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News Analysis

SUPREME COURT RESTORES EPA DEFERENCE BUT STOPS SHORT OF BROAD RULE

The Supreme Court's backing of EPA positions in key environmental cases during its just-ended term clearly reiterates judicial principles granting federal agencies significant deference in interpreting federal statutes, which EPA officials under Presidents Bush and Obama sought following a string of EPA court losses in recent years, observers say.

However, observers including top Bush administration enforcement officials say it is unclear whether the rulings will guide lower courts in future litigation because they did not include new instructions on conducting the long-established test to analyze whether to grant agencies deference.

Legal experts predicted last year — before the environmental cases were argued — that high court rulings could potentially create a climate where lower courts are more willing to grant EPA and other federal agencies discretion. Bush-era EPA General Counsel Roger Martella told *Inside EPA* June 24 that “it’s fair to say the prediction has come true.” The rulings do provide EPA more deference, he said.

“Broadly, it was a year for deference,” Ronald Tenpas, who served as head of the Justice Department’s Environment & Natural Resources Division in the Bush administration, told *Inside EPA*.

Two cases involving Clean Water Act (CWA) regulations involved “a fair amount of statutory complexity,” which is “a classic place to afford [agencies] some flexibility,” Tenpas said. In *Coeur Alaska v. Southeast Alaska Conservation Council*, the high court June 22 accepted EPA and the Army Corps of Engineers’ interpretation of potentially conflicting portions of the CWA — outlined in a 2004 EPA memorandum — to find that the Corps acted in accordance with the law when issuing a CWA section 404 permit to the Alaska gold mine.

And in *Entergy Corp., et al. v. Riverkeeper*, the high court April 1 backed EPA and industry arguments that Congress’ silence on whether CWA section 316(b) requires cost-benefit analysis or confers discretion on the agency in determining the “best technology available for minimizing adverse environmental impact” at existing power plants’ cooling water intake structures.

It remains uncertain, however, whether key appellate courts will begin granting EPA more deference because the decisions “did not purport to provide new instruction” on how to conduct the analysis for determining whether to grant agencies deference — as first outlined by the high court in its 1984 decision in *Chevron v. Natural Resources Defense Council* — Tenpas said. “There are some nuanced disagreements within the [high] court” over what types of agency positions should be afforded *Chevron* deference, which surfaced in the *Coeur Alaska* case, he said.

Chevron outlined a two-part analysis for courts to make in determining whether to afford agencies deference. The first is whether the statute is ambiguous or there is a gap that Congress intended the agency to fill. If the first part is true, then courts must determine whether the agency’s interpretation of a statute is reasonable or permissible.

Still, Tenpas said the Supreme Court’s rulings this year are important because the high court has said, “No, we mean it, and here are two more examples” of how to apply *Chevron*. And the rulings may cause some appellate judges to become more emboldened in supporting *en banc* reviews of rulings that have struck down EPA regulations on a “plain reading” of the environmental statute in question, he said.

Administrative and environmental law experts, including former EPA officials, said last year that EPA’s losses on previous air and water cases, especially before the U.S. Court of Appeals for the District of

Columbia Circuit, highlight how appellate courts in particular have been less willing in recent years to grant EPA deference.

In March, Robert Sussman, a senior advisor to EPA Administrator Lisa Jackson, told the agency's National Advisory Council for Environmental Policy and Technology that EPA has had a poor record in the courts over the last eight years and needed to get back its discretion. "I hope that after four years we can regain the respect of the courts and get the deference [EPA] deserves," Sussman said March 25.

At issue in *Coeur Alaska* was whether new source performance standards under section 306 should apply to the slurry discharges allowed under a section 404 permit. The high court found that both the CWA and the agencies' regulations are ambiguous on the issue and turned to a May 2004 EPA memorandum from Diane Regas, then-head of EPA's Wetlands, Oceans & Watersheds Office, to a key official in EPA Region X overseeing CWA permitting issues at the gold mine. Regas said in the memo that section 306 requirements do not apply.

The majority in *Coeur Alaska* said the memo, as an internal document, does not merit full *Chevron* deference but still is afforded some deference "because it is not 'plainly erroneous or inconsistent with the regulations[s]," the ruling says, going on to outline several factors that inform this conclusion.

Even though the majority is hesitant to call its analysis *Chevron* deference, "structurally, the opinion is a classic *Chevron* analysis," Tenpas said. The question of whether an agency position must go through a formal public notification process to be afforded deference is "one of the pieces of *Chevron* that has less clarity" than the general analytical principles, he added.

A 2001 high court ruling in *United States v. Mead Corp.*, a case involving customs duties, held that *Chevron* deference generally only applies to notice-and-comment rulemakings. Justice Antonin Scalia, who was the lone dissent in *Mead*, takes a broader view and reiterates his calls for overturning *Mead* in a partially concurring opinion in *Coeur Alaska*. *Mead*'s "incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts that there now has appeared the phenomenon of *Chevron* avoidance," Scalia's partially concurring opinion says.

In the *Entergy* case, Bush administration lawyers emphasized the need for *Chevron* deference, arguing in briefs that the 2nd Circuit's ruling "contravenes the principles of *Chevron* by usurping the agency's role of construing and filling in gaps in an ambiguous statute."

The 2nd Circuit backed activist arguments that section 316(b)'s language instructing EPA to set cooling water intake standards means the standards must require technology that achieves the greatest reduction in adverse environmental impacts at a cost that can reasonably be borne by the industry.

The Supreme Court agreed that the 2nd Circuit's interpretation of the statute is "plausible," but in overturning the lower court's decision, the high court noted that it is not the only interpretation. *Chevron* calls on the courts to grant agencies discretion for "a reasonable interpretation of the statute — not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts," the *Entergy* ruling says.