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## ***Kisor's* Chaos: Conflicting Meanings of the Clean Air Act's "Applicable Requirements" in the Fifth and Tenth Circuits**

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# KISOR'S CHAOS: CONFLICTING MEANINGS OF THE CLEAN AIR ACT'S "APPLICABLE REQUIREMENTS" IN THE FIFTH AND TENTH CIRCUITS

Marissa Corry\*

## ABSTRACT

*"Although [the administrative state] [is] . . . unrecognized by the Constitution, it has become the government's primary mode of controlling Americans, and it increasingly imposes profound restrictions on their liberty."<sup>1</sup> As this statement suggests, administrative agencies wield immense power and influence over the everyday lives of American citizens. In recent years, concern about the extensive power of the administrative state has led courts, policymakers, and the public to advocate for enhanced constraints on administrative agencies.*

*One such constraint is allowing courts to determine the meaning of a statute or regulation instead of deferring to an agency's interpretation of such statute or regulation. But this constraint comes at a cost. By making it more difficult for agencies to receive deference, courts create more uncertainty regarding the meaning of a particular statute or regulation. Without clear guidance on the meaning of the law, American citizens will struggle to comply with the law. In effect, the amount of power wielded by administrative agencies entails a trade-off between making administrative agencies more accountable to the public and ensuring the public understands what the law means.*

*This Comment discusses a recent circuit split between the U.S. Courts of Appeals for the Fifth and Tenth Circuits over how to interpret the Environmental Protection Agency's regulation defining the "applicable requirements" for obtaining a Title V permit under the Clean Air Act. This conflict demonstrates the confusion and inconsistency plaguing lower courts over the application of the different standards of agency deference. As a result, the meaning of a particular statute or regulation can vary from jurisdiction to jurisdiction. This Comment proposes a solution for reworking the regulatory deference framework that will promote clarity and uniformity in the interpretation of statutes and regulations. The proposed solution suggests that the Supreme Court should restore Auer to its*

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1. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014).

“plainly erroneous or inconsistent with the regulation” standard<sup>2</sup> and add a second step when an agency announces a new interpretation of a regulation that conflicts with its prior interpretation.<sup>3</sup> Under this second step, courts would take a “hard look” at the agency’s new interpretation to see if the agency provided a reasoned explanation for its changed position.<sup>4</sup> This approach would give agencies the flexibility to update regulations in response to changed circumstances while also providing courts with the oversight necessary to ensure an agency’s proposed interpretation aligns with “what the law is.”<sup>5</sup>

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2. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 453 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

3. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 56–57 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–16 (2009).

4. See Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 113, 148–50 (2015).

5. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

## I. INTRODUCTION

AS Chief Justice John Marshall once proclaimed, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>6</sup> However, at the same time, “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”<sup>7</sup> These statements, made long before the rise of the modern administrative state, reflect the fundamental conflict that pervades administrative law today—balancing the need to defer to agency expertise with the judiciary’s obligation to say what the law is. As the Supreme Court recently recognized, “sometimes the law runs out, and policy-laden choice is what is left over.”<sup>8</sup> Under such circumstances, courts presume that Congress would want the administrative agency to resolve the ambiguity rather than a court.<sup>9</sup> This rebuttable presumption arises because, unlike courts, administrative agencies have substantive expertise in matters falling under their authority and are more politically accountable to the people via presidential oversight.<sup>10</sup> However, courts struggle to delineate where the law runs out and policy choices begin.

To help judges differentiate between these two areas, the Supreme Court developed several doctrines that determine when deference to an agency’s interpretation is appropriate. The two main doctrines are *Chevron*, which applies to agency interpretations of *statutes*,<sup>11</sup> and *Auer*, which applies to agency interpretations of *regulations*.<sup>12</sup> When these doctrines were first announced, they were simple and relatively straightforward for courts to apply.<sup>13</sup> However, over time courts became concerned that these deference doctrines allowed agencies to take over the court’s duty to say what the law is.<sup>14</sup> As a result, courts established additional requirements that agencies must meet to receive deference.<sup>15</sup>

This Comment discusses a recent circuit split between the Fifth and Tenth Circuits over how to interpret the Clean Air Act’s “applicable requirements” for purposes of Title V permitting. Specifically, the central question involved in the dispute is whether the Title V permitting process may be used to second-guess prior preconstruction permitting decisions

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6. *Id.*

7. *Id.* at 170.

8. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

9. *See id.* at 2412.

10. *See id.* at 2413.

11. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

12. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

13. Kristin E. Hickman & Mark R. Thomson, *The Chevronization of Auer*, 103 MINN. L. REV. HEADNOTES 103, 107 (2019).

14. *See, e.g., Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 128–29, 131–32 (2015) (Thomas, J., concurring).

15. Hickman & Thomson, *supra* note 13, at 107.

made under Title I.<sup>16</sup> In discussing this conflict, this Comment aims (1) to illustrate the widespread confusion plaguing lower courts in applying deference doctrines despite the Supreme Court's recent attempts to refine these doctrines and (2) to encourage courts and policymakers to prioritize clarity and uniformity when addressing statutory and regulatory deference in the future.

Part II of this Comment begins with a broad overview of the Clean Air Act, focusing on Title I and Title V, which are both central to understanding the Environmental Protection Agency's interpretation of the Act's applicable requirements. Next, Part II introduces the statute the Environmental Protection Agency (EPA) claimed to interpret before the Fifth Circuit and the regulation the EPA claimed to interpret before the Tenth Circuit. Finally, Part II describes the different deference standards that apply to an agency's interpretation of a statute (*Chevron* and *Skidmore*) and the agency's own regulation (*Auer* and *Skidmore*).

Part III proceeds by detailing the EPA's reasons for changing its interpretation of its regulation as set forth under the 2017 Hunter Order. Next, Part III examines the Tenth Circuit's decision not to give *Auer* deference to the EPA's interpretation of its own regulation. Lastly, Part III outlines the Fifth Circuit's decision to give *Skidmore* deference to the EPA's interpretation of the statute.

Part IV argues that the Tenth Circuit's conclusion—that the regulation is unambiguous—is the right result under the Supreme Court's recent jurisprudence, given that courts must “exhaust all the ‘traditional tools’ of construction” before concluding the regulation is ambiguous.<sup>17</sup> However, Part IV also criticizes the Tenth Circuit's overly textualist approach because it ignores a latent ambiguity in the regulation. Next, Part IV explains that, under *Chenery*, the Fifth Circuit only should have considered the EPA's *regulatory* interpretation and not its *statutory* interpretation.<sup>18</sup> Nevertheless, Part IV argues that if the Supreme Court were to consider the issue, the Court likely would uphold the EPA's regulatory interpretation as the Fifth Circuit did. Part IV concludes by examining three commonly suggested solutions to reforming *Auer* and explaining why these solutions will not resolve the confusion surrounding *Auer* in the lower courts. Instead, Part IV offers a new solution: to restore *Auer* to its “plainly erroneous or inconsistent” standard and require agencies to provide a reasoned explanation when the agency's new interpretation conflicts with a prior one.

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16. See *infra* Part III.

17. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

18. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

## II. THE CLEAN AIR ACT AND STATUTORY AND REGULATORY INTERPRETATION

### A. THE CLEAN AIR ACT

Congress first passed the Clean Air Act in 1970 in response to rising concerns about the impact of air pollution on public health.<sup>19</sup> In the same year, Congress also established the EPA.<sup>20</sup> The Act authorizes the EPA to set limits on the amount of certain air pollutants and to limit emissions from specific sources such as chemical plants and utilities.<sup>21</sup> Under the Act, the EPA must approve state implementation plans (SIPs) designed to reduce air pollution.<sup>22</sup> In developing a SIP, the state must provide the public and local industries with the opportunity to comment on the plan.<sup>23</sup> If a state fails to develop an adequate plan, the EPA can impose sanctions and take over enforcement of the Act if necessary.<sup>24</sup> However, factors that contribute to pollution vary from region to region, and local governments usually have a better understanding of these region-specific factors.<sup>25</sup> Therefore, the EPA mostly leaves enforcement of the Act up to local governments.<sup>26</sup> Nevertheless, if the EPA finds that an operator has violated the Act, the EPA can issue an order of compliance, impose a penalty fee, or bring a civil judicial action against the violator.<sup>27</sup>

Under Title V of the Act, each state must establish an operating permit program to ensure that major stationary sources of pollution comply with the applicable requirements of the Act and the SIP.<sup>28</sup> Congress first established this requirement in the 1990 amendments to the Act.<sup>29</sup> The operating permit generally must state the types of pollutants being released, the levels of pollutants that may be released in the future, the steps that the operator will take to reduce pollution as required by the Act, and a plan to measure and report emissions.<sup>30</sup> These permits are useful because they compile all information relating to a source's air pollution in one place.<sup>31</sup> The EPA must approve each state's Title V permitting program to ensure it meets the applicable permitting requirements.<sup>32</sup> Before approving a permit, the state must provide an opportunity for public comment and a hearing.<sup>33</sup> Moreover, states must submit each proposed operating permit to the EPA for review, and the EPA has forty-five days

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19. EPA, *THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 2* (2007).

20. *Id.*

21. *Id.* at 3.

22. *Id.*

23. *Id.*

24. *Id.* at 19.

25. *Id.* at 3.

26. *Id.*

27. *Id.* at 19.

28. 42 U.S.C. § 7661a; EPA, *supra* note 19, at 7.

29. EPA, *supra* note 19, at 19.

30. *Id.*

31. *Id.*

32. 42 U.S.C. § 7661a(d)(1).

33. *Id.* § 7661a(b)(6).

to object to the proposed permit.<sup>34</sup> If the EPA does not object, any person may petition the EPA to object to the permit within sixty days of the expiration of the EPA's review period.<sup>35</sup>

Similar to Title V, the major New Source Review (NSR) program under Title I also requires major stationary sources to obtain permits.<sup>36</sup> The major NSR program has two components: the Prevention of Significant Deterioration (PSD) program under Part C of Title I and the nonattainment NSR program under Part D of Title I.<sup>37</sup> The PSD program applies in areas that are meeting the EPA's National Ambient Air Quality Standards (NAAQS), while the nonattainment NSR program applies in areas that are not meeting such standards.<sup>38</sup> Congress first established these programs in the 1990 amendments to the Act.<sup>39</sup>

The PSD program requires major stationary sources to obtain a PSD permit before constructing a new facility or modifying an existing facility.<sup>40</sup> Every state must establish requirements for obtaining a PSD permit in their SIP;<sup>41</sup> thus, the EPA will approve of such permitting program when approving the SIP. To obtain the PSD permit, the operator must show that the proposed facility will not cause air pollution in excess of any NAAQS and will employ the best available control technology for any emitted pollutants subject to regulation under the Act.<sup>42</sup> Similar to the PSD program, the nonattainment NSR program requires major stationary sources to obtain a nonattainment NSR permit before constructing a new facility or modifying an existing one.<sup>43</sup> Although nonattainment NSR permits will be customized for each source, the permit must generally require "(1) the installation of the lowest achievable emission rate (LAER), (2) emission offsets, and (3) opportunity for public involvement."<sup>44</sup>

In addition to the major NSR program, the Act also includes a minor NSR program.<sup>45</sup> The minor NSR program requires minor sources to obtain a permit before constructing a new source or modifying an existing source.<sup>46</sup> Minor modifications made by a major source also fall under the

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34. *Id.* § 7661d(b)(1).

