I. Hypothetical 1

A. Air pollution is emitted by industries not only through smokestacks, but also by smaller, more diverse sources. Machinery, for instance, may emit chemicals into the air while operating. Paint and solvents used at an industrial plant may emit volatile organic compounds. There can be many sources of these "fugitive emissions" of air pollution at an industrial plant.

B. Assume that the regulation that EPA adopted to define "stationary source" in the Chevron case (e.g. the bubble concept) was silent regarding whether a "stationary source" included only the emissions of air pollution from the smokestacks at the industrial plant or whether it included the emissions of air pollution from the smokestacks and all of the fugitive emissions at the industrial plant.

C. Assume that EPA decides that the term "stationary source" in its regulation should include the air pollution from the smokestacks and all of the fugitive emissions from an industrial plant BUT that EPA does not adopt a new rule to clarify its interpretation AND EPA does not issue a guidance document or policy that explains its interpretation of the regulation.

D. When the GloboChem Corporation recently made some changes to its chemical plant, EPA concluded that GloboChem should have obtained an air pollution permit under the Clean Air Act for those changes because the air pollution emissions from the plant exceeded the level that was acceptable for "stationary sources" without a permit. EPA reached the conclusion that the emissions exceeded acceptable levels for a "stationary source" because the agency added the amount of air pollution from the smokestacks to the amount of air pollution from the fugitive emissions to calculate the amount of air pollution from the "stationary source." EPA then notified GloboChem that the company needed to apply for an air pollution permit.

E. When GloboChem refused to apply for a permit under the Clean Air Act, EPA sued GloboChem for making changes to its chemical plant without obtaining a permit. As a defense, GloboChem argues that EPA has misinterpreted the term "stationary source" under the Clean Air Act and that the term should only include air pollution from the smokestacks. If the term is interpreted in that manner, the air pollution from GloboChem's plant would be lower than the amount that would trigger the permit requirement.

When the Court review's EPA' interpretation of the term "stationary source," will the Court accord it Chevron deference? Or will it apply some other standard of review?

II. Hypothetical 2

Assume that EPA had never adopted the regulations in the Chevron case to define stationary source. The term "stationary source" is defined in the statute itself (the CAA) as "any building, structure, facility or installation which emits or may emit any pollutant." Assume that EPA adopted a regulation that simply parroted that language - without addressing the bubble concept or fugitive emissions or anything else.

Assume then that you have the same hypothetical that we looked at to start the class, except that the regulation that EPA was interpreting was this very broad regulation that parrots the language of the CAA, rather than the regulation that EPA adopted that was challenged in the Chevron case. Would the Court accord Auer deference to the agency's interpretation of that regulation to include fugitive emissions and all stack emissions from a plant within the definition of stationary source?

III. Hypothetical 3

Assume that, in the Chevron case, EPA did not adopt the rules that were challenged in that case. As you'll recall, before EPA adopted the rules, it had interpreted the term "stationary source" in a way that each smokestack in a plant was a separate "stationary source" instead of interpreting the entire plant to be a "stationary source."

Assuming that EPA made that interpretation informally through a guidance document that it published in the Federal Register, would a Court give that legal interpretation Chevron deference when EPA applied it?