

LITIGATING THE ENVIRONMENTAL ADMINISTRATIVE LAW CASE

By Daniel Riesel and Elizabeth Read¹

Environmental litigation frequently involves litigation with the Environmental Protection Agency and other federal regulatory agencies and their state counterparts. This form of litigation is seldom “plenary,” and because it most often involves agency decision making, discovery, the device that can level the playing field, is normally unavailable. Theoretically, the reviewing court will examine the record of proceedings before the agency, which should objectively reflect all the proceedings before the administrative decision maker, and apply the relevant law. However, the environmental litigator is often faced with less than an objective process.

(1) **Agency Decision Making**

Environmental regulation increasingly turns on an agency’s often informal promulgation of rules, interpretations and “guidance.” These “actions,” often taken without public input, can impose onerous requirements on the regulated community, and dictate the initiation or even the outcome of enforcement proceedings. Nevertheless, government agencies have been quick to assert that many of these pronouncements are not subject to judicial scrutiny because they are internal guidance and therefore not final agency action reviewable by a Court. When agency actions are subject to judicial review, the agency often demands and receives “substantial deference” from the reviewing court. In addition, agency action is reviewed “on the record,” that is, on the papers before the agency at the time it made its decision.

Examples of agency efforts to avoid review or to cloak their decisions in “deferential” armor abound.² Indeed, one reviewing court noted that this attempt at insulation from scrutiny

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has led to a “let them eat cake” attitude among some regulators.³ However, courts have recently attempted to place limitations on administrative agencies’ attempts to frustrate meaningful judicial review.

(2) **Circumventing The Administrative Procedure Act**

The Administrative Procedure Act (“APA”), 5 U.S.C. § 553, and its state counterparts provide that legislative or substantive rules must be preceded by public notice and an opportunity for public comment. Hence, an agency’s “legislative” or “substantive” actions tend to have both an opportunity for the public to shape the ultimate agency decision and a fairly identifiable record for judicial review. Substantive rule making occurs when the agency is carrying out the statutory mandate to make rules to implement the statute.⁴ A familiar example of such rule making is the congressional directive to the U.S. Environmental Protection Agency (“EPA”) to promulgate rules implementing the broad mandates of the flagship environmental statutes enacted in the seventies.⁵

However, administrative agencies, particularly the EPA, have recently been prone to publish “guidance” and “interpretative” decisions which are not preceded by an opportunity for

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² Compare Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) with Flue-Cured Tobacco Cooperative Stabilization Corp., et al., v. EPA, 313 F.3d 852, No. 98-2407 (4th Cir. Dec. 11, 2002).

³ Chemical Manufacturers Ass’n v. EPA, 28 F.3d 1259, 1266 (D.C. Cir. 1994): “And, we may add, it bespeaks a ‘let them eat cake’ attitude that ill-becomes an administrative agency whose obligation to the public it serves is discharged if only it avoids being arbitrary and capricious.”

⁴ Professionals and Patients For Customized Care v. Shalala, 56 F.3d 592 (5th Cir. 1995); American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (D.C. Cir. 1993).

⁵ The scope of judicial review of an agency rulemaking under section 706 of the APA depends upon whether the challenged rule was promulgated “formally”, in which case the standard of review is substantial evidence, or “informally”, in which case the reviewing court applies the less rigorous arbitrary and capricious standard. Phillips Petroleum Co. v. Federal Energy Regulatory Commission, 786 F.2d 370, 374 (10th Cir. 1986); 5 U.S.C. § 706(2)(A) and (E). Formal rulemaking occurs according to the procedural requirements set forth at 5 U.S.C. §§ 556 and 557, providing for public trial-type hearings, and is necessitated only when specifically directed by an agency’s organic statute. See United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). An “informal rule” is promulgated pursuant to the notice and comment provisions of section 553 of the APA. See AT&T Wireless PCS, Inc. v. City Council Of the City Of Virginia Beach, 155 F.3d 423, 429-30 (4th Cir. 1998); Phillips Petroleum Co., *supra*, 786 F.2d at 374.

public comment. Agencies will attempt to avert substantive review of such decisions on two fronts: by arguing that they are not “rules” requiring compliance with APA procedures, and by arguing that they do not constitute “final agency action” subject to judicial review under Section 706 of the APA.