35. *Id.* § 7661d(b)(2).

36. PacifiCorp Energy, Hunter Power Plant, Emery, Utah, Permit No. 1500101002, Petition No. VIII-2016-4, at 4 (EPA Oct. 16, 2017) [hereinafter Hunter Order], [https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp\\_hunter\\_order\\_denying\\_title\\_v\\_petition.pdf](https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf) [<https://perma.cc/T4HH-Z96T>] (the EPA's order denying Sierra Club's petition to object to a Title V operating permit issued to the Hunter Power Plant).

37. *Id.*

38. *Id.* at 4–5.

39. *Id.* at 15.

40. 42 U.S.C. §§ 7475(a)(1), 7479(2)(C).

41. *Id.* § 7410(a)(2)(c).

42. *Id.* § 7475(a)(3)–(4).

43. *Nonattainment NSR Basic Information*, EPA (Dec. 22, 2020), <https://www.epa.gov/nsr/nonattainment-nsr-basic-information> [<https://perma.cc/C686-P5ZG>].

44. *Id.*

45. Hunter Order, *supra* note 36, at 5.

46. *Id.*

NSR program.<sup>47</sup> States must provide the EPA with copies of all major NSR permit applications and notice of all actions taken in consideration of such permits.<sup>48</sup> Because NSR permits are issued before operating permits, the relationship between Title I and Title V is important in considering the central question discussed in this Comment—whether a valid NSR permit is an applicable requirement for issuing a Title V operating permit.

#### B. THE STATUTE: APPROVING PERMITS UNDER TITLE V OF THE CLEAN AIR ACT

Title V of the Clean Air Act imposes the following conditions:

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with *applicable requirements* of this chapter, including the requirements of the applicable implementation plan.<sup>49</sup>

The Act does not define applicable requirements nor does the statute otherwise specify how to determine such requirements.<sup>50</sup> However, under § 7661a(b)(1), Congress directs the EPA to promulgate “regulations establishing the minimum elements of a permit program.”<sup>51</sup> Therefore, the EPA issued a regulation defining the applicable requirements to obtain a Title V operating permit.<sup>52</sup>

#### C. THE REGULATION: THE MEANING OF “APPLICABLE REQUIREMENTS”

The EPA’s regulation governing the Title V program provides the following:

*Applicable requirement* means all of the following as they apply to the emission units in a part 70 source . . . :

- (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;
- (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;<sup>53</sup>

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47. *Id.*

48. 42 U.S.C. § 7475(d)(1).

49. *Id.* § 7661c(a) (emphasis added).

50. Hunter Order, *supra* note 36, at 8–9.

51. § 7661a(b)(1).

52. 40 C.F.R. § 70.2 (2011).

53. *Id.*

As the EPA recently acknowledged, § 70.2(2) clearly includes the terms and conditions of *major* NSR permits (which include PSD permits under Part C and nonattainment NSR permits under Part D) issued under Title I as applicable requirements for purposes of Title V.<sup>54</sup> However, because § 70.2(2) includes “[a]ny term or condition of *any* preconstruction permit[ ],” the terms and conditions of a *minor* NSR permit issued pursuant to an approved SIP are also applicable requirements for purposes of Title V.<sup>55</sup> As the EPA explains in the Hunter Order, this language reflects a change from the original proposed language of § 70.2(2), which only would have covered major NSR permits.<sup>56</sup>

Although the text of the regulation appears unambiguous on its face, a latent ambiguity arises between § 70.2(1) and § 70.2(2) when, for instance, a state permitting authority incorrectly issues a *minor* NSR permit instead of a *major* NSR permit.<sup>57</sup> Under such circumstances, there are two different ways to interpret § 70.2(1). On the one hand, because a valid *major* NSR permit is a “standard or other requirement provided for in the applicable implementation plan,”<sup>58</sup> § 70.2(1) could suggest that any errors in prior preconstruction permits must be corrected as part of the Title V permit.<sup>59</sup> On the other hand, because the terms and conditions of a *minor* NSR permit are also applicable requirements, § 70.2(1) could also suggest that the terms and conditions of prior preconstruction permits, even if incorrectly issued, should be incorporated into the Title V permit “without further review.”<sup>60</sup> In effect, the conflict centers around whether the Title V permit process should be used to reverse prior preconstruction permitting decisions made by state authorities.

Over the years, the EPA has adopted conflicting positions over how to interpret the regulation. When the EPA first proposed § 70.2, the Agency took the position that the Title V permit process should not be used to question the validity of a prior preconstruction permit.<sup>61</sup> For example, the EPA indicated that the terms and conditions of a prior preconstruction permit will be incorporated into the Title V permit “*without further review*” as long as the source is complying with the preconstruction permit.<sup>62</sup> Additionally, in the proposed rule, the EPA indicated that “[t]he intent of title V is not to second-guess the results of any State NSR program.”<sup>63</sup> These statements are important because the Supreme Court consistently focuses on the regulation’s original meaning.<sup>64</sup> In fact, one

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54. Hunter Order, *supra* note 36, at 9.

55. *Id.*

56. *Id.*

57. *See id.* at 6–7; *Env’t Integrity Project v. EPA*, 969 F.3d 529, 538 (5th Cir. 2020).

58. 40 C.F.R. § 70.2(1) (2011).

59. *See* Hunter Order, *supra* note 36, at 8.

60. *See id.* at 11.

61. *See* *Sierra Club v. EPA*, 964 F.3d 882, 893–94 (10th Cir. 2020).

62. Operating Permit Program, 56 Fed. Reg. 21,712, 21,738–39 (proposed May 10, 1991) (emphasis added) (to be codified at 40 C.F.R. pt. 70).

63. *Id.* at 21,739.

64. *See, e.g.,* *Mullins Coal Co. v. Dir., Off. of Workers’ Comp. Programs*, 484 U.S. 135, 159 (1987).

rationale the Court commonly gives for *Auer* deference is that “the agency that promulgated a rule is in [a] ‘better position [to] reconstruct its original meaning.’”<sup>65</sup> In this case, there seems to be little room to question the regulation’s original meaning based on the statements referenced above.

However, in the late 1990s, the EPA shifted away from its original understanding of the regulation. Under the EPA’s new understanding of § 70.2(1), the Title V permitting process could include consideration of whether preconstruction permits were appropriately issued.<sup>66</sup> For instance, the EPA stated that “the merits of PSD issues can be ripe for consideration in a timely petition to object under Title V.”<sup>67</sup> Additionally, in a 1999 letter, John Seitz, the Director of the Office of Air Quality and Planning, indicated that Title V permits “include the requirement to obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and [SIPs].”<sup>68</sup> However, Seitz also suggested that the EPA generally would not object to a Title V permit based on a preconstruction permit that was issued a long time ago.<sup>69</sup> Until recently, the EPA continued to treat preconstruction permits as ripe for review in the Title V permitting process. However, in 2017, the EPA reverted to its original interpretation of the regulation.<sup>70</sup> The EPA first announced this change in an order upholding a Title V permit issued to PacifiCorp Energy’s Hunter Power Plant (the Hunter Order),<sup>71</sup> which will be further discussed in Part III of this Comment.

#### D. OVERVIEW OF STATUTORY AND REGULATORY DEFERENCE

##### 1. *Statutory Deference: Chevron and Skidmore*

Deference doctrines such as *Chevron* and *Skidmore* only apply if the statute is ambiguous.<sup>72</sup> If the meaning of the statute is clear, courts are bound to follow Congress’s clearly expressed intent.<sup>73</sup> First announced in 1984, the *Chevron* doctrine directs courts to defer to an agency’s interpretation of an ambiguous statute in certain circumstances.<sup>74</sup> As originally

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65. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) (citing *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151–53 (1991)).

66. Hunter Order, *supra* note 36, at 11.

67. Shintech, Inc., Permit Nos. 2466-VO, 2467-VO, 2468-VO, at 3 n.2 (EPA Sept. 10, 1997), [https://www.epa.gov/sites/default/files/2015-08/documents/shintech\\_decision1997.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/shintech_decision1997.pdf) [<https://perma.cc/2M2E-4AT6>].

68. Letter from John S. Seitz, EPA Off. of Air Quality Plan. & Standards, to Robert Hodanbosi and Charles Lagges, Ass’n of Local Air Pollution Control Officers (May 20, 1999).

69. *Id.*

70. See Hunter Order, *supra* note 36, at 13–20.

71. *Id.* at 1.

72. See, e.g., Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010).

73. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1241–42 (2007).

74. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

conceived, *Chevron* deference applies if an agency can show that (1) Congress has not directly spoken on the issue in question, and (2) the agency's interpretation is a permissible construction of the statute.<sup>75</sup> In justifying this two-step framework, the Court reasoned that Congress either implicitly or explicitly delegates authority to the agency to resolve any ambiguity in the statute.<sup>76</sup> Additionally, the Court thought that agencies are in a better position to interpret an ambiguous statute due to their subject matter expertise.<sup>77</sup> At first, scholars and judges praised *Chevron* as an opportunity to bring clarity to a complex area of the law.<sup>78</sup> However, over time, extensive criticism of *Chevron* arose, and courts began to impose additional criteria for agencies to meet before a court would defer to the agency's statutory interpretation.<sup>79</sup>

In *United States v. Mead Corp.*,<sup>80</sup> the Court first announced what has come to be known as *Chevron* "step zero."<sup>81</sup> Under *Mead*, the Court held that *Chevron* only applies when (1) Congress delegates authority to the agency to make rules carrying the force of law, and (2) the interpretation was adopted in the exercise of such authority.<sup>82</sup> Generally, rules carry the force of law when Congress provides "for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>83</sup> In the overwhelming majority of the Court's cases applying *Chevron*, rules carrying the force of law are the result of notice-and-comment rulemaking or formal adjudications.<sup>84</sup> However, *Chevron* could still apply even in the absence of these formal procedures if there is "some other indication" that Congress intended the agency's interpretation to carry the force of law.<sup>85</sup>

In *Barnhart v. Walton*, the Court clarified when *Chevron* deference would apply in the absence of formal administrative procedures.<sup>86</sup> According to *Barnhart*, whether *Chevron* is appropriate depends upon "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."<sup>87</sup> In sum, to apply *Chevron*, courts must first determine whether *Chevron* applies at all (i.e., whether the rule carries the force of law).<sup>88</sup> Then, the court must

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75. *See id.* at 842–43.

