REGULATORS MUST GIVE FAIR WARNING OF FORBIDDEN CONDUCT OR REQUIREMENTS

By: Kenneth Anspach[1]

Industry subject to environmental regulation, whether from such agencies as the U.S. Environmental Protection Agency ("USEPA"), the Illinois Environmental Protection Agency ("IEPA") and other state and local agencies, boards and entities, often finds itself subject to ambiguous statutes, rules and regulations. This ambiguity lends itself to expectations on the part of industry regarding the scope and nature of acceptable conduct. These expectations may or may not comport with agency interpretations of these statutes, rules and regulations. As a result industry may find itself subject to enforcement actions for engaging in conduct it believed to be acceptable, but which the agency interprets as prohibited. Now, as a result of the recent decision of the U.S. Supreme Court in *Christopher v. SmithKline Beecham Corporation ("Christopher")*, 132 S. Ct. 2156, 2167 (2012), these interpretations must be tempered by the Court's holding that "agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" This presentation examines the origin of this holding and how it applies to enforcement actions by the federal, state and local governments.

I. Deference to an Agency's Interpretation of its Own Ambiguous Regulations, Once a Hallmark of Administrative Law, is no Longer Allowed Where Such Interpretation is Unwarranted.

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The notion that courts will defer to an agency's interpretation of its own ambiguous statutes, rules and regulations arose out of the case entitled *Auer v. Robbins ("Auer")*, 519 U.S. 452 (1997). There, police officers sought payment from the police commissioners' board for overtime. The issue before Court was whether the police officers were exempt from the overtime under the pertinent provisions of the Fair Labor Standards Act of 1938, 29 USCS § 201 *et seq.* (the "FLSA"). The Court held, *inter alia*, that the Secretary of Labor's salary basis test was not an unreasonable interpretation of the statutory exemption to the FLSA as it applied to public-sector employees. In so doing, it stated that, "Because Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" (Citations omitted.) *Auer*, 519 U.S. at 457.

This principle that courts would defer to the agency's approach to construction of its governing statute or its own regulations became known as "*Auer* deference." 132 S. Ct. at 2160. *Auer* deference has been applied in at least one environmental case, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2469 (2009) where the Court deferred to USEPA's interpretation of whether mine slurry could be discharged into a lake as fill material under the Clean Water Act ("CWA"), § 404(a), 33 U.S.C. § 1344(a) and 40 CFR § 122.3). In other types of cases, the Court relied on *Auer* in deferring to the Federal Reserve System Board's interpretation of Truth In Lending regulations as revealed in the Board's amicus brief filed with the Court where the regulation was silent on the issue at hand, making it ambiguous, and the Board's stated position was consistent with its past views. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 (2011). The Supreme Court gave *Auer* deference to the U.S. Treasury Department's interpretation of anti-alienation regulations even though the Department's interpretation had changed over time where there was "'simply no reason to suspect that the

interpretation [did] not reflect the agency's fair and considered judgment on the matter in question.'" *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 872 & n.7 (2001 (quoting *Auer*, 519 U.S. at 462).

However, in *Christopher*, another FLSA case, *Auer* deference hit a major roadblock. There, plaintiff employees worked as pharmaceutical sales representatives for the employer, a prescription drug company. The employees' primary objective was to obtain a nonbinding commitment from physicians to prescribe particular drugs in appropriate cases. The Court determined that the employees were exempt from the FLSA's overtime compensation requirement because they qualified as outside salesmen under the Department of Labor's ("DOL") regulations, 29 U.S.C. §213(a)(1) . The Court found that the DOL's interpretation of the regulations, that a sale demanded a transfer of title, was not owed *Auer* deference, because the DOL never initiated any enforcement actions with respect to pharmaceutical detailers or otherwise suggested that it thought the industry was acting unlawfully.

In determining that the DOL's interpretation of its regulations was not entitled to *Auer* deference, the Court stated:

> Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, *** this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "'plainly erroneous or inconsistent with the regulation.' "*** And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *** This might occur when the agency's interpretation conflicts with a prior interpretation, *** or when it appears that the interpretation is nothing more than a "convenient litigating position," ***or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *** (Citations omitted). *Christopher*, 132 S. Ct. at 2166-67.

After distinguishing situations where *Auer* deference is inappropriate, the Court went on to set forth a legal principle that must govern administrative behavior in this context. Specifically, the Court stated:

> To defer to the agency's interpretation in this circumstance would seriously undermine *the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."* (Emphasis added.) *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156, 252 U.S. App. D.C. 332 (CADC 1986) (Scalia, J.). *Christopher*, 132 S. Ct. at 2167.

Thus, the Court found that regulated parties are entitled to fair warning of the conduct a regulation prohibits or requires. The Court went on to identify, based upon Court precedent, the type of "unfair surprise" that would result from an agency's failure to adhere to this principle.

