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Courts Less Likely to Enforce Government Agency's Interpretation of Regulations

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Before the United States Supreme Court decided the case of *Kisor v. Wilkie* in June of last year, if a regulated party challenged a governmental agency's interpretation of a regulation, courts followed a rule of deferring to the agency's reasonable interpretation of its own regulation. For example, prior to *Kisor*, if a landowner challenged the EPA's or the U.S. Army Corps of Engineers' regulations impacting wetlands development, the view of the EPA or of the Corps as to how to read its regulations would be given deference by the court and that interpretation would be controlling, unless that interpretation were plainly contrary to the text. This was the precedent set by the Supreme Court case of *Auer v. Robbins* over two decades ago.

One unfortunate consequence from *Auer* was that a government agency could avoid having to amend its regulations through a formal notice and comment process. Instead, the agency could use its rulemaking process to produce a vague regulation and fill in the details later in the way the agency applied its regulations to particular situations. The problem, from the perspective of the regulated public, is that the regulatory interpretations don't go through the notice and comment process and yet have the same legal force of the agency's regulations. In other words, public input before a regulation is adopted is avoided and by drafting an ambiguous regulation, the agency reserves the right to interpret the regulations as circumstances warrant on a go forward basis with confidence that if a regulated party challenges that regulation, courts will defer to the regulatory agency which – with respect to the EPA, the Corps or state environmental agencies – are regarded by courts as experts in the fields they regulate.

The Supreme Court's June 2019 ruling in *Kisor v. Wilkie* limits the deference a court will give to an agency's interpretation of its regulations. After the ruling in *Kisor*,

1. A court should not defer to an agency's interpretation unless the regulation is ambiguous.
2. The agency's interpretation must be reasonable. An agency's interpretation of its regulation is entitled to deference so long as it is consistent with the text.
3. Deference to the agency's interpretation only applies if the interpretation involves agency expertise.

Moreover, in *Epp v. Natural Resources Conservation Service*, a recent wetlands case out of Nebraska, the court relied on *Kisor* in stating that, "the interpretation must be the agency's 'authoritative' or 'official position,' not an ad hoc statement….". In *Natural Resources Defense Council, Inc. v. Perry,* a case originating in Montana, the position of the Department of Energy was challenged. The court, relying on *Kisor,* announced, "We think the plain language of the [rule] supports [the challengers'] reading, and that the absence of ambiguity in the rule's meaning precludes us from deferring to DOE's contrary interpretation."

Individuals and companies who find themselves in situations where environmental regulators are pushing an interpretation of a regulation that is not apparent from the plain reading of the regulation should keep this in mind: regulators know about *Kisor v. Wilkie* and are aware that, if the agency has gotten too far away from the plain reading of the regulation, if challenged in court, the court may be less likely to back the agency's interpretation. If the regulator is pushing a novel interpretation of a regulation, let the agency representative

know that you are aware of *Kisor v. Wilkie*. Tell the regulator that the agency's reading of the regulation does not give fair warning to the regulated public that these regulations will be applied in this manner. Courts will still defer to agency interpretations of the regulations they write, but your leverage with regulators has improved after *Kisor*.

For more information, please contact Michael T. Dawkins or any member of Baker Donelson's Environmental Team.