76. *See id.* at 843–44.

77. *See id.* at 844–45.

78. *See, e.g.,* Hickman & Thomson, *supra* note 13, at 107.

79. *See id.* at 107–10.

80. 533 U.S. 218 (2001).

81. *See id.* at 226–27; *see also, e.g.,* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

82. *Mead*, 533 U.S. at 226–27.

83. *Id.* at 230.

84. *Id.*

85. *Id.* at 227.

86. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

87. *Id.*

88. *Mead*, 533 U.S. at 226–27.

perform the *Chevron* two-step analysis (i.e., whether Congress directly spoke on the issue and whether the agency's interpretation is reasonable).<sup>89</sup> Due to this increased complexity, *Chevron* has resulted in more confusion than clarity.<sup>90</sup>

Further complicating the inquiry, *Mead* held that courts must consider whether *Skidmore* deference applies when *Chevron* step zero is not met.<sup>91</sup> Whether an interpretation receives *Skidmore* deference “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>92</sup> In contrast to *Chevron*, where a court must defer to the agency's interpretation as long as it's reasonable, a court only needs to defer under *Skidmore* if it finds the agency's interpretation persuasive.<sup>93</sup> However, scholars disagree about the level of deference that *Skidmore* entails,<sup>94</sup> and empirical evidence reveals an inconsistent application of *Skidmore* by circuit courts.<sup>95</sup> While some courts treat *Skidmore* as a no-deference standard, the majority of courts give substantial deference to agency interpretations under *Skidmore*.<sup>96</sup> Additionally, there is a lack of uniformity in applying the *Skidmore* factors amongst courts that treat it as a substantial deference standard.<sup>97</sup> Therefore, *Mead*'s revival of *Skidmore* has only added to the confusion surrounding *Chevron*.

## 2. Regulatory Deference: Auer and Skidmore

In 1945 in *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court first suggested that an agency's interpretation of its own regulation should be entitled to “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>98</sup> Over fifty years later, the Supreme Court reaffirmed regulatory deference under *Seminole Rock* in *Auer v. Robbins*.<sup>99</sup> Until recently, *Auer* was the strongest form of deference, with evidence showing that courts deferred to the agency in 90.9% of cases.<sup>100</sup> However, in recent years, the Supreme Court has imposed additional limitations for the doctrine to apply, leading to a decline in *Auer* defer-

89. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

90. See *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in the judgment).

91. *Mead*, 533 U.S. at 234.

92. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

93. See *id.*

94. See Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 *YALE L.J.* 2096, 2125 (2010).

95. See Hickman & Krueger, *supra* note 73, at 1271.

96. *Id.*

97. See *id.* at 1281–91.

98. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

99. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

100. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *GEO. L.J.* 1083, 1099 (2008).

ence.<sup>101</sup> Nevertheless, despite recent criticism of the doctrine by several Justices,<sup>102</sup> the Supreme Court refused to overturn *Auer* in *Kisor v. Wilkie*.<sup>103</sup> However, the Court's decision to uphold the doctrine was not unqualified; the majority opinion emphasized the limits of *Auer*'s application.<sup>104</sup>

According to the *Kisor* majority, generally, for *Auer* to apply, (1) the regulation must be genuinely ambiguous, (2) the agency's reading must be reasonable, and (3) the character and context of the agency's interpretation must be entitled to controlling weight.<sup>105</sup> Because these limitations drastically differ from *Auer*'s prior "plainly erroneous or inconsistent" standard,<sup>106</sup> *Kisor* arguably overruled *Auer* deference despite the Court's insistence on upholding the doctrine.<sup>107</sup> *Kisor*'s first limitation provides that deference will not be granted unless the regulation is genuinely ambiguous.<sup>108</sup> To determine whether a rule is ambiguous, "a court must exhaust all the 'traditional tools' of construction."<sup>109</sup> The "traditional tools" of construction include the text, structure, history, and purpose of the regulation, all of which should be "carefully consider[ed]" as "if [the court] had no agency to fall back on."<sup>110</sup> However, if courts actually do exhaust *all* the tools of construction, there will be little room to conclude the regulation is ambiguous.<sup>111</sup> Without a finding of ambiguity, "[t]he regulation then just means what it means—and the court must give it effect, as the court would any other law."<sup>112</sup>

Additionally, even if the regulation is ambiguous, the agency's interpretation of the regulation must still be "reasonable."<sup>113</sup> An interpretation is reasonable if it falls "within the zone of ambiguity the court has identified after employing all its interpretive tools."<sup>114</sup> Lastly, the court must make "an independent inquiry" as to whether *Auer* deference is appropriate under the circumstances.<sup>115</sup> This independent inquiry should center around whether Congress would want the agency rather than the

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101. Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 816 (2015) (finding that *Auer* deference fell to about 70.6% after some Justices criticized the doctrine in *Decker v. Northwest Environmental Defense Center*).

102. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 112–13 (2015) (Thomas, J., concurring).

103. 139 S. Ct. 2400, 2408 (2019).

104. *Id.* at 2414.

105. *Id.* at 2415–16.

106. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

107. *Kisor*, 139 S. Ct. at 2408.

108. *Id.* at 2415.

109. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

110. *Id.*

111. See *id.* at 2448 (Kavanaugh, J., concurring).

112. *Id.* at 2415 (majority opinion).

113. *Id.*

114. *Id.* at 2415–16.

115. *Id.* at 2416.

courts to resolve the ambiguity.<sup>116</sup>

The Supreme Court has set forth a number of factors that indicate that Congress would want the agency rather than a court to resolve the ambiguity. First, the regulatory interpretation “must be the agency’s ‘authoritative’ or ‘official position,’ rather than any m[e]re ad hoc statement not reflecting the agency’s views.”<sup>117</sup> Second, the “agency’s interpretation must in some way implicate its substantive expertise.”<sup>118</sup> Thus, courts should not grant *Auer* deference when “[t]he subject matter of the [dispute is] distan[t] from the agency’s ordinary’ duties or ‘fall[s] within the scope of another agency’s authority.’”<sup>119</sup> Third, the interpretation must reflect the agency’s “fair and considered judgment.”<sup>120</sup> Under this factor, a court may not defer if the interpretation is merely “a convenient litigating position.”<sup>121</sup> Moreover, courts should not defer if the agency announces a new interpretation that conflicts with a prior one and causes “unfair surprise” for regulated parties.<sup>122</sup> In sum, the *Auer* deference that exists today is not the “super deference” it once was because courts have substantial power to independently review the meaning of agency regulations.<sup>123</sup> However, *Kisor*’s “attempt to remodel *Auer*’s rule into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation.”<sup>124</sup>

Moreover, regulatory interpretation is further complicated by *Skidmore* deference. Similar to the *Chevron* context, courts must consider whether the agency’s regulatory interpretation warrants *Skidmore* deference even when *Auer* does not apply.<sup>125</sup> In such a scenario, courts should defer to the agency’s interpretation only to the extent it has “the power to persuade.”<sup>126</sup> However, the limitations on *Auer* announced in *Kisor* largely overlap with the *Skidmore* factors. As a result, “the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency’s interpretation of its own regulation.”<sup>127</sup>

This similarity begs the question of whether the *Auer* and *Skidmore* deference doctrines are one and the same. Chief Justice Roberts believes there is a difference between the two.<sup>128</sup> On the other hand, Justice Gor-

116. *Id.* (quoting *U.S. v. Mead Corp.*, 533 U.S. 218, 229–31, 236–37 (2001) (Scalia, J., dissenting)).

117. *Id.*

118. *Id.* at 2417.

119. *Id.* (alteration in original) (quoting *City of Arlington v. FCC.*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring)).

120. *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

121. *Id.* (quoting *Christopher*, 567 U.S. at 155).

122. *Id.* at 2417–18 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

123. *See id.* at 2416, 2419.

124. *Id.* at 2447 (Gorsuch, J., concurring).

125. *Id.* at 2414 (majority opinion) (citing *Christopher*, 567 U.S. at 159).

126. *Id.* (quoting *Christopher*, 567 U.S. at 159).

127. *Id.* at 2424–25 (Roberts, J., concurring).

128. *See id.* at 2424.

such suggests that *Kisor* “leaves *Auer* so riddled with holes that . . . courts may find that it does not constrain their independent judgment any more than *Skidmore*.”<sup>129</sup> In conclusion, *Auer* deference today more closely resembles *Skidmore* deference, leaving the judiciary with greater discretion to determine the meaning of an agency’s regulation. However, at the same time, *Kisor*’s limitations on *Auer* have transformed it into an unworkable standard,<sup>130</sup> causing increased confusion in the lower courts as evident by the circuit split discussed in this Comment.

### III. THE CIRCUIT SPLIT: THE MEANING OF “APPLICABLE REQUIREMENTS”

#### A. THE HUNTER ORDER: THE EPA’S INTERPRETATION OF ITS REGULATION

The EPA first announced its new interpretation of the regulation in 2017 under the Hunter Order.<sup>131</sup> The Hunter Order was a response to a petition by the Sierra Club requesting the EPA to object to a Title V operating permit issued to the Hunter Power Plant.<sup>132</sup> The Utah Division of Air Quality (UDAQ) initially issued the permit to the Hunter Power Plant in 1998, but as a result of permit modifications, UDAQ submitted a new Title V permit to the EPA on January 11, 2016.<sup>133</sup> The EPA did not object to the proposed permit within its forty-five-day review period, and UDAQ therefore issued the final permit on March 3, 2016.<sup>134</sup> Pursuant to 42 U.S.C. § 7661d(b)(2), Sierra Club petitioned the EPA to object to the permit within sixty days after the expiration of the EPA’s review period.<sup>135</sup>

In its petition, Sierra Club argued the Title V permit was invalid because it did not comply with the PSD permitting program, an applicable requirement of the Act.<sup>136</sup> Specifically, Sierra Club argued that boiler turbine upgrades at the Hunter Power Plant made between 1997 and 1999 were “major modifications” that should have required a PSD permit.<sup>137</sup> In 1997, UDAQ determined that the upgrades were not major modifications, and thus, were not subject to PSD permitting requirements.<sup>138</sup> Instead, UDAQ determined the upgrades were “minor modifications to a major source,”<sup>139</sup> and thus, were subject to “only the barest of requirements” under the minor NSR program.<sup>140</sup> However, Sierra Club argued

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129. *Id.* at 2448 (Gorsuch, J., concurring).