However, with regard to the latter line of defense, a series of federal decisions have made it clear that where the agency promulgates a decision that changes the legal regime affecting the plaintiff or establishes a new public standard, it has engaged in final agency action. In Bennett v. Spear,⁶ the Fish and Wildlife Service had issued a Biological Opinion letter to the Bureau of Reclamation, asserting that particular minimum water levels should be maintained in reservoirs relied upon by the petitioners, in order to avoid endangerment to a particular species of fish. The Supreme Court held that the Opinion was a reviewable final agency action because it had direct and immediate legal consequences, as it altered the legal regime controlling the Bureau of Reclamation’s decision making (the Bureau would be subject to legal penalties if the reservoir levels were not enforced). In Appalachian Power Co. v. EPA,⁷ EPA released a so-called “guidance” regarding state implementation of the Clean Air Act that required states to enforce periodic monitoring by state permit holders. The court held that the guidance in and of itself constituted final agency action with direct legal consequences in the form of the obligations it imposed on states to implement the requirements. In Barrick Goldstrike Mines, Inc. v. Browner,⁸ EPA issued a guidance stating that chemicals in waste rock were ineligible for the regulatory *de minimis* exception to reporting requirements of the Emergency Planning and Community Right-to-Know Act. The court held that the guidance, in concert with a regulatory preamble applying

⁶ 520 U.S. 154 (1997).

⁷ 208 F.3d 1015 (D.C. Cir. 2000).

⁸ 215 F.3d 45 (D.C. Cir. 2000).

the reporting requirements to the mining industry, served to “crystallize an agency position into final agency action.”⁹

However, in the Flue-Cured Tobacco case,¹⁰ the Fourth Circuit held that an EPA report classifying second hand smoke as a known human carcinogen was not a reviewable final agency action because the report (at least theoretically) carried no legally binding authority and imposed no rights or obligations.

The federal courts have also shown a willingness to reject agencies’ arguments that APA procedural rulemaking requirements, such as opportunities for public notice and comment, do not apply to determinations simply because they are denominated “guidance” or “policy statements.” As the Second Circuit noted thirty years ago in Lewis-Mota v. Secretary of Labor,¹¹ “the label that the particular agency puts upon its given exercise of administrative power is not ... conclusive, rather it is what the agency does in fact.”

For example, the D.C. Circuit held in Community Nutrition Institute v. Young¹² that the Food and Drug Administration’s establishment of an “action level” for a contaminant in corn required notice and comment although the agency characterized it as an interim standard used prior to the establishment of formal tolerances. The court was persuaded by “the fact that FDA considers it necessary for food producers to secure exceptions to the action levels ... If, as the agency would have it, action levels did ‘not bind courts, food producers or FDA,’ it would scarcely be necessary to require that ‘exceptions’ be obtained.”¹³ And also importantly, the language FDA used in establishing action levels indicated that they were presently effective

⁹ Id. at 49.

¹⁰ 313 F.3d 852, No. 98–2407 (4th Cir. 2002).

¹¹ 469 F.2d 478, 481-82 (2d Cir. 1972).

¹² 818 F.2d 943 (D.C. Cir. 1987).

¹³ 818 F.2d at 947 (citation omitted).

rather than “musings about what the FDA might do in the future.”¹⁴ The D.C. Circuit took a similar view of an EPA “PCB Risk Assessment Review Guidance Document” holding that the guidance document was a “legislative rule” within the meaning of the APA.¹⁵

The temptation of agencies to promulgate standards as “guidance” in an attempt to avoid the delay and public scrutiny inherent in the APA’s “Notice and Comment” provisions is illustrated in a recent Southern District of New York litigation involving an agreement between the EPA and the Army Corps of Engineers (“ACOE”) to set new standards for PCB levels in dredged material to be disposed in designated dumping grounds.¹⁶ In that case, plaintiff needed a permit from the Army Corps of Engineers to dredge sediment from a channel adjoining one of its plants and place it in a designated ocean disposal site. The sediment was contaminated with PCBs, but below the 400 parts per billion (ppb) bioaccumulation level that had been deemed the maximum acceptable by both the ACOE and the EPA. A few days before the permit was to be granted, however, the ACOE entered into a Memorandum of Agreement (“MOA”) with the EPA which lowered the level to 113 ppb. Neither agency had subjected the new ocean disposal standard to the rigors of APA public notice and comment. The MOA provided for the immediate adoption of an “interim” standard. With that, it became apparent that the ACOE would deny the permit, and the plaintiff sued EPA and the ACOE.

