# A Silent Revolution of Agency Review

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Municipalities frequently interact with state and federal agencies, and they sometimes need courts to review whether an agency decision is arbitrary, an abuse of discretion, or otherwise contrary to law. Many agency review cases require the court to evaluate agency interpretations or involve agency decisions to impose specific restrictions or conditions on municipalities. In the past, Wisconsin courts had given considerable deference to agency interpretations and policy determinations, to varying degrees ("great weight," "due weight," or no deference at all) depending on the circumstances and "the comparative institutional qualifications and capabilities of the court and the administrative agency." *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶ 13. Generally, however, courts deferred to agency interpretations when the statute was ambiguous and the agency's construction was reasonable – particularly when the agency had extensive experience and the agency's interpretation was longstanding. That approach largely tracked the principles of agency deference that federal courts have applied ever since *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

But the era of agency *Chevron*-style deference in Wisconsin is over. It abruptly ended with the Wisconsin Supreme Court's recent decision in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75 (June 26, 2018), which instructs courts to review every agency interpretation *de novo* ("anew"). Moreover, some observers predict that federal courts will soon follow suit and abandon *Chevron* deference to federal agency interpretations of law.

As Aristotle observed, "in revolutions the occasions may be trifling but great interests are at stake." Aristotle, Nicomachean Ethics, bk. V, ch. 3. And to Aristotle's point, the specific legal issue presented in the *Tetra Tech* case is rather mundane—whether separating river sediment as part of environmental remediation efforts constituted "processing" as that term was used in Wisconsin Statutes, such that the Department of Revenue properly imposed a sales tax for those activities. The Court took the opportunity in *Tetra Tech*, however, to transform principles of agency review in a way that will dramatically affect municipalities and everyone involved in agency decision-making.

Two of the Justices in the majority (Daniel Kelly and Rebecca Bradley) embedded their decision in the separation-of-powers principle inherent in the Wisconsin Constitution, reasoning that deference to agency interpretations violated the maxim first announced in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). *See Tetra Tech*, 2018 WI 75, ¶ 50. Those two Justices also concluded that agency deference "deprives the non-governmental party of an independent and impartial tribunal." *Id.*, ¶ 67. Three other Justices in the majority (Annette Ziegler, Patience Roggensack, and Michael Gableman) avoided the constitutional question but instead arrived at the same result based on the Court's power to overrule court-created doctrine. *See id.*, ¶¶ 135, 159.

The revolution against agency deference in Wisconsin actually began several years before the *Tetra Tech* decision. In 2011, as part of Act 21, a broad effort of regulatory reform, the State enacted a provision that bars agencies from adopting or enforcing any standard, requirement, or threshold unless it is explicitly required or explicitly permitted by statute or rule. Wis. Stat. § 227.10(2m). The implications of that statutory change may not be obvious at first glance, but the practical consequences are almost certain to be profound. In 2016 Wisconsin Attorney General Brad Schimel issued an opinion stating that because there was no statutory provision explicitly authorizing DNR to impose a monitoring requirement on high-capacity well permits, any such requirement is prohibited and unenforceable under Section 227.10(2m). *See* Opinion Letter from B. Schimel to Chairperson R. Vos (May 10, 2016), available at https://goo.gl/knsU8n

Another example is a case involving a permit application by Kinnard Farms for a concentrated animal feeding operation in Kewanee County. DNR had concluded, overruling a decision of an administrative law judge, that Section 227.10(2m) prevented the agency from limiting the number of animals allowed on the property or requiring the placement of monitoring wells where the animal waste was being disposed. A Dane County circuit court later reversed

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the DNR's decision, see *Clean Wisconsin, Inc. v. Wisconsin Dep't of Natural Resources*, Case No. 2015-CV-2633, Decision and Order (July 14, 2016), available at https://goo.gl/UMQYFU, and that case is currently on appeal.

There appears to be a similar movement away from agency deference at the federal level. In one of the final cases to be decided in the previous term, United States Supreme Court Justice Anthony Kennedy wrote in a concurrence that he found "reflexive deference" to agency interpretations to be "troubling," particularly when the statutory provision at issue concerns the scope of the agency's own authority. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (June 21, 2018). He concluded that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision." *Id.* at 2121.

Sounding similar themes the Wisconsin Supreme Court would echo in *Tetra Tech* five days later, Justice Kennedy indicated that the proper rule for review of agency interpretations "should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.*

Justice Kennedy is not alone on the Court in expressing skepticism toward the agency deference principles of *Chevron*. Justice Clarence Thomas has long questioned the constitutionality of agency deference. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2712 (Thomas, J., concurring). Justice Neil Gorsuch wrote as a court of appeals judge that *Chevron* shifts "the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (Gorsuch, J., concurring). And Judge Brett Kavanaugh, recently nominated to replace Justice Kennedy on the Supreme Court, would likely pick up the mantle if he is confirmed. In a 2016 law review article, Judge Kavanaugh described Chevron as "an atextual invention by courts" and "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch." Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

It is perhaps impossible in the midst of any revolution to know how it will all end. That is certainly true here. It is difficult to predict how courts will apply Tetra Tech, and any guidance to be drawn from the decision itself is particularly limited in light of the fractured nature of the ruling. Municipalities and other participants in agency decision-making will have to wait and see whether and to what extent courts continue to give "due weight" to the experience, technical

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competence, and specialized knowledge of an administrative agency, as required by Wis. Stat. § 227.57(10). *See id.*, ¶ 3. After *Tetra Tech*, however, the term "due weight" no longer has "the patina of 'deference' with which our cases have covered the concept," and is instead reduced to a "matter of persuasion, not deference." 2018 WI 75, ¶ 71. It is also unclear what effect that the Court's decision will have on the decades of court rulings that relied on principles of deference. *See id.*, ¶ 139 (Ziegler, J., concurring). But there should be no doubt that we are in the midst of radical change in connection with judicial review of agency decision-making.

The changes that are underway to agency deference will undoubtedly affect municipalities and their interactions with state and federal agencies. Municipalities and other participants in agency decision-making may want to evaluate whether agency standards or requirements are explicitly permitted by statute, because if not, then those standards may be invalid and unenforceable under Wis. Stat. § 227.10(2m). And in light of *Tetra Tech*, it may also be worth reevaluating longstanding agency interpretations of ambiguous statutes to determine whether they would survive a more searching *de novo* court review. Municipalities should also pay close attention to the issue of agency deference as it continues to develop in state and federal courts.

## About the Author:

Barry J. Blonien has substantial experience at all stages of litigation, from case analysis before filing a complaint all the way through trial and, if necessary, an appeal. He has worked on complex litigation matters involving constitutional law, civil rights, environmental justice, consumer rights, antitrust, false claims, class actions and collective actions, administrative law, and intellectual property. Contact Barry at bblonien@boardmanclark.com