130. *See id.* at 2446.

131. *See generally* Hunter Order, *supra* note 36.

132. *Id.*

133. *Id.* at 6.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 7.

138. *See id.*

139. *See id.* at 5, 9; *see also* Sierra Club v. EPA, 964 F.3d 882, 887 (10th Cir. 2020).

140. *Sierra Club*, 964 F.3d at 886 (quoting *Luminant Generation Co. v. EPA*, 675 F.3d 917, 922 (5th Cir. 2012)).

UDAQ did not use the test established by the Utah SIP for identifying major modifications.<sup>141</sup> According to Sierra Club's calculations, if UDAQ had employed the correct test, the modifications would have triggered the requirements of the major PSD permitting program.<sup>142</sup> In effect, Sierra Club's petition "raise[d] the fundamental issue of whether decisions made during previous preconstruction permitting . . . should be reconsidered when issuing or renewing a title V operating permit."<sup>143</sup>

The EPA rejected Sierra Club's petition to object to the Hunter Power Plant's Title V permit on the grounds that "the title V permitting process is not the appropriate forum to review preconstruction permitting decisions."<sup>144</sup> Instead, the EPA held that the terms and conditions of prior preconstruction permits "define [the] applicable SIP requirements for the title V source" under § 70.2(1).<sup>145</sup> Therefore, the terms and conditions of such permits will be incorporated into the Title V permit "without further review of whether those conditions were properly derived or whether a different type of permit was required."<sup>146</sup> In reaching this conclusion, the EPA acknowledged that it was adopting a position that differed from the Agency's prior interpretation of § 70.2(1) but argued that its new interpretation was more consistent with "Title V's text, Title V's structure and purpose, and the structure of the Act as a whole."<sup>147</sup>

First, the EPA argued that its new interpretation is more consistent with the text of the regulation itself. As mentioned previously, the original proposed language of § 70.2(2) only would have applied to major NSR permitting, reading "any preconstruction permits issued pursuant to title I, part C or D of the Act."<sup>148</sup> However, the final text of § 70.2(2) "makes clear that the EPA viewed the terms of *all* preconstruction permits as 'applicable requirements,' including minor NSR permits."<sup>149</sup> The EPA found the regulation ambiguous because § 70.2(2) provides that the terms and conditions of minor NSR permits are applicable requirements, while § 70.2(1) provides that "*any* standard or other requirement" provided for in the SIP are applicable requirements.<sup>150</sup> Thus, a latent ambiguity appears in the regulation when a source has duly obtained a minor NSR permit, but there is reason to question whether the minor NSR permit was the appropriate type of permit under the Act and the applicable SIP.<sup>151</sup> On the one hand, § 70.2(1) suggests the preconstruction permit should be corrected because major NSR is a "requirement" provided for

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141. See Hunter Order, *supra* note 36, at 6–7.

142. See *id.* at 7.

143. *Id.* at 8.

144. *Id.*

145. *Id.* at 10 (citing 57 Fed. Reg. 32,250, 32,259 (July 21, 1992)).

146. *Id.* at 11.

147. *Env't Integrity Project v. EPA*, 969 F.3d 529, 541 (5th Cir. 2020).

148. Hunter Order, *supra* note 36, at 9 (quoting 56 Fed. Reg. 21,738, 21,768 (May 10, 1991)).

149. *Id.*

150. See *id.* at 8–9.

151. See *id.* at 10.

in the SIP.<sup>152</sup> On the other hand, § 70.2(2) suggests the terms and conditions of the minor NSR permit must be incorporated into the Title V permit.<sup>153</sup> Based on legal and policy considerations, the EPA adopted the latter view.

Second, the EPA emphasized that its new interpretation matched the EPA's interpretation when the regulation was first promulgated.<sup>154</sup> Because an agency's contemporaneous interpretation of a statute is given great weight, the EPA argued the Agency's contemporaneous interpretation of its own regulation should also be given great weight.<sup>155</sup> Moreover, the EPA asserted its new interpretation was more consistent with the purpose of Title V. In enacting Title V, Congress did not intend to impose "new substantive requirements"<sup>156</sup> on a source but merely wanted to "consolidate 'existing air pollution requirements into a single document.'"<sup>157</sup> Reading § 70.2(1) to require reevaluation of prior state permitting decisions is contrary to Congress's intent for Title V because such interpretation would impose new substantive requirements on a source.<sup>158</sup>

Third, the EPA's interpretation aligns with the structure of the Act as a whole. Under Title I, Congress carefully laid out the appropriate forums to challenge the validity of state preconstruction permitting decisions.<sup>159</sup> Under this framework, states bear the "primary responsibility" for ensuring preconstruction permits comply with the SIP and the Act.<sup>160</sup> According to the EPA, Title V includes "no clear indication that Congress intended to alter the balance of oversight that the EPA [has] over state preconstruction permitting."<sup>161</sup> Because Congress "does not alter the fundamental details of a regulatory scheme in vague terms," the EPA refused to change the balance of oversight by adopting Sierra Club's interpretation of the regulation absent clearer indication from Congress.<sup>162</sup> Moreover, because state permitting decisions are "reached through a process that include[s] public input and the opportunity for judicial review," it would be inappropriate to second-guess these decisions via the "limited administrative review process" afforded to the EPA under Title V.<sup>163</sup>

Fourth, the EPA argued its new interpretation is consistent with other provisions of Title V. For example, § 7661a(b)(6) requires states to adopt procedures that allow for "expeditious review of permit actions."<sup>164</sup> If

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152. *See id.*

153. *See id.*

154. *Id.* at 13.

155. *Id.* at 13–14 (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993)).

156. *Id.* at 14.

157. *Id.* (citing *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016)).

158. *Id.*

159. *Id.*

160. *Env't Integrity Project v. EPA*, 969 F.3d 529, 535 (5th Cir. 2020).

161. *Hunter Order*, *supra* note 36, at 15.

162. *Id.*

163. *Id.* at 18.

164. *Id.* at 16 (quoting 42 U.S.C. § 7661a(b)(6)).

UDAQ were required to reevaluate prior permitting decisions for every Title V permit it considered, its review certainly would not be “expeditious.”<sup>165</sup> Furthermore, the forty-five-day period provided for the EPA to review Title V permits is not conducive to “an in-depth and searching review of every source-specific preconstruction permitting decision that has previously been made.”<sup>166</sup> Additionally, for other applicable requirements under Title V, the EPA does not second-guess the content of requirements derived through a process that provided for public notice and comment and judicial review.<sup>167</sup>

Notably, the EPA’s refusal to correct state permitting decisions via Title V does not preclude the EPA or citizens from challenging a preconstruction permitting decision in an enforcement action as provided for under Title I.<sup>168</sup> The EPA’s interpretation “merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit.”<sup>169</sup> In sum, the EPA held that its oversight role under Title V is limited to “ensur[ing] that the terms and conditions of the preconstruction permit are properly included as ‘applicable requirements,’ and that the permit contains monitoring, recordkeeping, and reporting sufficient to assure compliance with those permit terms and conditions.”<sup>170</sup> Because Sierra Club failed to show that the Title V permit was deficient in any of these regards, the EPA found that it had no obligation to object to the Title V permit.<sup>171</sup>

#### B. THE TENTH CIRCUIT REFUSES TO GIVE *AUER* DEFERENCE TO THE EPA’S UNAMBIGUOUS REGULATION

After the Hunter Order was issued, Sierra Club sought judicial review of the EPA’s interpretation before the Tenth Circuit.<sup>172</sup> In *Sierra Club v. EPA*, the Tenth Circuit concluded that *Auer* deference did not apply because the text of regulation was unambiguous, agreeing with Sierra Club’s interpretation of the regulation.<sup>173</sup> According to the court, major NSR is an applicable requirement for Title V permitting because it is a requirement provided for in the SIP.<sup>174</sup> As a result, the Tenth Circuit held that the plain meaning of the regulation foreclosed the EPA’s interpretation and vacated the Hunter Order.<sup>175</sup>

Although the EPA gave several arguments in favor of finding ambiguity, the court remained unpersuaded. First, the EPA argued that § 70.2(1) should be read as a general catch-all that is limited by the more specific

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165. *Id.*

166. *Id.*

167. *Id.* at 19.

168. *Id.* at 21.

169. *Id.* at 20.

170. *Id.* at 17.

171. *Id.* at 20.

172. *Sierra Club v. EPA*, 964 F.3d 882, 887 (10th Cir. 2020).

173. *Id.* at 891.

174. *Id.*

175. *Id.* at 899.

provision in § 70.2(2).<sup>176</sup> However, the court concluded § 70.2(2) does not limit any of the other twelve requirements listed in the regulation because the “applicable requirements” are defined as “the combination of ‘all’ of the thirteen requirements.”<sup>177</sup> Moreover, the court rejected the EPA’s argument that Sierra Club’s interpretation of § 70.2(1) makes § 70.2(2) redundant.<sup>178</sup> The court reasoned that § 70.2(2) “would retain independent meaning because requirements could appear in a Title I permit but not appear in the state’s implementation plan.”<sup>179</sup>

Next, the EPA argued that the phrase “as they apply” in the introductory language of the regulation limits § 70.2(1) to only those requirements in the SIP that were imposed in earlier preconstruction permits.<sup>180</sup> In response, the court again emphasized language that the EPA relied on in its argument to conclude § 70.2(2) merely “includes the terms from a preconstruction permit” but does not “limit ‘applicable requirements’ to the terms in earlier preconstruction permits.”<sup>181</sup> Lastly, the EPA pointed to language in the preamble to argue its new interpretation was consistent with the EPA’s original interpretation of the regulation.<sup>182</sup> However, the court refused to consider this language because the text of the regulation was unambiguous.<sup>183</sup> Moreover, the court did not think such language supported the EPA’s claim.<sup>184</sup> For example, in response to language stating that “title V generally does not impose substantive new requirements,” the court asserted that the requirement for major NSR permitting “is not a ‘new’ substantive requirement.”<sup>185</sup>

Additionally, the EPA pointed to language in the preamble of the final rule emphasizing that Congress did not intend for Title V “to second-guess the results of any State NSR determination.”<sup>186</sup> However, the court countered that this language only refers to state determinations about “the requirements *within* an NSR permit” but not to “the threshold issue of *whether* major NSR requirements apply to a given source.”<sup>187</sup> The court also questioned whether the Hunter Order actually reflects the original meaning of the regulation when the EPA’s longstanding position contradicts such an interpretation.<sup>188</sup> Finally, the court acknowledged that the Fifth Circuit adopted the EPA’s interpretation in a decision pub-

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176. *Id.* at 891.

