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# Whose Line is it Anyway? Expertise or Caprice in Regulatory Decision-making?

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## The *Chevron* Doctrine:

- Two Step Process:
  - Has Congress spoken clearly?
  - If not, and the statute is silent or ambiguous, is the agency's decision based on a reasonable construction of the statute?
- But: is what agencies do really akin to statutory construction? They are charged with *carrying out* programs, not with issuing disinterested interpretations of statutes.

- What are the real limits on agency decision-making?
- Is process what matters?
- Is it realistic or even reasonable to expect courts to wade into technical and scientific questions?



# The Language of Administrative Law

- Deference: Submission to or compliance with the acknowledged superior claims, skill, judgment or qualities of another. (New Oxford English Dictionary)
- Discretion: Freedom to decide or act as one thinks fit, absolutely or within limits.

- Caprice: An unaccountable change of mind or conduct; a whim; a freakish fancy.
- Arbitrary: Based on mere opinion or preference as opposed to the real nature of things; unpredictable; inconsistent.

## Examples

- Numeric water quality criteria v. narrative
- Beneficial use designation
- Selection of Hardness for metals limitations



## Example #1

- Numeric water quality criteria v. narrative  
Process for establishing a numeric effluent  
limitation for– e.g. aluminum

# Water Quality Criteria Development

- Numeric Criteria:
  - Evaluate a range of numeric values
  - Comply with CEQA
  - Consider statutory factors, including economics and the individual characteristics of the water body





## Numeric v. Narrative Criteria

- Numeric Criteria  
(cont'd)

- Develop a program of implementation

Amend Basin Plan or  
other WQ plan

- Approval by Office of  
Administrative Law

- Approval by USEPA

- Narrative Criteria

- 30 + year old  
provision—e.g. no  
toxics in toxic  
amounts

- “interpret” criteria to  
equal USEPA  
304(a) numeric  
criterion

## Is this legal?

- Regional Boards do not need to consider economic factors when implementing a narrative standard. (WQO 2003-0002, *In the matter of the City of Stockton*)
- Use of European Union at-the-tap standard for ammonia to establish a receiving water limit: *Held: It was error to use the EU value to implement the narrative taste and odor objective because it was designed to protect human health— not taste and odor.* (Order WQ 2002-015, *In the matter of the City of Vacaville.*)

- Imposition of an EC limit based on a UN Report on Agriculture without considering whether sensitive crops were likely to be present was improper.
- Regional Boards must consider site-specific conditions and qualifications in guidance documents when using them to translate narrative standards into numeric limits. (Order WQ 2004-0010, *In the matter of the City of Woodland*)

## Example # 2

- Designation of beneficial uses via the “Tributary Rule”: Basin Plan provides:

“The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board’s judgment will be applied.

It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis.”

- The staff report notes that literal application of the prior provision, a footnote that applied beneficial uses to upstream waters without qualification, would be “inflexible and unworkable.” The Regional Board “never intended that the footnote serve as the foundation for establishing water quality objectives . . . [a]nd the Regional Board certainly never intended that the footnote should prevail over findings of scientific fact.”

- In 2000 (5 years after adoption), USEPA objected to " the Tributary Statement in the Basin Plan because the statement was not "specific enough" and that a Basin Plan amendment would be required to do anything other than apply all the uses of the downstream water.

## Is this legal?

- Can the State, after acknowledging the flaws in the “blanket” tributary footnote, simply begin implementing it as “black letter” law without a Basin Plan amendment, without public comment, compliance with the Water Code?
- Is a use attainability analysis, including extensive scientific study, required to un-do the designation?

Can this become a drinking water source and cold water fishery with the stroke of a pen?





## At least one judge thinks so...

- “It is not the role of the judiciary to determine which regulatory scheme is ‘best’ or ‘most functional.’ If it were, the Court would certainly recommend a different approach here. . . .While... the process is less than efficient. . . [it] does not appear to lead to arbitrary or capricious results.. . and thus is not illegal.” (Tentative Order, *City of Vacaville v. SWRCB*, October 24, 2008.)

## Example #3: Use of Minimum Levels for Compliance

- CA's water quality standards include MLs (the lowest level of concentration in a sample that can be accurately quantified) for determining compliance with effluent limitations for toxics that are below the detection limit.

## WaterKeepers of No. California v. SWRCB, (2002) 102 Cal. App. 4th 1448

- In 2002, NGOs challenged this, arguing that the ML was an illegal substitute less stringent effluent limit.
- State argued: Deference: citing *Industrial Welfare Com. v. Superior Court of Kern County*, (1980) 27 Cal. 3d 690: 'A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision; . . . in these technical matters requiring the assistance of experts and the collection and study of statistical data, courts let administrative boards and officers work out their problems with as little judicial interference as possible.' "

## The Court of Appeal said...

- Deference not appropriate
  - Regulatory provision was ambiguous and there had been no history of interpretation
  - NGOs challenged the State's statutory authority to enact the provision
  - EPA's approval relevant, but only an "absence of objection." Court found EPA's interpretation to have "shifted from a position supporting the [State] to a position closer to that of the [NGOs] without providing any clear and controlling guidance."

## So, the Court...

Came up with its own approach:

- “use of ML's in compliance determinations would raise at least the appearance of a novel concept previously unknown in the federal and state regulatory scheme--a compliance-based effluent limitation.
- But, if the use of ML's is confined to reporting and a guideline for administrative enforcement, the provision can stand— judgment for the State.

## So the State won, except...

- Plaintiff argued it had prevailed and was entitled to attorneys fees. They had sought declaratory relief, and the Court stated “this decision offers appellants the substantive equivalent of a declaratory judgment.”
- The State paid attorneys fees to the NGO plaintiffs via settlement.

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