The federal agencies moved to dismiss on the grounds that the new PCB standard was merely “guidance” and therefore did not amount to “final agency action.” The government also relied on the terms of the MOA, which declared that it was “intended exclusively for the internal

¹⁴ Id. at 948.

¹⁵ 5 U.S.C. § 551(4), another rubric used by an agency to circumvent the APA’s notice and comment provision is to argue that notice is not required because the promulgation is merely an “interpretive rule”. See e.g., General Electric Co. v. EPA (“General Electric”), 290 F.3d 377 (D.C. Cir. May 17, 2002); Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

¹⁶ United States Gypsum Co. v. Muszynski, etc., et al., 161 F.Supp.2d 29 (S.D.N.Y. 2001), later proceedings, 209 F.Supp.2d 308 (S.D.N.Y. 2002).

management of the Executive Branch, and does not establish or create any enforceable rights, legal or equitable, on behalf of any person not a signatory to this agreement. The District Court for the Southern District of New York denied this motion, finding that “as a practical matter, the new PCB standard...was binding and resulted in tangible legal consequences for plaintiff.” The District Court also declared that “such boilerplate cannot render an otherwise final and binding agency action non-final and non-binding.” Similarly, the District Court disregarded the MOA’s recitation that the new PCB number would be subject to revision, noting that all standards are subject to revision.

The plaintiff then moved for summary judgment. This time the government developed a new dodge to the effect that the MOA’s interim standard was not a legislative rule requiring prior notice and an opportunity for comment but an “interpretive rule,” which is subject to judicial review but does not require prior notice and comment.¹⁷ Interpretive rules are decisions that do not have controlling effect on parties not before the agency in the particular proceedings.¹⁸

In July 2002, the District Court again ruled for the plaintiff, finding that the new standard, “being binding and outcome determinative, was a ‘rule’ subject to the notice and comment requirements of the Administrative Procedure Act.”

Accordingly, private litigants are not bound by the now typical agency boilerplate characterizing its pronouncement as merely guidance; courts apply a functional test. Moreover, the agency’s action should be reviewed carefully to ascertain if it essentially promulgates a legislative or interpretive rule because the former requires an opportunity for public comment.¹⁹

¹⁷ Prior notice and comment are only required for legislative rules within the meaning of the APA, 5 U.S.A. § 551(4); see General Electric, 290 F.3d 377; Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

¹⁸ General Electric, *supra*.

¹⁹ See 2, *supra*.

(3) **The Administrative Record And Discovery**

Given the limitations on judicial review, members of the regulated community must attempt to shape administrative decisions during the administrative process. Absent that ability, there are a few basic concepts that can be used to make judicial review more meaningful.

A readily identifiable record can be developed in formal rule making or in trial-type administrative adjudications. Unfortunately, more and more agency decisions are made pursuant to an informal process. Upon judicial review, the agency should file with the reviewing court what it believes to be the administrative record, which should consist of all the relevant papers that were directly or indirectly before the decision-maker.²⁰ Unfortunately, this is a subjective process often involving the agency's lawyers whose decisions or work product is under attack in the judicial process. Not surprisingly, critical documents may be left out of the submitted record, or documents justifying the agency's decisions which were not actually considered, added to the record. Omitted documents can be particularly important to a successful challenge because they might well reveal criticism of the agency's decision by independent experts.

Barriers to insuring the development of an accurate record in these circumstances include the deference given to the agency's compilations of an appropriate record,²¹ and the general rule that judicial review of agency action does not involve pre-trial discovery. However, in appropriate instances, limited discovery to establish the record will be allowed, and courts have permitted discovery of an administrative agency to determine the adequacy of the record submitted by the agency.²² Indeed, there appears to be a fairly low threshold to allow discovery for the limited

²⁰ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

²¹ Fund for Animals v. Williams ("Fund for Animals"), 245 F.Supp.2d 49, 55 (D.D.C. 2003).