177. *Id.* at 892 (emphasis added) (quoting 40 C.F.R. § 70.2 (2011)).

178. *Id.*

179. *Id.* (citing Operating Permit Program, 57 Fed. Reg. 32,250, 32,276 (July 21, 1992) (to be codified at 40 C.F.R. pt. 70)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 893.

184. *Id.*

185. *Id.* (citing Operating Permit Program, 57 Fed. Reg. at 32,251 (July 21, 1992) (to be codified at 40 C.F.R. pt. 70)).

186. *Id.* (citing Operating Permit Program, 57 Fed. Reg. at 32,289 (July 21, 1992) (to be codified at 40 C.F.R. pt. 70)).

187. *Id.* at 894.

188. *Id.*

lished in May of 2020.<sup>189</sup> However, the Tenth Circuit did not see a conflict because the Fifth Circuit based its decision on the EPA's interpretation of the statute rather than the regulation.<sup>190</sup>

C. THE FIFTH CIRCUIT UPHOLDS THE EPA'S STATUTORY INTERPRETATION UNDER *SKIDMORE*

In contrast to the Tenth Circuit's decision where the Hunter Order was directly at issue, the Hunter Order was only indirectly at issue in the Fifth Circuit's decision. In *Environmental Integrity Project v. EPA*, Sierra Club and the Environmental Integrity Project (EIP) petitioned the EPA to object to a permit issued to ExxonMobil's Baytown Olefins Plant by the Texas Commission of Environmental Quality (TCEQ).<sup>191</sup> In 2012, TCEQ issued a Title I permit to the Baytown plant to build a new ethylene production facility.<sup>192</sup> Because TCEQ had earlier issued a Plantwide Applicability Limitation (PAL) permit, known as PAL6, for the plant, ExxonMobil received a minor NSR permit rather than a major NSR permit.<sup>193</sup> PAL permits allow existing sources to bypass major NSR "for alterations if, as altered, the whole facility's emissions do not exceed levels specified in the PAL permit."<sup>194</sup> To be valid, the EPA must approve a state's PAL program.<sup>195</sup>

When ExxonMobil attempted to incorporate the minor NSR permit into its Title V permit, Sierra Club and EIP filed complaints with TCEQ, arguing that PAL6 violated federal PAL rules.<sup>196</sup> TCEQ rejected these arguments and submitted the Title V permit to the EPA.<sup>197</sup> After the EPA did not object to the Title V permit, Sierra Club and EIP submitted a petition to the EPA.<sup>198</sup> Relying on the Hunter Order, the EPA denied the petition.<sup>199</sup> EIP and Sierra Club then sought judicial review of the EPA's denial of the petition, arguing that the statute unambiguously foreclosed the EPA's interpretation under the Hunter Order.<sup>200</sup> Ultimately, the court deferred to the EPA's interpretation of the statute.<sup>201</sup>

In reaching this decision, the court first determined the level of deference to afford to the EPA's statutory interpretation.<sup>202</sup> The court recognized that the EPA relied on its interpretation of the *regulation* rather

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189. *See id.* at 896 (citing *Env't Integrity Project v. EPA*, 960 F.3d 236, 247 n.6 (5th Cir.), *withdrawn*, 969 F.3d 529 (5th Cir. 2020)).

190. *Id.* at 897.

191. *Env't Integrity Project v. EPA*, 969 F.3d 529, 538–39 (5th Cir. 2020).

192. *Id.* at 538.

193. *Id.* at 539.

194. *Id.* at 536 (quoting *New York v. EPA*, 413 F.3d 3, 36 (D.C. Cir. 2005)).

195. *Id.* (citing 42 U.S.C. § 7410).

196. *Id.* at 539.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 540.

201. *Id.*

202. *Id.* at 539.

than the *statute* for both the Hunter Order and ExxonMobil Order.<sup>203</sup> However, because the EPA argued for *Chevron* deference only, the court solely examined the EPA's statutory interpretation.<sup>204</sup> Although the court never explicitly stated whether the statute was ambiguous, the court implicitly indicated its view that the statute was ambiguous in determining the level of deference to apply.<sup>205</sup> Ultimately, the court concluded that it did not need to consider whether *Chevron* deference applied because the EPA's statutory interpretation was "persuasive" under *Skidmore*.<sup>206</sup>

The court found the EPA's interpretation persuasive "based principally on Title V's text, Title V's structure and purpose, and the structure of the Act as a whole."<sup>207</sup> First, the court agreed with the EPA's argument that Title V "lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits."<sup>208</sup> Without such a mandate, under the *casus omissus pro omissis habendus est* canon, the court refused to interpret the statute "to include a matter it does not include."<sup>209</sup> Moreover, the court endorsed the EPA's argument that, in comparison to the "stringent oversight authority" Congress provided for in Title I, the lack of such provisions in Title V suggests Congress intended for the EPA to have more limited oversight under Title V.<sup>210</sup>

Next, the court considered the EPA's argument that its interpretation better reflects the structure and purpose of Title V. The court adopted the EPA's view that Title V was intended to "add clarity and transparency . . . to the regulatory process" by "consolidat[ing] into a single document (the operating permit) all of the clean air requirements applicable to a particular source."<sup>211</sup> Moreover, the court concluded that the EPA's interpretation was more consistent with the Act's overall structure.<sup>212</sup> As the court noted, Congress designed the Act as an "experiment in cooperative federalism" under which states bear the "primary responsibility" of implementing standards set by the EPA.<sup>213</sup> Given this structure, the court determined the applicable requirements clause relied on by Sierra Club and EIP was "too 'general' and 'broad' to upset the Act's balance of power."<sup>214</sup> The court also thought the language to which the EPA pointed in the preamble of the final rule was indicative of "Congress's intent for Title V," given that it was written "shortly after [Title V's] enactment."<sup>215</sup>

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203. *Id.* at 540 n.6.

204. *Id.*

205. *Id.* at 540.

206. *Id.*

207. *Id.* at 541.

208. *Id.*

209. *Id.*

210. *Id.* at 542.

211. *Id.* at 543–44 (quoting *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008)).

212. *Id.* at 545.

213. *Id.* (quoting *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012)).

214. *Id.* (quoting *Hunter Order*, *supra* note 36, at 15).

215. *Id.* at 544.

Additionally, the court acknowledged that the EPA had changed its approach but concluded that it could still defer to its present position.<sup>216</sup> Lastly, the court suggested that EIP and Sierra Club's view did not align with the short time period Congress gave the EPA to review Title V permits.<sup>217</sup> Therefore, the court upheld the EPA's interpretation under *Skidmore* and denied Sierra Club and EIP's petition.<sup>218</sup>

#### IV. ANALYSIS

##### A. THE TENTH CIRCUIT'S DECISION: THE RIGHT RESULT UNDER *KISOR*

The Tenth Circuit's decision not to defer to the EPA's unambiguous regulation under *Auer* reflects the necessary result under the Supreme Court's recent jurisprudence. Because *Kisor* requires judges to "exhaust all the 'traditional tools' of construction" before determining that a regulation is ambiguous,<sup>219</sup> a court will almost always conclude that a regulation is unambiguous and impose what it believes to be "the best and fairest reading"<sup>220</sup> of the regulation.<sup>221</sup> As several scholars have suggested in recent years, judges use canons "strategically, to justify judicial policy preferences or to frustrate clear legislative intent."<sup>222</sup> Moreover, as Karl Llewellyn famously demonstrated, "For virtually every canon of construction, . . . there [is] another canon that [can] be employed to reach the opposite result."<sup>223</sup> Thus, judges are able to substitute one canon for another, depending on their desired result.

Even in 1995, Richard J. Pierce, Jr. observed that "[t]he Court now rarely defers to an agency's construction of ambiguous statutory language because a majority of Justices . . . attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent."<sup>224</sup> As a result of this "hypertextualism" (as Pierce called this phenomenon), courts contravene the intent of Congress by attributing plain meaning where evidence strongly suggests that Congress

216. *Id.* (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 416–18 (1993)).

217. *Id.*

218. *Id.* at 546.

219. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

220. *Id.* at 2430, 2448 (Gorsuch, J., concurring).

221. *Id.* at 2448 (Kavanaugh, J., concurring).

222. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *VAND. L. REV.* 1, 4–5 (2005) (first citing Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 *VAND. L. REV.* 561, 562 (1992)); and then citing Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 *VAND. L. REV.* 579, 583–87 (1992)).

223. Ross, *supra* note 222, at 561 (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395 (1950)).

224. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 *COLUM. L. REV.* 749, 752 (1995).

intended a different result.<sup>225</sup> The trend in hypertextualism has only become more prevalent since 1995 as evidenced by Justice Neil Gorsuch's recent statement that "judges are, to one degree or another, 'all textualists now.'"<sup>226</sup>

Arguably, as more and more judges have adopted a hypertextualist approach to reading statutes and regulations, support for the deference doctrines has declined. Indeed, one of the biggest proponents of overturning *Auer* was Justice Antonin Scalia<sup>227</sup> who coincidentally wrote the majority opinion in the case.<sup>228</sup> According to Justice Scalia, judges should use the traditional tools of interpretation to determine the "fairest" reading of a regulation.<sup>229</sup> Justice Gorsuch's *Kisor* concurrence, joined by Justices Thomas, Alito, and Kavanaugh, suggests these four conservative Justices would also support overturning *Auer*.<sup>230</sup> Similar to Justice Scalia, Justice Gorsuch believes the "cure" for *Auer* is to "redirect[ ] the judge's interpretive task back . . . toward the traditional tools of interpretation . . . to elucidate the law's original public meaning."<sup>231</sup>

For the more conservative Justices, "The text of the regulation is treated *as* the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text."<sup>232</sup> Thus, if a judge determines that the agency's interpretation conflicts with the regulation's text, the agency must adopt the judge's interpretation unless the agency is willing to go through the burdensome process of amending the regulation via notice-and-comment rulemaking.<sup>233</sup> Considering that judges can use the traditional tools of construction to make regulations mean what they want, a hypertextualist approach leaves little room to defer to an agency's policy preferences when the regulation is ambiguous.<sup>234</sup> Additionally, with Justice Amy Coney Barrett replacing the late Justice Ruth Bader Ginsburg, there may be enough votes to overturn *Auer* altogether. Although Justice Barrett's stance on the deference doctrines is unclear, she is a strong proponent of textualism and will likely favor relying on the traditional tools of interpretation to determine plain meaning.<sup>235</sup> In sum, with a majority of the Justices being hypertextualists, the Court may finally overturn *Auer*. Moreover, even if the Court maintains *Auer*, in a

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225. *Id.*; see also Brudney & Ditslear, *supra* note 222, at 6.

