October 2016 | Volume 8 | Issue 7

BEATTY & WOZNIAK, P.C.
ENERGY IN THE LAW

Uncertainty of Reasonability: The Impact of Recent Judicial Decisions on Agency Deference

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For the last thirty years, one case has been paramount to understanding and evaluating agency decisions: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*). In *Chevron*, the Supreme Court succinctly set forth the two step general rule to evaluate agency interpretation. First, a court must identify whether Congressional intent is clear from the statute, and if Congress has spoken on the matter, the agency must apply the regulation based on the unambiguous intent of the legislature. If, however, Congress has not directly addressed the issue, agencies are free to interpret the statute. Importantly, the Supreme Court gave agencies considerable deference with respect to such interpretations—courts are instructed to accept any reasonable interpretation provided by the agency.

In recent years, numerous cases have addressed the "*Chevron* deference" provided to agencies, signaling that courts have taken a stand against unfettered agency action. This trend directly impacted the oil and gas industry in the recent decision by United States District Court Judge Skavdahl setting aside the Bureau of Land Management's (BLM) regulations governing hydraulic fracturing on federal and Indian lands. In that order, Judge Skavdahl determined that it was unreasonable for BLM to regulate fracking under a general statute, when Congress expressly removed the only explicit authority for an agency to regulate fracking in a different statute. Consequently, Judge Skavdahl concluded that Congress had spoken on the matter, and BLM did not have authority to interpret statutes in a manner so as to allow for regulation of fracking.

While not directly related to oil and gas, two recent Supreme Court decisions further indicate that agency deference is not limitless. First, in *Michigan v. Environmental Protection Agency*, a majority of the Court concluded that the Environmental Protection Agency (EPA) acted unreasonably by not taking cost into account when determining whether a proposed regulation to establish emission standards on power plants was "appropriate and necessary." Notably, this decision came soon after two other cases in which the Court did give agencies deference to consider cost. Ultimately, the Court did acknowledge the EPA's ability to adopt such a regulation on emissions, but restricted the agency's ability to enforce any regulation desired. Consequently, the decision hinted that administrative policies cannot be simply pushed through, rather agencies must take the appropriate steps to ensure that regulations are reasonable and thoroughly considered.

Additionally, in June 2016, the Court decided *Encino Motorcars, LLC v. Navarro*, in which a Department of Labor regulation was not given *Chevron* deference and therefore ignored. From 1987 until 2011, the Department of Labor exempted service advisors at car dealerships from overtime pay under the Fair Labor Standards Act. In 2011, the Department of Labor issued new regulations which, among other things, removed the overtime exemption for these service advisors. As with *Michigan*, the Court did not say the Department of Labor could not adopt regulations interpreting categories of workers who could be exempt from overtime pay; rather the Court concluded that the agency "gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt." The Court specified that "*Chevron* deference is not warranted where the regulation is 'procedurally defective,'" and here the agency did not provide sufficient analysis to support its decision and justify deference. Yet again, the decision showed that courts will not let agencies adopt regulations without reasonable justification.

Recent cases, including those described in this article, illustrate a trend of denying agencies unrestricted deference to adopt regulations. Indeed, in *Michigan*, Justice Thomas suggested that the presumption of agency deference should be abandoned because it gives agencies the impression that their function is to legislate rather than execute, and restricts the judiciary's ability to perform its interpretive authority.

The current administration has proposed a slew of regulations that impact the oil and gas industry, including altering factors to be considered in declaring critical habitats and BLM regulating methane emissions from venting and flaring. Recent judicial precedent has suggested that courts will not blindly rubber stamp such actions under the guise of agency deference. Instead, agencies are increasingly required to consider all regulatory impacts, provide adequate justification for their decisions, and only regulate where Congress has elected not to do so. This trend may provide support necessary to halt recent agency overreach.

For more information on cases addressing agency deference, please contact Michael Cross.