²² The seminal authority is Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, as modified by Camp v. Pitts, 411 U.S. 138 (1973). These cases and their progeny establish that a reviewing court may go beyond the administrative record provided by the agency when (i) the record is not complete; (ii) there is a strong showing of

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purpose of ascertaining the adequacy of the record.²³ This standard would seem consistent with Rule 56(f), Fed. R.Civ. P., or where there is a material disputed fact such as the completeness of the record.²⁴

A useful technique is to keep track of the agency's documents prior to the commencement of litigation through the use of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 551. In response to FOIA requests, the agency must file a "Vaughn Index" listing the documents withheld under claims of privilege.²⁵ The government's liberal interpretation of the work product and attorney-client privileges as a basis for withholding documents has received critical scrutiny from the Courts.²⁶

(4) **Contents Of The Record**

The "record" has been defined by the courts as "all the documents and materials that were directly or indirectly considered by the decision-makers at the time the decisions were rendered."²⁷ The scope of the complete administrative record, as described in the case law, is necessarily highly inclusive. "[T]o the extent the agency's final decision was in fact based on a

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bad faith or impropriety; or (iii) the reviewing court is not able to understand the basis for the agency's decision from the record certified to it by the agency.

²³ Dopico v. Goldschmidt ("Dopico"), 687 F.2d 644, 654 (2d Cir. 1982) ("a strong suggestion that the record before the court was not complete"); Pension Benefit Guaranty Corp. v. LTV Steel Corp., 119 F.R.D. 339, 342 ("there are compelling reasons to allow limited discovery to proceed at this stage...the absence of both a formal agency proceeding and formal administrative findings suggest that some limited discovery will be useful to ensure that all matters considered by the [agency] are brought before the court.") See also Public Power Council v. Johnson, 674 F.2d 791, 795 (9th Cir. 1982) ("a showing that need for discovery was not 'insubstantial or frivolous'").

²⁴ Dopico, 687 F.2d at 654.

²⁵ Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

²⁶ See, e.g., Mead Data Cent. Inc. v. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). In Maine v. U.S. Dep't of Interior, 285 F.3d 126 (1st Cir. 2002), the Court held that such claims made for documents generated during periods when both rule making and litigation are ongoing must have Vaughn Index documentation that the work product privilege is claimed with respect to a specific litigation and establish that the document was prepared "primarily" for litigation purposes. Similarly, the attorney-client privilege must support the critical proposition that the attorney generated document would reveal a confidential client communication.

²⁷ Miami Nation of Indians of Indiana v. Babbitt ("Miami Nation"), 979 F.Supp. 771, (N.D. Ind. 1996); Lloyd v. Illinois Regional Transp. Authority ("Lloyd"), 548 F.Supp. 575, 590-591 (N.D. Ill. 1982); Tenneco Oil Co. v. Dept. of Energy ("Tenneco"), 475 F.Supp. 299 (D.Del. 1979).

compendium of materials, documents, submissions and initial staff decisions and opinions, these constitute the whole record.”²⁸ Courts will presume that agency decision makers referred to a “variety of internal memoranda” in reaching their conclusions, which materials should therefore be included in the record before a reviewing court.”²⁹ The complete record may also include “notes, personal logs, and working papers” which document the collection of information by agency personnel involved in the decision making process.³⁰ Necessary elements of the administrative record are not limited to those materials supporting the conclusion that the agency ultimately adopted.³¹ Moreover, the record must include materials relevant to all levels of decision making leading up to the final agency action; “[a] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record.”³² Upon a showing that the defendant agency considered materials not included in the record submitted to the court, the record should be completed by order of the court.³³

Two District of Columbia cases illustrate some of the problems in attempting to produce a “full” record. In Linemaster v. EPA,³⁴ Chief Judge Mikva, writing for the Court of Appeals for the District of Columbia, refused to include in the record certain data that petitioner submitted to a Regional Office, as opposed to the Washington decision-maker, reasoning that material was

²⁸ Exxon Corp. v. Dept. of Energy, 91 F.R.D. 26, (N.D. Tex. 1981).

²⁹ Tenneco, 475 F.Supp. at 317. See also Lloyd, 548 F.Supp. at 590; Ammex, Inc. v. United States (“Ammex”), 62 F.Supp. 2d 1148, 1156 (Ct. Int. Trade 1999).

³⁰ Miami Nation, 979 F.Supp. at 777. The delineation of materials to be included in the administrative record before the reviewing court can be complicated by agency invocation of the “deliberative process privilege.” See, e.g., id. at 777-79. However, the application of the privilege from which the agency seeking its protection has the burden of making specific showings, involves an inquiry separate from that of establishing the scope of the complete administrative record. See id. Materials which are properly included in the administrative record may turn out to fit within the privilege, but only if it has not been waived and the agency invoking the privilege has made the necessary affirmative showings.

