Oceans and Ecosystem Services: Moving from Soft Policy to Hard Law to Apply

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Reference question

Can ecosystem services play a role in national oceans management policy?
When thinking innovatively, think about the box of existing law:

- Avoid Type I false positive error: being too creative while falsely believing existing laws allow a new favored regulatory innovation

- Avoid Type II false negative error: not being creative enough while falsely believing existing laws do not allow more innovative regulatory thinking
Implementing regulatory innovation

<table>
<thead>
<tr>
<th>Constitution allows?</th>
<th>Existing statute allows?</th>
<th>Existing regs allow?</th>
<th>Action needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>New guidance</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>New regulation</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>Statutory amendment then new regulation</td>
</tr>
<tr>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
<td>Const. amendment</td>
</tr>
</tbody>
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Matching regulations to statutes

- How do we know whether:
  - (1) a new regulation is permissible under an existing statute if the new regulation extends, departs from, or conflicts with prior agency regulations and practice, or
  - (2) a new regulation is permissible under a new statute for which no prior agency practice exists?

Turn to *Chevron* and *Brand X*...
In *Chevron*, the Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.
Some of the respondents dispute this conclusion, on the ground that the Commission’s interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy. We therefore have no difficulty concluding that *Chevron* applies.
A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court’s interpretation to override an agency’s. *Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency’s construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.
Two approaches to ecosystem services under Chevron/Brand X

• Can the statute reasonably be interpreted to allow direct protection of ecosystem services?

  and if not

• Can the statute reasonably be interpreted to allow using ecosystem services as a performance metric for determining whether the attribute for direct protection is being adequately protected?

The performance metric approach provides considerable leverage
A recent example from CWA Section 404

- Section 404 does not mention wetlands in connection with the Corps permit program
- Section 404 does not mention compensatory mitigation
- Section 404 does not mention ecosystem services
- For two decades Corps rules for section 404 did not mention ecosystem services

- Yet, new Corps/EPA regulations require the Corps to consider impacts on ecosystem services when deciding appropriate compensatory mitigation for fill of wetlands.
Apply Chevron/Brand X

- It would be very difficult to argue that Section 404 unambiguously prohibits the Corps/EPA from using ecosystem services as one of the performance metrics in the 404(b) guidelines.

- It would be very difficult to argue that it would be unreasonable to interpret Section 404 as allowing the Corps/EPA to use ecosystem services as one of the performance metrics in the 404(b) guidelines.
Now think about Oceans Laws

- Clean Water Act
- CZMA
- Endangered Species Act
- MMPA
- Magnuson-Stevens
- Marine Sanctuaries Act
- MPAs
- Etc....