



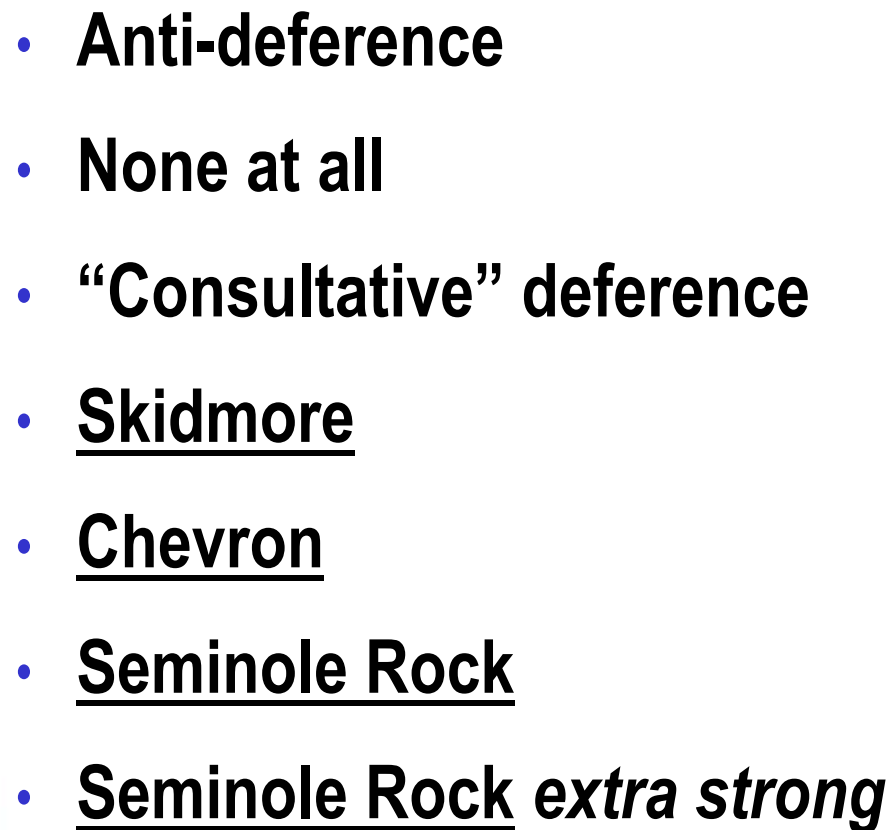
Regulatory Deference: Whose Line Is It Anyway?

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Gradations of Deference

- 
- **Anti-deference**
 - **None at all**
 - **“Consultative” deference**
 - **Skidmore**
 - **Chevron**
 - **Seminole Rock**
 - **Seminole Rock *extra strong***

Anti-Deference

- Doesn't really exist in environmental context
- But still worth remembering, especially in serious enforcement cases where "code of lenity" may be relevant
- See Gonzales v. Oregon, 546 U.S. 243 (2006)

No Deference at All

- Best example: where the legislative mandate is clear
- Most vivid, recent application:
 - The law says “daily.” We see nothing ambiguous about this command. “Daily” connotes “every day.” Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of “[g]ive us this day our daily bread” as a prayer for sustenance on a seasonal or annual basis. Friends of the Earth v. EPA, 446 F.3d 140, 144 (D.C. Cir. 2006)

Consultative Deference

- Academic turn-of-phrase used to define situations where a court does not invoke any particular deference doctrine but nonetheless relies on an agency amicus brief, policy or interpretative guidance to influence outcome of case
- See Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

Skidmore Deference

- Agency interpretation is entitled to “respect proportional to its power to persuade.”
Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)
- Grounded in agency’s inherent expertise and investigative powers as opposed to specific legislative grant of authority. See United States v. Mead Corp., 533 U.S. 218 (2001)

Chevron Deference

- If the legislature has not directly addressed the question, then defer to the agency's *reasonable* interpretation
- See Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984)

Seminole Rock Deference

- Agency interpretation of its own regulation is “controlling...unless it is plainly erroneous or inconsistent with the regulation.” Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)
- Note that there is growing criticism over this approach, which arguably undermines the objective of making rules “clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law.”

Seminole Rock *Extra Strong*

- Deference to the agency is “especially strong” where its challenged decisions involve technical or scientific matters within the agency’s area of expertise.
- See Utah Environmental Congress v. Russell, 518 F.3d. 817 (10th Cir. 2008)

Theories to Erode Deference

- **Constitutional theories like due process and fair notice**
- **Procedural theories like inadequate/defective process or response to comments**
- **Inconsistencies in application or practice (e.g., where an agency ignores its own policy)**
- **Failure to consider all relevant factors**
- **Inadequate fact basis (usually expressed as “without substantial evidence”)**
- **Irrational, arbitrary, capricious...**

Considerations and Context

- **Important distinctions between deference standards as applied to rules versus case decisions (e.g., permits)**
- **Occasional ambiguity between the two (e.g., what is a TMDL?)**
- **Likely variants at the state level**

Comparative Statistics

- In the history of NPDES appeals before the EAB, EPA's NPDES permit decisions have been reversed and/or remanded 58 times (but note that this does not do justice to the exponentially higher number of permits that EPA takes back on its own initiative to correct obvious flaws or engage in further negotiations)
- “Clearly erroneous” standard applies to EPA's permit decisions (akin to Seminole Rock deference standard)
- Examples of “clearly erroneous” decisions:
 - failing to provide compliance schedules where required by applicable state (D.C.) water quality standards (WASA Blue Plains NPDES Permit)

More Examples

- selecting “frequency of exceedance” value without an adequate rationale in the record (Dominion Energy Brayton Point NPDES Permit)
- changing final from draft without explaining the reason(s) for the change (Marlborough, Mass. NPDES Permit)
- failing to explain, on the record, how the permit will ensure compliance with applicable water quality standards (D.C. MS4 NPDES Permit)
- failing to reconcile permit with state water quality certification (WASA Blue Plains NPDES Permit)

How to Win

- Don't just protest a limit or condition; rather, position your protest around one or more of the theories available to erode agency deference
- Don't repeat the same arguments at different stages of the proceeding; rather, react to the agency's responses to earlier arguments
- Keep in mind that finding an accord with your agency is always better (and nearly always cheaper) than seeking to compel such an accord in court
- Remember that an agency always has multiple potential critics, what is good to you may not be perceived as good to an environmental group, and the agency may need your help building a defensible record to protect its permit decision on appeal