³¹ Woodhill Corp. v. Federal Emergency Mgmt. Agency (“Woodhill Corp.”), 1997 U.S. Dist. LEXIS 13311, *5 (N.D. Ill. 1997) (ordering the inclusion in the administrative record of notes of a meeting where the unsuccessful applicant advocated its position to the defendant agency).

³² Miami Nation, 979 F.Supp. at 777.

³³ Woodhill Corp., 1997 U.S. Dist. LEXIS 13311, *3 (N.D. Ill 1997); see Miami Nation, 979 F.Supp. at 778.

³⁴ Linemaster Switch Corp. v. EPA (“Linemaster”), 938 F.2d 1299 (D.C.Cir. 1991).

not “before” agency decision-makers. The Court reasoned to hold that the documents should be included “would effectively require EPA to comb all regional files for potentially relevant data before listing a site on the NPL, and would be inconsistent with our prior decisions emphasizing the necessarily abbreviated nature of the listing process and tolerating somewhat cursory agency actions and explanations in that context.”³⁵

However, a year later, Chief Judge Mikva expanded the scope of an administrative record to include internal documents relevant to the agency’s decision despite the fact that these documents had not actually been considered by agency decision-makers. While Mikva stopped short of finding bad faith, he concluded that the administrative record was incomplete because the EPA negligently failed to discover readily available documents relevant to its decision to use certain testing methods and relied instead on a single memorandum from a another program.³⁶

(5) **Electronic Mail**

Recently, e-mails have become a common part of the administrative record in the same manner as any other type of correspondence, indicating that the standard for including emails in the administrative record is simply whether they were part of the full record before the agency decision maker. See e.g., Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1236 (10th Cir. 2001) (E-mail correspondence between Bureau of Indian Affairs staff); Stone v. West, 133 F.Supp.2d 972, 975 (E.D.Mich. March 21, 2001) (E-mail correspondence between plaintiff employee and her supervisor); City of Roseville v. Norton, 219 F.Supp.2d 130, 166 (D.D.C. 2002) (E-mail correspondence between Bureau of Indian Affairs staff); Defenders of Wildlife v. Norton, 239 F.Supp.2d 9, fn 10 (D.D.C. 2002) (E-mails sent to or from Fish and Wildlife Service biologist who wrote final rule); Hayward Area Planning Association v. Norton, 2004 WL

³⁵ Id. at 1306.

³⁶ Kent County, Delaware Levy Court v. EPA, 963 F.2d 391, 396 (D.C.Cir 1992).

724950, *6 (N.D.Cal. March 29, 2004) (Internal Fish and Wildlife Service e-mail correspondence); Citizens for Health v. Thompson, 2004 WL 765356, *7 (April 2, 2004) (Public comments to proposed agency rule submitted via e-mail included in the administrative record). Moreover, there are several cases in which the administrative record included e-mails exchanged between different agencies. See Center for Biological Diversity v. Federal Highway Administration, 2002 WL 32307826, *3 (S.D.Cal. Nov. 19, 2002) (Email correspondence between Federal Highway Administration and California Transportation Ventures, Inc.); Ft. Funston Dog Walkers v. Babbitt, 96 F.Supp.2d 1021, 1026 (N.D.Cal. April 26, 2000) (Email correspondence between Defendant National Park Service and the California Department of Fish and Game); Defenders of Wildlife v. Dalton, 2000 WL 1562928, *6 (Ct.Int.Trade Oct. 12, 2000) (Email correspondence between the Commerce Department and the State Department).

The only cases found in which emails were contested as outside the scope of the administrative record were those instances where it was questionable whether the decision maker ever considered the email over the course of the decision making process. Where it is demonstrated that an email was not considered by the decision maker, it is excluded from the record. See Schneider v. Board of School Trustees, Ft. Wayne Community Schools, 255 F.Supp.2d 891, 893-894 (N.D.Ind. Jan. 3, 2003) (Email correspondence between third parties excluded from the record because it was never considered by Defendant).

The e-mail phenomenon is an interesting feature of record compilation because e-mails quite often do not receive the deliberation that non-electronic written communications frequently receive.

