CHAPTER FIVE: ADMINISTRATIVE LAW (Updated September 2018)

Items that are new or modified in 2018 are in yellow highlight.

Add a new Note before section g. on page 258:

1. A corollary to the doctrine of *Chevron* deference is what is sometimes called "*Auer* deference" (from *Auer v. Robbins,* 519 U.S. 452 (1997)). Under this doctrine, an agency's interpretation of *its own regulations* is to be afforded deference by the courts. This principle is perhaps less well-settled in the courts than the principle of *Chevron* deference. The operation of *Auer* deference – and its controversial nature – can be seen in *Decker v. Northwest Environmental Defense Center*, ___ S.Ct. ___, 2013 WL 1131708 (2013). In this opinion, which arose under the Clean Water Act (and is discussed in the updates to Chapter 8), Justice Kennedy's majority opinion describes a broad sort of deference to an agency's interpretation of its own rules: "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (citations and internal quotes omitted). In their concurrence, however, Chief Justice Roberts and Justice Alito note that "[i]t may be appropriate to reconsider that principle in an appropriate case," although they conclude that "this is not that case." Finally, Justice Scalia, the lone dissenter, castigates *Auer* deference as "a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." Moreover, he argues, "*Auer* deference encourages agencies to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." (citation and internal quotes omitted). This rule, he concludes, "is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power."

Add Notes 5 and 6 to the top of page 273:

5. The Office of Information and Regulatory Affairs (OIRA), created by Congress to administer the Paperwork Reduction Act, has also become the body within OMB that administers the presidential cost-benefit policy.

6. Beyond the cost-benefit criterion and the other agency oversight exercised by OIRA, OMB exercises considerable control over agency policy through the budgetary process. For a detailed, thoughtful overview of OMB's role in this process, see Eloise Pasachoff (2016) "The President's Budget as a Source of Agency Policy Control," 125 *Yale Law Journal* 2182. Pasachoff highlights the role of OMB's five Resource Management Offices (RMOs), which she describes as "a critically important but understudied part of OMB" that "contain[s] more than four times as many staff members as OIRA." The RMOs, she notes, "play a large role in overseeing—indeed,

at times in directing—the work of agencies … because they have primary responsibility for pulling the [oversight 'levers'] associated with budget preparation, budget execution, and management initiatives."

Add immediately after the excerpt and discussion of the *State Farm v. NHTSA* opinion:

The principles articulated in *State Farm* have come increasingly to the forefront after the election of Donald Trump in 2016. As an avowed opponent of much of the nation's environmental, public health, and consumer protection regulation, President Trump has repeatedly directed federal agencies to reverse or delay the implementation of regulations enacted or developed by previous administrations. (See, for example, the discussion in Chapter 8 of the administration's attempts to scuttle the Obama administration's "Clean Water Rule," which was promulgated to clarify the jurisdictional limits of the federal Clean Water Act.) These executive branch de-regulatory efforts could face a rocky reception in the federal courts. Two appellate court decisions handed down in August 2018 illustrate the point.

In *League of Latin American Citizens v. Wheeler*, 2018 WL 3763531 (9th Cir., Aug. 9, 2018), the Ninth Circuit ordered EPA to revoke its regulations allowing foods containing the pesticide chlorpyrifos to be sold in the United States. "Over nearly two decades," the Court observed, "the U.S. Environmental Protection Agency ("EPA") has documented the likely adverse effects of foods containing the residue of the pesticide chlorpyrifos on the physical and mental development of American infants and children, often lasting into adulthood." In 2016, EPA concluded that the risk from residues of the pesticide in foods exceeded relevant safety standards. In 2017, however, the Trump administration reversed this finding, and issued an order indicting EPA's intention to study the matter further, according to an indefinite time frame. A coalition of environmental groups, states, and farmworker groups submitted comments challenging this reversal, but EPA issued no response to the comments. The groups then filed a petition in the Ninth Circuit requesting an order directing EPA to act on the pesticide. EPA offered no substantive defense to the petition, but instead argued that the court had no jurisdiction to consider the petition until the agency responded to the groups' comments. The court disagreed: "If Congress's statutory mandates are to mean anything, the time has come to put a stop to this patent evasion."

And in *Utility Solid Waste Activities Group v. EPA*, D.C. Circuit No. 15-1219 (Aug. 21, 2018), the D.C. Circuit overturned significant portions of EPA's "coal combustion residuals" (coal ash) rule (discussed in Chapter 9) as being insufficiently protective of public health and the environment, and thus in violation of the federal Resource Conservation and Recovery Act. In so doing, the court rejected the Trump administration's argument that the court should delay any ruling until EPA has finished its "reconsideration" of the rule. This latter ruling is significant

because the Trump EPA has made the same type of argument regarding other Obama-era regulations it intends to reconsider and revise.

Add Notes 8 and 9 to page 338:

8. An industrial activity that has become increasingly contentious in many areas of the country is what is commonly known as "fracking" – drilling operations designed to extract underground quantities of natural gas or oil through horizontal drilling coupled with multi-stage hydraulic fracturing. In the Energy Policy Act of 2005 (Pub. L. 109-58), Congress took steps to insulate such activities from the EIS requirement when they are performed on public lands. This legislation creates "a rebuttable presumption that the use of a categorical exclusion [from NEPA requirements] would apply" to a list of specified drilling activities done under a license granted by "the Secretary of the Interior in managing the public lands, or the Secretary of Agriculture in managing National Forest System Lands," so long as "the activity is conducted pursuant to the Mineral Leasing Act [30 U.S.C. 181 *et seq*.] for the purpose of exploration or development of oil or gas." 42 U.S.C.A. § 15942.

9. In *High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d 1174 (D. Col. 2014), the plaintiffs challenged the issuance of federal lease modifications that would enable and expand coal mining exploration on federal land in Colorado. They argued that the EIS done by the Forest Service, Bureau of Land Management, and Department of the Interior was deficient because it failed to adequately assess the social costs of the increased greenhouse gas emissions (GHC) that would be occasioned by the combustion of the coal to be mined. The agencies had calculated the extent of the increased GHC emissions that would likely be created, but argued that predicting the consequences of these emissions was infeasible. The court disagreed, holding that such calculation was a necessary part of the EIS. The court noted the existence of a "social cost of carbon" protocol that had been developed with the input of federal agencies, and noted that the government had used that protocol in the EIS to calculate the social benefits (but not the social costs) of expanding the coal mining operations. In previous cases, decided prior to the development of the protocol, courts had held that calculation of the social costs of GHC emissions was not required by NEPA because no tool existed for such calculation. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), and *WildEarth Guardians v. U.S. Forest Service*, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011).