> Indeed, it would result in precisely the kind of "unfair surprise" against which our cases have long warned. See *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 170-171, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007) (deferring to new interpretation that "create[d] no unfair surprise" because agency had proceeded through notice-and-comment rulemaking); *Martin v. OSHRC*, 499 U.S. 144, 158, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295, 94 S. CT. 1757, 40 L. Ed. 2d 134 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose "new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages"). *Christopher*, 132 S. Ct. at 2167.[2]

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[2] The Court at note 15 gave other examples of cases where courts had determined fair warning must be given, as follows: "Accord, *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1192 (CA9 1982) (recognizing that "the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited"); *Kropp Forge Co. v.* Secretary *of Labor*, 657 F.2d 119, 122(CA7 1981) (refusing to impose sanctions where standard the regulated party allegedly violated "d[id] not provide 'fair warning' of what is required or prohibited"); *Dravo Corp. v. Occupational Safety and Health Review Comm'n*, 613 F.2d 1227, 1232-1233 (CA3 1980) (rejecting agency's expansive interpretation where agency did not "state with ascertainable certainty what is meant by the standards [it] ha[d] promulgated" (internal quotation marks omitted and emphasis deleted)); *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (CA5 1976) (explaining that "statutes and regulations which allow monetary penalties against those who violate them" must "give an employer fair warning of the conduct [they]

Where, as here, the agency failed to provide "fair warning of the conduct a regulation prohibits or requires" the Court found the agency's "interpretation neither entitled to *Auer* deference nor persuasive in its own right" and simply refused to enforce it. *Christopher,* 132 S. Ct. at 2167.

II. The Requirement that Agencies Give Regulated Parties "Fair Warning of the Conduct a Regulation Prohibits or Requires" is Equally Applicable in both the Federal and State Administrative Context.

A. The Principle of "Fair Warning" is Grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

That agencies must provide "fair warning of the conduct a regulation prohibits or requires" is rooted in the due process clauses of the Fifth[3] and Fourteenth Amendments[4] to the U.S. Constitution. That was the finding in *Gates & Fox Co. v. Occupational Safety and Health Review Commission,* 790 F.2d 154, 156 (D.C. Cir. 1986), cited in *Christopher* at 132 S. Ct. at 2170, which stated, "Where the imposition of penal sanctions is at issue, however, *the due process clause* prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." (Emphasis added.)

Indeed, in the same term that the Court decided *Christopher*, it decided in *FCC v. Fox Television Stations, Inc. ("Fox")*, 132 S. Ct. 2307, 2317-18 (2012), that the due process clause of the Fifth Amendment precludes the Federal Communications Commission from punishing Fox

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prohibi[t] or requir[e]"); 1 R. Pierce, Administrative Law Treatise § 6.11, p. 543 (5th ed. 2010) (observing that "[i]n penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule").

[3] USCS Const. Amend. 5: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation." (Emphasis added.)

[4] USCS Const. Amend. 14, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

for its broadcasting of "fleeting expletives," because the regulations did not give Fox "fair notice" that such conduct could subject it to punishment. *Fox,* 132 S. Ct. at 2317. The Court specified that:

> *A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required*. *** "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" ***…*This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment****** It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *** (Citations omitted; emphasis added.) *Fox*, 132 S. Ct. at 2317.

That "fair warning" or "fair notice" is rooted in the principles of the U.S. Constitution, Fifth and Fourteenth Amendments renders the principle equally applicable to state and local agencies interpreting their own governing statutes, and their own rules and regulations.

B. Illinois Recognizes the "Fair Warning" and "Fair Notice" Principles.

The principle that government action must be preceded by "fair warning or "fair notice" is well-known at the state level. Thus, in Illinois, it is well settled that a statute is unconstitutionally vague and violates due process if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or if there is an absence of standards restricting the discretion of governmental authorities who apply the law. *East St. Louis Federation Of Teachers, Local 1220, American Federation Of Teachers, AFL-CIO v. East St. Louis School District No. 189 Financial Oversight Panel,* 178 Ill. 2d 399, 425 (1997). The terms of a statute cannot be so ill defined that their meaning may be determined at whim

rather than by objective criteria. *Id.* A statute's terms must serve as a guide to those who must comply with the statute. *Id.*

The Illinois Pollution Control Board (the "Board") is no stranger to the concept of "fair notice." In *EPA v. Rosenbalm*, PCB No. 71-299, 1973 Ill. ENV LEXIS 2 (January 16, 1973), in addressing pleadings that had been amended subsequent to the filing of the initial complaint to add new violations that allegedly occurred post-complaint, the Board stated:

> …[W]e caution the Agency and its representatives to avoid unfair, omnibus pleadings which either intend to sweep within its purview prospective violations which may occur subsequent to the filing of the complaint, or are so vague and indefinite as to fail to give the Respondent fair notice of the specific dates of alleged infractions of the law so as to enable him to properly prepare a defense.

