 U.S. 452, 461 (1997), the Supreme Court held that courts should uphold an agency's interpretation of its regulations unless it is "plainly erroneous or inconsistent with the regulation."

Hypotheticals

1. Focusing on the same statutory language that was interpreted in *Chevron*, assume, for purposes of this hypothetical, that EPA did not promulgate a regulation that allowed states to adopt a plant-wide definition of "stationary source." Instead of adopting a regulation, EPA adopted a "policy statement" that indicated that states could adopt a plant-wide definition of "stationary source". The agency adopted the policy statement because it was not fully committed to that interpretation of the statute and wanted to consider the matter further before issuing a regulation to define the term. Nevertheless, EPA published the policy statement in the Federal Register and posted it on its website. If NRDC were able to challenge EPA's policy statement, should a court review the agency's interpretation of the statute under the *Chevron* analysis or some other analysis?

2. Focusing on the same statutory language that was interpreted in *Chevron*, assume that EPA did not promulgate a regulation that allowed states to adopt a plant-wide definition of "stationary source" and assume that they did not adopt a policy statement to that effect either. Assume that they did not provide any direction to states or regulated industries regarding the definition of "stationary source." Instead, assume that EPA began an administrative penalty proceeding (an informal process) against Chevron alleging that Chevron was violating the Clean Air Act because it had not sought a permit for modifications to its refinery. In the context of that informal administrative proceeding, EPA announced that it was interpreting the term "stationary source" to mean each smokestack in a plant. If Chevron appealed EPA's decision to court, would the reviewing court apply the *Chevron* analysis to EPA's interpretation of "stationary source" or would the court apply some other analysis?

3. Focusing on the same statutory language that was interpreted in *Chevron*, assume that EPA adopted the regulations that it adopted in Chevron, allowing States to adopt a plant-wide definition of "stationary source." Assume, however, that the regulations were ambiguous regarding whether a "plant-wide" definition could incorporate smokestacks that were located a mile away from the plant (but were related to the process at the plant), and that EPA began an administrative penalty proceeding against Chevron when Chevron made changes to the off-site processes that increased pollution from an off-site smokestack without obtaining a permit, because the agency determined that the term "stationary source" should not include off-site stacks. If Chevron appealed EPA's decision to court, would the reviewing court apply the *Chevron* analysis to EPA's interpretation of "stationary source" or would the court apply some other analysis?

Chapter Quiz

Now that you've finished Chapter 3, why not try a CALI lesson on the material at http://www.cali.org/aplesson/10781 It should take about 20 minutes.