(6) **Completion or Supplementation of the Administrative Record**

When an agency fails to submit all of the materials considered by decision-makers, courts will allow limited discovery in order to complete the administrative record.³⁷ A party need only show that there is a reasonable basis to believe these materials are not in the record.³⁸ However, when a party wishes to supplement the administrative record with materials not considered by the agency, it must overcome a heavier burden. Courts may consider requests to supplement the record with extra-record materials in limited circumstances, where an agency's failure to explain its actions frustrates effective judicial review or where a party makes a strong showing of agency bad faith.³⁹ However, the granting of such requests is rare. Effective judicial review is not frustrated merely because a more detailed or more precise statement of an agency's rationale could be helpful to a reviewing court.⁴⁰ Courts may also supplement the record with extra-record materials when effective review of agency action requires an explanation or clarification of technical terms.⁴¹

Ad Hoc Metals, may illustrate a judicial reluctance to probe the internal administrative mind. In this case, the court refused to include internal agency e-mails in the administrative record, stating that "judicial review of agency action should be based on an agency's stated justifications, not the pre-decisional process that led up to the final, articulated decision."⁴² The

³⁷ Ohio Valley Env'tl Coalition v. Whitman, ("Ohio Valley"), 2003 WL 43377 (S.D.W.Va. 2003); Ad Hoc Metals Coalition v. Whitman, ("Ad Hoc"), 227 F.Supp.2d 134 (D.D.C. 2002).

³⁸ Ammex, 62 F.Supp.2d at 1156.

³⁹ Camp v. Pitts, 411 U.S. at 142-43; Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997-98 (D.C.Cir. 1990); Fund for Animals, 245 F.Supp.2d at 57; Bethlehem Steel Corp. v. EPA, 638 F.2d 994 (7th Cir. 1980).

⁴⁰ Madison County Bldg. and Loan v. FHLBB, 622 F.2d. 393, 397 (8th Cir. 1980).

⁴¹ Ammex, 62 F.Supp.2d at 1157.

⁴² Ad Hoc Metals Coalition v. Whitman, 227 F.Supp.2d 134, 143 (D.D.C 2002). In National Nutritional Foods Ass'n v. Mathews, 557 F.2d 325, 331 (2d Cir. 1977), the court found intra-agency communications and drafts of regulations exempt from disclosure under the Freedom of Information Act. It also held that plaintiff had not shown sufficient justification to overcome agency's claim of deliberative process privilege.

court reasoned that inclusion of such deliberative materials “could hinder candid and creative exchanges regarding proposed decisions and alternatives” creating a chilling effect on open discussion.⁴³

(7) **Documents That Need Not Be Produced**

Privileged documents need not be included in certain administrative records. In judicial review of administrative actions, a frequently asserted privilege arises under the “deliberative process privilege” doctrine. To establish the deliberative process privilege, a federal agency must demonstrate that the deliberations the agency wishes to withhold satisfy two requirements. First, the communication must be predisciplinary.⁴⁴ Second, the communication must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”⁴⁵ Under the deliberative process privilege, discovery cannot be had of “intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”⁴⁶ In addition, the privilege applies to factual materials that would reveal the deliberative process.⁴⁷

Fortunately, unlike certain other privileges (e.g., attorney-client), the deliberative process privilege is not absolute.⁴⁸ After concluding that the privilege is properly invoked, the court must balance the public interest in nondisclosure with the individual need for the information as evidence. The factors to be weighed include: (1) the degree to which the proffered evidence is relevant; (2) the extent to which it may be cumulative; and (3) the opportunity of the party

⁴³ Id.

⁴⁴ Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

⁴⁵ Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

⁴⁶ Carl Zeiss Stiftung v. V.E.B., Carl Zeiss Jena (“Carl Zeiss”), 40 F.R.D. 318, 324 (D.D.C. 1966), aff’d, 348 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967); Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438 (1st Cir. 1992).

⁴⁷ National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1116-18 (9th Cir. 1988).

⁴⁸ Carl Zeiss, 40 F.R.D. at 328-29; Gomez v. City of Nashua, N.H., 126 F.R.D. 432 (D.N.H. 1989).

seeking disclosure to prove the particular facts by other means. To compel disclosure, the claimant must make “a showing of necessity sufficient to outweigh the adverse effects the production would engender.”⁴⁹

(8) **Judicial Deference To Agency Action**

Members of the regulated community face two additional hurdles in obtaining relief through judicial review. Judicial review seldom involves plenary litigation, and the standard of review normally involves some formulation of the now familiar doctrine that agency decisions will not be overturned unless procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute.⁵⁰ In addition, agencies lay claim to judicial “deference” to their actions. Indeed, the incantations of deference would make the Lord High Executioner blush. Historically, deference appears as a recognition of the agency’s primary role in administering a legislative mandate; the reviewing court must accept a reasonable agency interpretation even if it would reach a different one if not acting as a reviewing court under what has been called the Hearst doctrine.⁵¹ In addition, the courts have developed the Skidmore⁵² deference doctrine, wherein a reviewing court will give respectful consideration to the agency’s views in light of the agency’s experience and informed judgment. However, the decision that has recently dominated judicial review of agency action has been Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (“Chevron”).⁵³ The Chevron doctrine provides for a two-step judicial analysis:

First, always, is the question whether the U.S. Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court

⁴⁹ Id.