226. *Kisor*, 139 S. Ct. at 2442 n.99 (Gorsuch, J., concurring) (quoting Diarmuid F. O'Scannlain, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia, 91 ST. JOHN'S L. REV. 303, 304 (2017)).

227. See, e.g., *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part).

228. See *Auer v. Robbins*, 519 U.S. 452, 454 (1997).

229. *Decker*, 568 U.S. at 622 (Scalia, J., concurring in part and dissenting in part).

230. See *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

231. *Id.* at 2442.

232. *Id.*

233. *Id.*

234. See *Pierce*, *supra* note 224, at 779.

235. See generally Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016).

case such as this one, a majority of the Court likely would conclude § 70.2 is unambiguous, and therefore, *Auer* would not apply.

The Tenth Circuit's decision depended on whether the court determined that § 70.2 is ambiguous.<sup>236</sup> If the court had determined that the regulation was ambiguous, *Auer* likely would have applied because the EPA's interpretation would have met the other requirements for receiving *Auer* deference. First, the EPA has a strong argument that its interpretation is "reasonable" based on text, structure, and history of Title V.<sup>237</sup> Second, the EPA's interpretation would be entitled to "controlling weight"<sup>238</sup> because it reflects the agency's "official position,"<sup>239</sup> "implicates [the agency's] substantive expertise" on the relationship between Title I and Title V,<sup>240</sup> is not "merely a convenient litigating position,"<sup>241</sup> and does not create "'unfair surprise' to regulated parties."<sup>242</sup>

While the Court may be more reluctant to give *Auer* deference because the EPA's new interpretation conflicts with its previous one,<sup>243</sup> this limitation would not apply in this case. The reasoning behind this limitation is that it prevents "unfair surprise" to regulated parties.<sup>244</sup> However, in this case, the EPA's new interpretation actually lessened the administrative burden on regulated parties because state permitting authorities no longer have to reconsider the accuracy of Title I permitting decisions every time a Title V permit is filed or renewed.<sup>245</sup> Moreover, this interpretation does not "impose[] retroactive liability on parties for long-standing conduct that the agency had never before addressed."<sup>246</sup> Instead, this interpretation would relieve major and minor sources from being subject to changing requirements every time they update their Title V permit.<sup>247</sup> Therefore, the EPA's new interpretation would not cause "unfair surprise."<sup>248</sup> In conclusion, if the Court determined § 70.2 is ambiguous, the EPA's interpretation would receive *Auer* deference.

The Tenth Circuit's decision in *Sierra Club* reflects the pitfalls of a hypertextualist approach to regulatory interpretation. While the court could have used any number of tools to interpret the regulation, the Tenth Circuit decided to rely solely on the plain meaning of the text.<sup>249</sup> By solely considering the text of the regulation and not the facts at issue,

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236. *Sierra Club v. EPA*, 964 F.3d 882, 891 (10th Cir. 2020).

237. *See Kisor*, 139 S. Ct. at 2416.

238. *See id.* at 2416 (first citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); and then citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229–31, 236–37 (2001)).

239. *See id.* at 2416 (quoting *Mead*, 533 U.S. at 257–59, 258 n.6 (Scalia, J., dissenting)).

240. *See id.* at 2417.

241. *See id.* (quoting *Christopher*, 567 U.S. at 155).

242. *See id.* at 2418 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

243. *See id.* at 2418.

244. *Id.* (quoting *Long Island Care*, 551 U.S. at 170).

245. Hunter Order, *supra* note 36, at 14.

246. *Kisor*, 139 S. Ct. at 2418 (citing *Christopher*, 567 U.S. at 155–56).

247. Hunter Order, *supra* note 36, at 14.

248. *Kisor*, 139 S. Ct. at 2418 (quoting *Long Island Care*, 551 U.S. at 170).

249. *See Sierra Club v. EPA*, 964 F.3d 882, 891 (10th Cir. 2020).

the court only considered whether § 70.2 was patently ambiguous. However, with the facts of the Hunter Order in mind, a latent ambiguity appears in the regulation. As the EPA acknowledged, the applicable requirements clearly include the terms and conditions of Title I major NSR permits under § 70.2(2).<sup>250</sup> However, this does not mean “major NSR permits constitute the *only* source of ‘applicable requirements’ from preconstruction permits.”<sup>251</sup> Instead, applicable requirement means “*any* term or condition of *any* preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I.”<sup>252</sup> This language reflects a change from the original proposed language of § 70.2(2), which only would have included major NSR permitting.<sup>253</sup> Thus, the terms and conditions of both major and minor NSR permits are applicable requirements under § 70.2(2).<sup>254</sup>

Prior to the Hunter Order, the EPA understood § 70.2(1) to require that a source obtain a validly issued preconstruction permit because obtaining the appropriate type of permit (either a major or minor NSR permit) is a requirement provided for in the SIP.<sup>255</sup> However, “in circumstances where a source has obtained a legally enforceable preconstruction permit” that may not be “the appropriate type of permit” under the SIP, there is a conflict between § 70.2(1) and § 70.2(2).<sup>256</sup> Thus, the Tenth Circuit vastly oversimplified the analysis in concluding that the applicable requirements unambiguously include “major NSR requirements” simply because “Utah’s implementation plan requires major NSR.”<sup>257</sup> The court’s conclusion especially does not make sense in light of its argument that “the ‘applicable requirements’ are defined as the combination of ‘*all*’ of the thirteen requirements.”<sup>258</sup> The text of § 70.2(2) clearly includes the terms and conditions of a minor NSR permit as applicable requirements for Title V permits.<sup>259</sup> However, because the terms of major and minor NSR permits will conflict, they cannot both be incorporated into a Title V permit. Thus, under the Tenth Circuit’s interpretation of § 70.2(1), § 70.2(1) and § 70.2(2) cannot both be applicable requirements owing to the conflict between the terms of major and minor NSR permits.

Moreover, the court rejected the EPA’s argument that Sierra Club’s interpretation would render § 70.2(2) redundant on the grounds that “requirements could appear in a Title I permit but not appear in the [SIP].”<sup>260</sup> However, under 42 U.S.C. § 7410(a)(2)(C), states must estab-

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250. Hunter Order, *supra* note 36, at 9 (noting that “Parts C or D [ ] of the Act” refers to “both PSD (part C) and nonattainment NSR (part D) permits”).

251. *Id.* (emphasis added).

252. *Id.* (quoting 40 C.F.R. § 70.2 (2011)).

253. *Id.*

254. *See id.* at 9–10.

255. *Id.*

256. *Id.* at 10.

257. *See* Sierra Club v. EPA, 964 F.3d 882, 891 (10th Cir. 2020).

258. *See id.* at 892 (emphasis added) (quoting 40 C.F.R. § 70.2 (2011)).

259. 40 C.F.R. § 70.2(2) (2011).

260. *Sierra Club*, 964 F.3d at 892.

lish the requirements for obtaining Title I PSD and nonattainment NSR permits in their SIP, and thus, the EPA approves of such permitting program when approving the SIP.<sup>261</sup> The court's lack of knowledge about the Clean Air Act reflects why Congress presumably would want the EPA, rather than any court, to decide what the regulation means.<sup>262</sup> Additionally, the court's reliance on the fact that "[n]owhere does the regulation *limit* 'applicable requirements' to the terms in earlier preconstruction permits" falls flat because neither does the regulation require the EPA to "*second-guess the results of any State NSR determination*" as the Tenth Circuit holds.<sup>263</sup> In fact, language in the preamble of the final rule suggests imposing such meaning would be inconsistent with the intent of the agency that promulgated the regulation.<sup>264</sup> However, the court misconstrued a provided example to conclude that "second-guess" "appears to address *how* states implement the NSR requirements . . . , not the threshold issue of *whether* major NSR requirements apply to a given source."<sup>265</sup> This ignores that the language cited provides that the purpose of Title V is "not to second-guess the results of *any* State NSR determination."<sup>266</sup>

The Tenth Circuit's decision demonstrates the dangers inherent in relying on "semantic resources, such as dictionaries or syntactic canons of construction," to resolve latent ambiguities in a regulation.<sup>267</sup> In fact, "Most academics think it contrary to the spirit of *Chevron* to rely too heavily on semantic resources to clarify latent ambiguity in the text of an administrative statute."<sup>268</sup> Thus, it is also "contrary to the spirit" of *Auer* "to rely too heavily on semantic resources" to resolve latent ambiguities in administrative regulations.<sup>269</sup> Although the Supreme Court would likely agree with the Tenth Circuit that § 70.2 is unambiguous as explained above, the Court could still reach a different result. As Karl Llewellyn once proved, the canons of construction can be easily manipulated by judges to reach their preferred result.<sup>270</sup> Given the wide range of tools in a judge's toolbox, the Justices could easily interpret § 70.2 differently, especially considering that the Tenth Circuit relied solely on the plain meaning of the regulation. As discussed below, a number of practical considerations may lead the Court to uphold the EPA's interpretation of § 70.2.

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261. EPA, *supra* note 19, at 3.

262. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019).

263. See *Sierra Club*, 964 F.3d at 892–93 (quoting Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (to be codified at 40 C.F.R. pt. 70)).

264. See Operating Permit Program, 57 Fed. Reg. at 32,251.

265. *Sierra Club*, 964 F.3d at 894.

266. See Operating Permit Program, 57 Fed. Reg. at 32,251 (emphasis added).

267. John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1530 (2014).

268. *Id.* at 1530 n.65.

