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CAFO Suit Opens Door To High Court Reversal Of 'Deference' Precedent

EPA's recent appeal of a ruling that limited its regulation of animal feedlots could provide private parties with a vehicle to overturn a landmark Supreme Court ruling that granted judicial deference to agencies' interpretations of their own rules — nearly a year after conservative justices on the high court invited parties to bring such a suit.

"This is the first step in how we're going to rein in, to the extent that it's possible, this problem of limited judicial review of administrative decisions," says one attorney who has litigated deference cases for industry and other regulated entities in the past.

The effort to appeal the precedent — known as *Auer v. Robbins* — could ultimately benefit both industry and environmentalists, who at different times have locked horns with the agency over its interpretation of its regulatory

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authority.

In the feedlot case, however, the agency's appeal has been a welcome surprise for industry groups who are seeking to curb the deference that courts have long granted agencies but were not expecting EPA to risk an appeal in a case whose precedent was relatively narrow.

"What you would be left with [if *Auer* were overturned] is the courts interpreting rules like they interpret contracts — they look at the plain language. It's not construed in favor of one party or the other, even if one of them wrote the contract. You just look at the language," the first attorney says.

The attorney continues that overturning *Auer* would give EPA and other agencies an incentive to write rules that are less open to interpretation, which in turn would allow more meaningful oversight of new regulations, both from Congress and from the public through notice-and-comment input.

EPA and environmentalists Dec. 20 asked the U.S. Court of Appeals for the 4th Circuit to overturn *Lois Alt, et al. v. EPA*, in which a federal judge ruled that discharges of manure, feathers and other litter from the "farmyard" area of a West Virginia concentrated animal feeding operation (CAFO) are exempt from Clean Water Act (CWA) oversight.

In the underlying ruling, Chief Judge John Preston Bailey of the U.S. District Court for the Northern District of West Virginia rejected EPA's argument that the court must defer to its 2003 regulations, which narrowly explained how the stormwater exemption applied to pollutants from land application areas.

The ruling hinged on Bailey's interpretation that EPA is not entitled to deference under either the 1984 Supreme Court decision in *Chevron v. Natural Resources Defense Council (NRDC)* or its 1997 ruling in *Auer* — the two cases that

have long provided agencies deference in how they interpret their authorities.

While *Chevron* detailed a two-part test for courts to determine whether agencies should be granted deference in how they interpret their statutory authority, *Auer* provided a similar means for interpreting agencies' regulatory authority. The two rulings have long provided agencies with key support for crafting new policies. Since it was issued, *Auer* has been cited to defend EPA's application of a host of its rules, including those governing stormwater controls, CWA cleanup plans and the creation of new air pollution standards, among other issues.

But critics have charged that rather than supporting regulatory certainty, so-called "*Auer* deference" encourages agencies to craft vague rules whose impacts will not become clear until regulators establish their interpretation of the language, sometimes years after promulgating a rule.

Critics began searching for a case that could provide the high court with a vehicle to overturn *Auer* after conservative justices invited such challenges, in concurring opinions in the March 20 ruling in *Decker v. Northwest Environmental Defense Center*.

In a partial dissent, Associate Justice Antonin Scalia — the author of the majority opinion in *Auer* — said, "Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'"

And discussing both *Auer* and the earlier deference case *Bowles v. Seminole Rock & Sand Co.* Chief Justice John Roberts, joined by Associate Justice Samuel Alito, wrote that "The bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue. I would await a case in which the issue is properly raised and argued."

The industry attorney says because EPA and environmentalists have appealed the district court ruling, it could provide an opportunity to revisit *Auer*. "Just about everyone who's dealing with this issue has it under a microscope in Washington," the source says.

A second industry attorney says the justices' opinions are evidence of "a discomfort among parts of the court with the agency being able to defer to its own discretion and interpretation on rules that it wrote ambiguously in the first place."

In the wake of *Decker*, opponents of EPA and other regulatory agencies "have been digging through the pending cases" for suits that could raise the questions Scalia and Roberts asked for, the first industry attorney says.

But according to both the attorneys and a former EPA official, none of the *certiorari* petitions now pending before the Supreme Court are "a suitable vehicle to address *Auer*." Instead, sources say that out of the cases now pending at the appellate level, *Alt* could be the most appropriate setting in which to revisit the high court's approach to regulatory interpretations.

The agency's decision to appeal *Alt* is welcome news for industry as few were anticipating that the agency would risk a broader adverse precedent, though the agency's appeal allows the appellate court to overturn the lower court ruling on both procedural and substantive grounds.

At issue in the litigation was EPA's interpretation of a rule exempting "agricultural stormwater" from permit requirements to claim that releases of manure and litter tracked from the Alt poultry houses into the farmyard area, along with dust particles and dander blown there from ventilation fans, should be considered water pollutants requiring discharge permits.

The CWA generally exempts "agricultural stormwater discharges" from its definition of point sources that are subject to NPDES permit requirements. But until Bailey's ruling, EPA had defined the term only in cases where CAFOs and farms are land-applying animal waste, while leaving the issue unaddressed for other farm areas and operations.

However, in his Oct. 23 decision, Bailey held that the exemption does apply to such pollutants, refusing to grant *Auer* deference to EPA's view, expressed in non-binding letters, that a farmyard should be considered a "production area," which would be outside the scope of the agricultural exemption.

"[T]he EPA regulations are not entitled to deference under *Chevron v. NRDC* or *Auer v. Robbins* . . .This Court will grant limited deference to the guidance letters only to the extent that they have the power to persuade," Bailey wrote in his opinion.

Not only is EPA appealing the merits ruling, the agency is also urging the appellate court to consider several procedural questions that could moot or otherwise undermine the ruling. For example, the agency is challenging Bailey's decision to allow the litigation to proceed even after it withdrew the enforcement order that the industry plaintiffs were challenging and even cited the lack of an active enforcement effort as a reason to dismiss the case as moot. The agency is also appealing Bailey's decision to allow industry groups to intervene in the case.

The first industry attorney says observers did not expect EPA to appeal *Alt* because of the risk of a broad appellate or Supreme Court ruling, as well as the limited practical impact of the case. "There's some question, given what the Supreme Court said about *Auer* [in *Decker*], whether the EPA is willing to court fate and put a case like that in front of the court. Especially when you're dealing with a lower court decision that can be contained relatively easily," the attorney says.

A ruling that overturns *Auer* would require courts to consider the most reasonable reading of a regulation when applying it, rather than giving weight to an agency's preferred meaning of the rule. It would cut back EPA's discretion to

interpret a host of rules, including exemptions from stormwater permits — which were at issue in *Decker* as well as *Alt* — and its Clean Air Act new source review enforcement program, which has been used to enforce greenhouse gas controls and was the subject of an unsuccessful industry challenge in a 2012 appeal to the 6th Circuit, *United States v. Detroit Edison Energy Company*.

But agencies would continue to receive deference when they interpret vague or unclear laws granting them rulemaking, enforcement or other authority — so-called *Chevron* deference — which the justices recently upheld in *City of Arlington v. Federal Communications Commission*.

"*Auer* is obviously different from *Chevron*, where you have the agencies interpreting Congress — they can't go back and rewrite the law to make it clear. They have to work with what the legislature gave them," the second industry attorney says. — *David LaRoss*