Consider, then, the application of the principle of fair warning or fair notice in two cases pending before the Board.[5] In *People of the State of Illinois v. Sheridan-Joliet Land Development, LLC et al.*, PCB No. 13-19 and PCB No. 13-20, the State has sought to enforce amended and superseded regulations against the respondents without the type of "fair notice" that was the subject of *Christopher* and *Fox.* There, the State brought a Complaint against respondents that alleged violations of various purported provisions of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/1 *et seq.* and, specifically, 415 ILCS 5/22.51, entitled Clean Construction or Demolition Debris Fill Operations ("CCDD"). The Complaint alleged that these purported violations, in turn, stemmed from alleged violations of purported "Section 1100.205(a)(b)(c) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c), [and (h)]." However, respondents asserted in a Motion to Strike and Dismiss that there is no "Section 1100.205(a)(b)(c) [and (h)] of the Board CCDD Regulations, 35 Ill. Adm. Code

[5] The author of this article and presentation is counsel for respondents in each of these cases. Complete copies of the motions and briefs discussing the issues raised in these cases, including the positions taken by the State of Illinois with respect thereto, can be found at www.ipcb.state.il.us.

1100.205(a)(b)(c) [and (h)]." That is so because, as the respondents argue, the Board CCDD Regulations had been amended as of August 27, 2012 and once the new rules became effective they supplanted and superseded the previous rules, including those under which these allegations of the Complaint were brought, purported §§ 1100.205(a)(b)(c) and (h) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c) and (h). Thus, when the Complaint, which was filed subsequent to August 27, 2012, sought to charge respondents with purported violations of Board CCDD Regulations, such Complaint, according to respondents, could only allege violations of regulations that actually appear "on the books." Yet, as respondents point out, it patently did not do so.

Respondents assert that the only known instance where the Board was allowed to apply otherwise moribund regulations in an enforcement action was in *Mystik Tape, Div. of Borden, Inc. v. Pollution Control Board*, 60 Ill. 2d 330, 339-340 (1975). In that case, the Board was able to enforce regulations of a predecessor enforcement board because only because it was specifically authorized to do so by statute. Former § 49(c) of the Act, Ill. Rev. Stat. 1971, ch. 111 1/2, par. 1049(c), provided that "all rules and regulations" of such predecessor boards "shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act." Here, to the contrary, no such statutory provision authorizes the Board to enforce superseded regulations.

By the same token, former § 49(c) of the Act, Ill. Rev. Stat. 1971, ch. 111 1/2, par. 1049(c), gave the regulated community "fair notice" that the regulations of predecessor boards would remain in effect. Here, even assuming, *arguendo*, the Board had the authority to apply superseded regulations, respondents assert it needed to provide notice to the regulated community. Fair notice encapsulates "the principle that agencies must provide regulated parties

'fair warning of forbidden conduct or requirements.'" *Christopher*, 132 S. Ct. at 2167. Respondents assert that no notice that these superseded requirements purportedly still remain in force was ever provided. Thus, respondents assert the Complaint must be dismissed.

C. Michigan Recognizes the "Fair Warning" and "Fair Notice" Principles.

The State of Michigan also views agency interpretation of statutes and regulations through the lens of "fair warning" and "fair notice." In *People v. Kircher*, 2008 Mich. App. LEXIS 1627, an unpublished opinion, the Court of Appeals of Michigan considered a constitutional challenge to defendant's conviction for a discharge of a substance into the waters of the state that endangered the public health, safety, and welfare contrary to the provisions of MCL 324.3109 in violation of MCL 324.3115(2) and MCL 324.3115(4). Defendant's convictions arose from the discharge of raw sewage into a catch basin or storm drain. Specifically, sewage back up occurred in an apartment complex owned by defendant. He instructed his employees to open a manhole and use a sump pump and hoses to dump raw sewage directly into a catch basin designated for storm water only. State authorities concluded that the catch basin did not lead to a treatment facility, but ultimately led to the Huron River. After the first pump burned out, defendant instructed employees to set up a second pump, and when that stopped functioning, defendant purchased a third pump. Ultimately, defendant pumped raw sewage over a three-day period before being ordered to stop by township officials. During that three-day period, employees and the plumber informed defendant that his conduct was illegal, but he did not end the pumping operation. Altogether, defendant discharged an estimated107,000 gallons of raw sewage. A tenant of the apartment complex testified that he drank from the hose, unaware that it contained sewage, and became physically ill.