⁵⁰ United States v. Morton, 467 U.S. 822 (1984); 5 U.S.C. §706.

⁵¹ National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944).

⁵² Skidmore v. Swift & Co., 323 U.S. 134 (1944).

⁵³ 467 U.S. 837 (1984).

determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵⁴

Thus, the first step is to determine whether the statute is clear and unambiguous; if it is, then deference to an agency interpretation is not appropriate. Where the statute is silent or "ambiguous" then the second step of the Chevron deference doctrine mandates that the court must accept the agency's interpretation of the statute so long as it is reasonable.

Since 1984, Chevron deference has been in the forefront of agencies' defenses of their actions and pronouncements. While Chevron arose in the context of rule making, agencies have tended to invoke it in a wide variety of circumstances.⁵⁵ The Supreme Court has placed those attempts in perspective in several recent decisions. In Christensen, et al. v. Harris County, et al. ("Christensen"),⁵⁶ the Court noted that the unsuccessful plaintiffs had argued that the Department of Labor opinion letter should be granted deference under Chevron. The Court then held:

Here, however, we confront an Interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication, or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference.⁵⁷

In the following year, the court decided United States v. Mead Corporation.⁵⁸ Here, the Court attempted to sort through the various claims of deference. Justice Souter wrote for the

⁵⁴ Id. at 842-43.

⁵⁵ See, e.g., National Association of Broadcasters v. Librarian of Congress, 146 F.3d 907 (D.C. Cir. 1998) (distribution of royalties collected from cable television systems); Bamidele v. Immigration and Naturalization Service, 99 F.3d 557 (3d Cir. 1996) (Board of Immigration Appeals determination to deport the plaintiff); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) (Navy practices of leasing acreage and contiguous water rights to local farmers).

⁵⁶ 529 U.S. 576 (2000).

⁵⁷ Id. at 587.

⁵⁸ 533 U.S. 218, 121 S.Ct. 2164 (2001).

Court “[t]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”⁵⁹ Justice Souter noted that agencies that are filling legislative “gaps” at the express direction of Congress are entitled to “substantial deference” in their promulgation of rules pursuant to the Chevron doctrine, but that in other circumstances, agency actions have received judicial responses of “near indifference.”⁶⁰

To agree with the Court of Appeals that Customs ruling letters do not fall within Chevron is not, however, to place them outside the pale of any deference whatever. Chevron did nothing to eliminate Skidmore’s holding that an agency’s interpretation may merit some deference whatever its form, given the “specialized experience and broader investigations and information” available to the agency, . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140. See generally Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry “at least some added persuasive force” where Chevron is inapplicable); Reno v. Koray, 515 U.S. 50, 61 (1995) (according “some deference” to an interpretive rule that “does not require notice and comment”); Martin v. Occupational Safety and Health Review Comm’n, 499 U.S. 144, 157, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (“some weight” is due to informal interpretations though not “the same deference as norms that derive from the exercise of . . . delegated lawmaking powers”).

...

A classification ruling in this situation may therefore at least seek a respect proportional to its “power to persuade,” Skidmore, *supra*, at 140; see also Christensen, 529 U.S. at 587; *id.*, at 595 (STEVENS, J., dissenting); *id.*, at 596-597 (BREYER, J., dissenting). Such a ruling may surely claim the merit of its writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.⁶¹

⁵⁹ Id., 121 St. Ct. at 2171-72, citing Chevron (internal quotes and other citations removed).

⁶⁰ Id.

⁶¹ Id. at 2175-76.