269. See *id.*

270. See generally Llewellyn, *supra* note 223.

## B. THE FIFTH CIRCUIT'S DECISION: THE BETTER RESULT

For several reasons, the Fifth Circuit reached a better result in upholding the EPA's interpretation. However, the court reached this result for the wrong reason. As noted above, the court relied on the EPA's interpretation of the statute rather than the regulation because the EPA only argued for *Chevron* deference.<sup>271</sup> But as the Tenth Circuit pointed out in its opinion, *SEC v. Chenery Corp.* should have led the Fifth Circuit to interpret the regulation instead of the statute.<sup>272</sup> Under *Chenery*, "in dealing with a determination or judgment which an administrative agency alone is authorized to make, [a reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency."<sup>273</sup> In both the Hunter Order and the Baytown Olefins Plant petition, the EPA invoked its interpretation of § 70.2 as its basis for denying the petitions.<sup>274</sup> Thus, the Fifth Circuit should have "judged the propriety of such action" solely based on the EPA's interpretation of the regulation and not the statute.<sup>275</sup>

Despite the fact that the Fifth Circuit's analysis was questionable, the court reached a better result than the Tenth Circuit. If the Fifth Circuit's case were to reach the Supreme Court, the Court could reach the same result as the Fifth Circuit and uphold the EPA's interpretation of § 70.2. First, the EPA's interpretation is more consistent with Congress's intent for Title V. For example, the fact that Congress provided for "in-depth oversight of case-specific' state permitting decisions" in Title I but not in Title V suggests that "Congress did not intend to recapitulate the Title I process in Title V."<sup>276</sup> The abbreviated timeframes Congress provided for the EPA to review Title V permits further supports this conclusion.<sup>277</sup>

Moreover, as several courts have recognized, Congress did not intend for Title V to impose any new requirements on sources.<sup>278</sup> Instead, Title V permits were intended to bring "clarity and transparency . . . to the regulatory process to help citizens, regulators, and polluters themselves understand which clean air requirements apply to a particular source of air pollution."<sup>279</sup> Further, Title V requires state programs to provide for "expeditious review of permit actions."<sup>280</sup> However, if a state permitting authority is "required to reevaluate . . . [final permitting decisions] each time it renews [a] title V permit . . . then it could require substantial resources and unsettle expectations and reliance interests on the part of the

271. *Env't Integrity Project v. EPA*, 969 F.3d 529, 540 n.6 (5th Cir. 2020).

272. *See Sierra Club v. EPA*, 964 F.3d 882, 897 (10th Cir. 2020).

273. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

274. *See Env't Integrity Project*, 969 F.3d at 539; Hunter Order, *supra* note 36, at 8.

275. *See Chenery*, 332 U.S. at 196.

276. *Env't Integrity Project*, 969 F.3d at 542.

277. *See* 42 U.S.C. § 7661d(b).

278. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016); *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302 (11th Cir. 2004).

279. *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008).

280. 42 U.S.C. § 7661a(b)(6).

state, owner/operators, and the broader public.”<sup>281</sup> This is especially the case given that Title V permits must be reviewed every five years.<sup>282</sup>

Second, the EPA's interpretation better aligns with the structure of the Clean Air Act as a whole. As several courts have noted, Congress intended the Act to be an “experiment in cooperative federalism.”<sup>283</sup> Indeed, Congress gave the states broad authority to implement the provisions of Title I<sup>284</sup> and Title V,<sup>285</sup> while the EPA's authority generally is limited to “approv[ing] or recall[ing] SIPS it finds inconsistent with the Act.”<sup>286</sup> Nothing in the legislative history for Title V suggests Congress intended to give the EPA more oversight over state preconstruction permitting.<sup>287</sup> Thus, § 70.2 should not be interpreted to allow the EPA to second-guess state preconstruction permits. Moreover, the common criticism that *Auer* deference creates “a systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else” would not apply in this case.<sup>288</sup> Instead, the EPA's interpretation “respects the finality” of decisions made by state permitting authorities<sup>289</sup> and shifts “the balance of oversight” over preconstruction permitting back to the states as Congress intended.<sup>290</sup>

Third, the EPA's new interpretation aligns with the interpretation adopted by the EPA when the regulation was promulgated. Indeed, the Supreme Court has consistently recognized that “the agency that promulgated a rule is in [a] ‘better position [to] reconstruct’ its original meaning.”<sup>291</sup> In this case, language in the proposed rule indicates that the EPA's new interpretation aligns with that expressed contemporaneously with the regulation's promulgation.<sup>292</sup> For instance, the EPA stated, “[i]f the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits *without further review*.”<sup>293</sup> Moreover, the EPA also clearly indicated that “[t]he intent of title V is not to second-guess the results of *any* State NSR program.”<sup>294</sup> These statements directly align with the new interpretation the EPA adopted under the Hunter Or-

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281. Hunter Order, *supra* note 36, at 16.

282. 42 U.S.C. § 7661a(b)(5).

283. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (2012) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001)).

284. *See* 42 U.S.C. § 7410.

285. *See id.* § 7661a(d).

286. *Env't Integrity Project v. EPA*, 969 F.3d 529, 545 (5th Cir. 2020) (citing 42 U.S.C. § 7410(k)).

287. *See id.* at 536 n.1

288. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring).

289. *See* Hunter Order, *supra* note 36, at 18.

290. *See id.* at 15 (citing *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001)).

291. *Kisor*, 139 S. Ct. at 2412 (citing *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152 (1991)); *see also* *Mullins Coal Co., v. Dir., Off. of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987).

292. *See* Hunter Order, *supra* note 36, at 12–13.

293. Operating Permit Program, 56 Fed. Reg. 21,712, 21,738–39 (proposed May 10, 1991) (emphasis added) (to be codified at 40 C.F.R. pt. 70).

294. *Id.* at 21,739 (emphasis added).

der.<sup>295</sup> Further, a court should not refuse deference simply because an agency has changed its interpretation over time. As the Supreme Court has held, an agency “is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation.”<sup>296</sup>

Fourth, the EPA’s new interpretation is consistent with its public meaning as represented by the EPA in the proposed rule and the preamble of the final rule. Under the Administrative Procedure Act, agencies must provide the public with notice of any proposed legislative rule.<sup>297</sup> Agencies publish these notices in the Federal Register with the full text of the proposed rule and a preamble that explains each provision<sup>298</sup> and “respond[s] to material public comments in detailed ways.”<sup>299</sup> Once published, the agency must give the public an opportunity to comment on the proposed rule, and the final rule must be a “‘logical outgrowth’ of the [proposed] rule.”<sup>300</sup> These “[p]rovision-by-provision analyses in preambles are the most reliable sources of the text’s public meaning because they are subject to review by multiple veto-gate actors, including the President, Congress, and the courts.”<sup>301</sup> Thus, the Fifth Circuit reached the right result by upholding the EPA’s new interpretation because the previous interpretation allowed the agency “to strategically skew the meaning of [the] text away from what it publicly conveyed earlier.”<sup>302</sup>

Fifth, it is inefficient to interpret Title V to require state permitting authorities and the EPA to second-guess “preconstruction permitting decisions that have already been subject to public notice and comment and an opportunity for judicial review.”<sup>303</sup> For example, in the 1997 Approval Order issued for the Hunter Power Plant, UDAQ alerted the public that additional emission limits would be imposed so as not to trigger the PSD permitting requirements.<sup>304</sup> In accordance with the provisions of the Clean Air Act, Sierra Club could have submitted comments objecting to the 1997 Approval Order, yet Sierra Club failed to do so.<sup>305</sup> Moreover, under Utah’s Administrative Procedure Act, Sierra Club could have challenged the Order in state court, yet Sierra Club failed to do so.<sup>306</sup> Essentially, in relying on the Title V process to object to a preconstruction permit issued over twenty years ago, Sierra Club sought a “second bite at the apple.”<sup>307</sup> Because the EPA’s new interpretation refuses to give challengers a “second bite at the apple,” it preserves administrative resources

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295. See Hunter Order, *supra* note 36, at 12–13.

296. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).

297. 5 U.S.C. § 553(b).

298. Nou, *supra* note 4, at 111.

299. *Id.* at 118–19.

300. *Id.* at 119.

301. *Id.*

302. *Id.*

303. Hunter Order, *supra* note 36, at 17.

304. *Id.*

305. See 42 U.S.C. §§ 7661a(b)(6), 7661d(b)(2).

306. Hunter Order, *supra* note 36, at 17.

307. *Id.*

and protects the settled expectations of affected parties.<sup>308</sup>

C. CURING *KISOR'S CHAOS*: THE NEED TO RESTORE *AUER* OR DO AWAY WITH IT

One of the biggest benefits of *Auer* as originally understood was that “it impart[ed] . . . certainty and predict-ability to the administrative process.”<sup>309</sup> Because *Auer* was straightforward and easy to apply, it avoided circuit splits by “ensur[ing] that courts across the country g[a]ve the same meaning to ambiguous regulations.”<sup>310</sup> However, over the years, the Supreme Court has imposed increasing limitations on *Auer*, transforming it from “a seemingly simple legal standard into a doctrine of uncertain scope and application.”<sup>311</sup> Arguably, these limitations have reached a point where the Supreme Court has effectively overruled *Auer* despite purporting to uphold it.<sup>312</sup>

Given that “regulations, rather than statutes, are the principal way in which legal rights and obligations are established,” the Supreme Court should prioritize uniformity and clarity when refining *Auer* in the future.<sup>313</sup> To accomplish these goals, first and foremost, the Court needs to decide whether *Auer* stays or goes. Of these two courses, the better option is to restore *Auer* to its original “plainly erroneous or inconsistent” standard.<sup>314</sup> Additionally, a second step should be added to the analysis when the agency’s new interpretation conflicts with a prior interpretation. Under this second step, courts would take a “hard look” to see if the agency provided a reasoned explanation for changing its interpretation.<sup>315</sup> This standard gives agencies the flexibility to reinterpret regulations in response to changing circumstances while also allowing courts to ensure the agency’s proposed interpretation aligns with “what the law is.”<sup>316</sup>

The Supreme Court’s recent jurisprudence effectively overrules *Auer* and makes it highly unlikely that courts will defer to agency expertise, even on purely policy matters. As *Kisor* recognized, the agency’s interpretation should control when “the law runs out, and the policy-laden choice is what is left over.”<sup>317</sup> However, the line between questions of law and policy is often blurred, and a judge’s legal toolkit is broad. Thus, the Court’s current conception of *Auer* leaves little room to conclude that a

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308. *Id.*

309. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

310. Hickman & Thomson, *supra* note 13, at 104.

311. *Id.* at 105.

312. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2425, 2443 (2019) (Gorsuch, J., concurring).

313. Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 832 (2014).

314. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

315. *See Nou*, *supra* note 4, at 88–89.

316. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

317. *Kisor*, 139 S. Ct. at 2415.

regulatory interpretation question is “more [one] of policy than of law.”<sup>318</sup> *Kisor*’s command for courts to exhaust all the tools of interpretation before concluding a statute is ambiguous essentially directs courts to determine the “best and fairest reading” of a regulation.<sup>319</sup> As a result, judges end up substituting their policy preferences for those of the agency. Out of respect for the agency’s technical expertise and the authority delegated to the agency by Congress,<sup>320</sup> judges should leave such policy choices to the agency unless the agency’s interpretation directly conflicts with the regulation.<sup>321</sup>

Moreover, the Court’s recent limitations on *Auer* have only increased confusion in the lower courts as demonstrated by the circuit split discussed in this Comment. As Justice Gorsuch recognized in his *Kisor* concurrence, “retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops.”<sup>322</sup> Indeed, empirical evidence suggests that there has been a steady decrease in the rate at which lower courts grant *Auer* deference since Justice Scalia first criticized *Auer* in *Talk America, Inc. v. Michigan Bell Telephone Co.*<sup>323</sup> Once upon a time, *Auer* was known as a “super-deference” doctrine<sup>324</sup> because agencies won 90.9% of the cases where the Supreme Court invoked *Auer*.<sup>325</sup> However, since 2013, the agency win rate under *Auer* at the appellate level has decreased from 82.3% to 70.6%.<sup>326</sup> This finding is unsurprising given the Supreme Court’s rising skepticism of the doctrine, yet the declining rate of deference comes at a cost: increased confusion in the lower courts.

In the statutory interpretation context, the Court’s unyielding reluctance to find ambiguity in statutes has eroded *Chevron* deference, making it more difficult for agencies to carry out their statutory obligations.<sup>327</sup> A similar pattern is emerging in the context of regulatory interpretation.<sup>328</sup> Prior to *Kisor*, Kevin O. Leske demonstrated the inconsistency among courts of appeals in applying and interpreting the *Auer* standard.<sup>329</sup> *Kisor* did very little to remedy this confusion. The Court’s failure to provide meaningful guidance on how to determine when *Auer* does not apply relegated *Auer* to the level of “a doctrine of uncertain scope and application.”<sup>330</sup> As a result, the meaning of a regulation could differ “depending

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318. *Id.*

319. *Id.* at 2425 (Gorsuch, J., concurring).

320. *See id.* at 2412–13 (majority opinion).

321. Nou, *supra* note 4, at 148–50.

322. *Id.* at 2425 (Gorsuch, J., concurring).

323. Barmore, *supra* note 101, at 815–16.

324. J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 48 (2010).

325. Eskridge & Baer, *supra* note 100, at 1104.

326. Barmore, *supra* note 101, at 816.

327. Pierce, *supra* note 224, at 753, 763–64.

328. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2430 (2019) (Gorsuch, J., concurring).

329. *See generally* Leske, *supra* note 313.

330. *Kisor*, 139 S. Ct. at 2430 (Gorsuch, J., concurring).

on which circuit hears the case.”<sup>331</sup>

In sum, the Supreme Court's decision to retain *Auer* in a “zombified” state<sup>332</sup> despite constantly criticizing the doctrine has led to extreme confusion in the lower courts. “Uniformity and consistency are hallmarks of our administrative and judicial states,” yet the confusion surrounding *Auer*'s application in the lower courts greatly undermines these goals.<sup>333</sup> To restore uniformity and consistency within the administrative state and the judiciary, the Supreme Court needs to decide whether *Auer* stays or goes.

Considering that a majority of the Justices on the Court are strict textualists, the Court seems well-positioned to finally overrule *Auer*. If the Supreme Court does decide to overrule *Auer*, there are three primary solutions that have been proposed to replace it. The first proposes that judges review regulations de novo,<sup>334</sup> the second proposes replacing *Auer* with *Skidmore* deference, and the third proposes establishing an *Auer* Step Zero.<sup>335</sup> Under the first view, judges would attempt to determine the “best and fairest” construction of the regulation using all the traditional tools of interpretation.<sup>336</sup> However, as suggested above, this view can lead judges to disregard strong evidence to the contrary and find “plain meaning” where it does not exist.<sup>337</sup> Moreover, while the Court has explained how statutes should be interpreted in immense detail, the Court has devoted very little attention to how regulations should be interpreted.<sup>338</sup> Thus, if the Court does adopt this form of review, the Court should take additional steps to clarify how judges should approach regulatory interpretation.

Indeed, “[d]espite the fact that regulations overwhelm statutes in number and scope, neither judges nor scholars have confronted regulations with the level of interpretive sophistication applied to constitutions, statutes, or contracts.”<sup>339</sup> The tools of regulatory interpretation should not be the same as those used in statutory interpretation. Regulatory interpretation needs to account for the fact that regulations are much more detailed and technical than statutes.<sup>340</sup> Moreover, as opposed to statutes, regulations are subject to comments from regulated parties and the general public; thus, the focus should be on ascertaining the regulation's public meaning rather than its “plain meaning” as interpreted by the judge.<sup>341</sup>

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331. Leske, *supra* note 313, at 832.

332. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

333. Leske, *supra* note 313, at 832.

334. William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 GEO. L.J. 515, 516 & n.7 (2018) (citing Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) (as passed by the House of Representatives, Jan. 11, 2017)).

335. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 108–10 (2018).

336. See *Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring).

337. See *Pierce*, *supra* note 224, at 779.

338. Nou, *supra* note 4, at 88–89.

339. *Id.* (footnote omitted).

340. See *id.* at 107–09.

341. See *id.* at 106–08, 116.

By providing lower courts with more guidance on regulatory interpretation, the Court could bring some much-needed clarity to administrative law.

The second solution is replacing *Auer* with *Skidmore* deference.<sup>342</sup> However, after *Kisor*, the *Skidmore* and *Auer* analyses overlap almost entirely,<sup>343</sup> making it doubtful that *Skidmore* will resolve any of the issues that *Auer* has generated. Moreover, lower courts may be even more uncertain about how to apply *Skidmore* compared to *Auer*.<sup>344</sup> Additionally, given the overlap between these doctrines, one could criticize *Skidmore* deference for all the same reasons *Auer* has been criticized. In effect, trading *Auer* for *Skidmore* will not remedy the issues pervading administrative law.

The third solution suggests that courts should incorporate an “*Auer* step zero,” similar to *Chevron*’s step zero, under which only those regulatory interpretations that have the force of law would be entitled to deference.<sup>345</sup> However, this will further complicate the job of lower courts. Indeed, some courts, such as the Fifth Circuit in *Environmental Integrity Project*, engage in “*Chevron* avoidance” and decide the case on other grounds because the *Chevron* analysis has become so convoluted.<sup>346</sup> Further modification to *Auer* will bring more confusion to administrative law and could result in *Auer* avoidance. Therefore, the Court should restore *Auer* to its original conception rather than overrule it.

Restoring *Auer* to its “plainly erroneous or inconsistent with the regulation” standard<sup>347</sup> will bring some clarity to administrative law and ensure that regulations have the same meaning regardless of which court hears the case. Such a standard allows the court to meet its obligation to say “what the law is” while also respecting the agency’s policy expertise.<sup>348</sup> Additionally, by adding a second step to the analysis when an agency’s new interpretation conflicts with a prior one, courts can ensure the agency is not merely changing its interpretation to achieve its political agenda.<sup>349</sup> Under the hard look doctrine, agencies are allowed to change a prior policy position as long as the agency provides a reasoned explanation for the changed position.<sup>350</sup> It makes little sense why agencies should not also have the same flexibility to change their position when a regulation is involved as long as the agency’s new interpretation is not “plainly

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342. Walker, *supra* note 335, at 108.

343. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring).

344. See Hickman & Krueger, *supra* note 73, at 1291.

345. See generally Yeatman, *supra* note 334.

346. See *Env’t Integrity Project v. EPA*, 969 F.3d 529, 540 (5th Cir. 2020).

347. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 453 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

348. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

349. See Nou, *supra* note 4, at 148–50 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

350. See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43, 56–57; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–16 (2009).

erroneous or inconsistent with the regulation.”<sup>351</sup> Requiring an agency to show that it took a hard look before changing its interpretation of a regulation “balances the need for agency flexibility to update regulatory policy, on the one hand, against the countervailing needs for fair notice and accountability, on the other.”<sup>352</sup>

## V. CONCLUSION

In summary, the conflict between the Fifth and Tenth Circuits over the meaning of the Clean Air Act's applicable requirements demonstrates the strong need for the Supreme Court to take decisive action as to whether *Auer* will stay or go. As a result of this circuit split, the Clean Air Act's applicable requirements for purposes of Title V permitting have a different meaning in the Fifth and Tenth Circuits. Unless the EPA changes its interpretation through notice-and-comment rulemaking or the Supreme Court resolves the conflict, affected parties will be left with little guidance on what the law is in their jurisdiction. Regulations cannot continue to take on different meanings depending on which court hears the case. The Supreme Court needs to take action to ensure that regulated parties and the broader public are able to discern what the law is so that they can conform their behavior accordingly.

If the Supreme Court were to consider the issue, the Court likely would agree with the Tenth Circuit that the EPA's regulation is unambiguous. However, this does not necessarily mean the Court would reach the same result as the Tenth Circuit. In fact, although the Fifth Circuit utilized flawed reasoning, the Court could reach the same result as the Fifth Circuit and uphold the EPA's interpretation of the Clean Air Act's applicable requirements for Title V permitting. As discussed in this Comment, the Fifth Circuit's decision reaches the correct result because the EPA's new interpretation better aligns with congressional intent for Title V, the structure of the Act as a whole, the drafting agency's original interpretation, and the regulation's public meaning. Moreover, this interpretation preserves judicial and administrative resources and protects reliance interests by preventing challengers from getting a “second bite at the apple.”<sup>353</sup>

Considering the drastically different results reached in the Fifth and Tenth Circuits, the Supreme Court should prioritize clarity and uniformity when addressing *Auer* in the future. Maintaining *Auer* in this “zombified” state<sup>354</sup> has only complicated the analysis for lower courts and will likely lead to the rise of *Auer* avoidance. In response to skepticism over *Auer*, scholars have proposed primarily three solutions for remedying its defects: (1) direct courts to review the regulation de novo to determine

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351. See Nou, *supra* note 4, at 90 & n.31, 148–50 (first quoting *Auer*, 519 U.S. at 461; and then quoting *Seminole Rock*, 325 U.S. at 414).

352. *Id.* at 149–50.

353. Hunter Order, *supra* note 36, at 17.

354. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring).

the “best and fairest” construction,<sup>355</sup> (2) replace *Auer* with *Skidmore* deference, and (3) impose an “*Auer* step-zero,” deferring to only those regulations that have the force of law.<sup>356</sup> However, none of these solutions will bring the clarity or uniformity needed in administrative law.

Instead, the Court should restore *Auer* to its original framework and take a “hard look” when the agency’s interpretation conflicts with a prior one.<sup>357</sup> Under this framework, courts can defer to agency expertise on policy choices while still carrying out the judiciary’s duty to say “what the law is.”<sup>358</sup>

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355. See Yeatman, *supra* note 334; *Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring).

356. See Walker, *supra* note 335.

357. See Nou, *supra* note 4.

358. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).