The court considered defendant's challenge to MCL 324.3109 on the grounds that it was "constitutionally void for vagueness." The court noted that "A statute may be unconstitutionally vague on any of three grounds" including whether "it fails to provide *fair notice* of the conduct proscribed." (Emphasis added.) The language of the statute provided:

> "Discharge into state waters; prohibitions; exception; violation; penalties; abatement" and provides in pertinent part:
> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
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> * * *
>
> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. …

In denying the constitutional challenge the court found as follows:

> [D]efendant's actions in discharging raw sewage into a state water body constituted a discharge of a substance that was or could be injurious to human health. The statute at issue is not void for vagueness when the meaning of the statute's terms as defined by the dictionary demonstrates that defendant's conduct fell within the statutory prohibitions.

Thus, the court considered, but rejected, the constitutional challenge to the statute.

The Court of Appeals of Michigan similarly rebuffed a "fair notice" challenge to Yankee Springs Township's so-called anti-funneling ordinance and riparian-lot-use regulations barring defendant's access from his waterfront lot to a local lake in *Township of Yankee Springs v. Fox*, 264 Mich. App. 604 (2004). Defendant contended that the riparian-lot-use regulations were void

for vagueness because the regulations did not provide fair notice of the conduct proscribed. The pertinent regulation provided that each "parcel of land shall contain at least 70 lineal feet of water frontage…for each dwelling unit or each single-family unit." 264 Mich. App. At 608. Because at least eight families with nonwaterfront dwellings owned one-eighth interests in defendant's lot, and because the lot had only 103 feet of water frontage, the court found that the riparian-lot-use regulations validly prohibited the use of the lot as access property and that the ordinance was not void for vagueness.

On the other hand, in *West Bloomfield Charter Township v. Karchon*, 209 Mich. App. 43 (1995), the court upheld a constitutional challenge to woodlands ordinances the township sought to enforce against the defendants. The court found that an ordinance does not provide fair notice of proscribed conduct if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. That is, an ordinance must be sufficiently clear and definite as to give those reading it fair notice of prohibited conduct. On that basis, the court held that the ordinances' definition of the terms "woodland" and "woodland edge" were unconstitutionally vague. The court further held that the ordinances lacked standards necessary to govern their enforcement, thus giving unstructured and unlimited discretion to those charged with their administration. The court noted that the ordinances lacked the criteria to guide the decision whether to grant a permit, deny a permit, grant an exception, or deny an exception, and such unstructured, unlimited, and arbitrary discretion to determine whether to grant or deny a permit was constitutionally repugnant.

D. Wisconsin Recognizes the "Fair Warning" and "Fair Notice" Principles.

The State of Wisconsin also applies the principle of "fair warning" and "fair notice" when considering agency interpretation of statutes and regulations. In *State of Wisconsin v.*

Perry Printing Corporation, 128 Wis. 2d 554 (1985), an unpublished opinion, the State challenged a judgment of the Circuit Court for Jefferson County, Wisconsin that dismissed its claims that defendant corporation violated Wis. Admin. Code § 154.11(6) by emitting solvent emission from its plant presses, and that denied injunctive relief against future violations. The corporation cross-appealed challenging the constitutionality of § 154.11(6). In finding a violation of Wis. Admin. Code § 154.11(6), the Court found that:

> Wisconsin Adm. Code sec. 154.11(6) gives *fair notice* of what is prohibited and includes fair standards for enforcement. The opacity limits are specific. To determine compliance with these limits, the DNR has developed a procedure for emission evaluation. Emission evaluators are trained where and how to observe emission plumes and how to determine opacity. The procedure is based on EPA guidelines. Opacity is calculated from twenty-four consecutive opacity observations taken at fifteen second intervals. The DNR also allows readings to be taken over longer periods and recommends this practice when opacity is near or over the emission limits. a violation, however, remains based on twenty-four consecutive readings at fifteen second intervals. (Emphasis added.)

On that basis the court reversed the dismissal entered by the Circuit Court, although it refused to reverse the denial of injunctive relief against future violations.

III. Conclusion.

As a result of the recent decision of the U.S. Supreme Court in *Christopher v. SmithKline Beecham Corporation*, 132 S. Ct. 2156, 2167 (2012), administrative interpretations of statutes, rules and regulations must be tempered by the Court's holding that "agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" That "fair warning" or "fair notice" is rooted in the principles of the U.S. Constitution, Fifth and Fourteenth Amendments renders the principle equally applicable to state and local agencies interpreting their own governing statutes, and their own rules and regulations. In fact, it appears that the

courts in Illinois, Michigan and Wisconsin recognize and apply the principle of “fair warning” or “fair notice” when considering agency interpretation of statutes and regulations.