Subsequent to Mead, the Supreme Court discussed judicial deference to agency interpretation in three cases. In Edelman v. Lynchburg College⁶² (“Edelman”), the issue was the correctness of the Equal Employment Opportunity Commission (“EEOC”) acceptance of a letter from a claimant’s attorney as a sufficient ‘charge’ under 42 U.S.C. § 2000e-5(e)(1) (1994), even though the official form was not filed until after the statutory 300 day time period. The Court sustained the EEOC’s position. However the Court sidestepped the deference issue, noting, “there is no need to resolve any question of deference here. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference or how much.”⁶³ Shortly thereafter in Barnhart v. Walton⁶⁴ (“Barnhart”), Chevron deference to formal regulations was applied, despite petitioner’s argument that the regulation shouldn’t be considered given its recent enactment. The Court dismissed this argument, noting the Agency’s interpretation was one of long standing, “[a]nd the fact that the Agency previously reached its interpretation through [less formal means] does not automatically deprive that interpretation of the judicial deference otherwise its due.”⁶⁵

However, in Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler⁶⁶ (“Keffeler”), a similar outcome was reached but by different means. The Court accepted an informal Social Security Administration definition interpreting a statute, and therefore excluded respondent’s claim, because, “[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake

⁶² 122 S.Ct. 1145 (2002).

⁶³ Id. at 1150.

⁶⁴ 122 S.Ct. 1265 (2002).

⁶⁵ Id. at 1271 (citations omitted).

⁶⁶ 123 S.Ct. 1017 (2003).

of...abstract breadth.”⁶⁷ Although Chevron deference was not warranted because the definition appeared in an Administration operating manual, some deference was afforded because the interpretation was reasonable and adhered to general principles of statutory construction.⁶⁸

Edelman, Barnhart and Keffeler may simply stand for the propositions that reasonable agency interpretations, vetted by some process that vouches for their reasonableness, will likely be sustained.⁶⁹

Nevertheless, members of the regulated community should try to conduct their judicial fight along lines that do not invoke the maximum deference of Chevron or similar administrative doctrines. Justice Souter’s list of varying degrees of deference is a useful tool for the private litigant. For example, internal guidelines and other pronouncements not subject to prior public scrutiny, or positions advanced for the first time in the course of the litigation, are only entitled to some or little deference, as opposed to substantial deference under Chevron.⁷⁰

The advantages to this approach are illustrated by the case Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,⁷¹ in which the plaintiff alleged that the City had violated the Clean Water Act with an unpermitted discharge from a dam. The City argued that no permit was required, relying on an EPA policy, articulated in opinion letters, reports to Congress, and litigation positions over the years, that the Act’s discharge permit requirement did

⁶⁷ Id. at 1026.

⁶⁸ Id. at 1025.

⁶⁹ See also Heimmermann v. First Union Mortgage Corporation, 305 F.3d 1257 (2002) (holding that Chevron deference applied to a HUD statement of policy because Congress expressly delegated authority to make and interpret rules, and thereby gave the statement the full force of law); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219 (2002) (holding that Skidmore deference is appropriate where the Secretary of Labor’s position on citation pardons was only expressed in a litigation document); Teambank, N.A. v. McClure, 279 F.3d 614 (2002) (holding that an Office of the Comptroller of the Currency (“OCC”) opinion letter was entitled to Chevron deference because, under Mead, OCC decisions are deferred to even in the absence of formality); Heartland By-Products, Inc. v. United States, 264 F.3d 1126 (2001) (holding that Customs classification rulings are not given Chevron deference under Mead, however this particular case did merit Skidmore deference due to its persuasiveness).

⁷⁰ 533 U.S. 218, 121 S.Ct. at 2175-76.

⁷¹ 273 F.3d 481 (2d Cir. 2001).

not apply to discharges from dams. The Second Circuit, following Mead and Christensen, held that because the EPA policy was never formalized in a notice-and-comment rulemaking or formal adjudication under the APA, it was not due Chevron deference, and need not be adopted by the court unless it was “persuasive.”⁷² Thus, the court engaged in its own interpretation of the statute and rejected the EPA position as applied to discharges from a more polluted body of water into a less polluted one.⁷³

(9) **Conclusion**

All of the foregoing leads to the ineluctable conclusion that the real fight should be before the agency as opposed to a reviewing court. However, when the dispute has progressed to the Courts, careful attention should be paid to whether the rule requires an opportunity for public comment and whether the record docketed by the agency’s lawyers reflects what the agency actually considered, and the issues should be framed in a manner that avoids an application of the broad discretion of the agency. Claims of deference should be reviewed to ascertain their entitlement under the Supreme Court’s teaching in United States v. Mead and similar earlier cases.

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⁷² Id. at 489-91.

⁷³ Id. at 491-94.