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Impending Supreme Court Ruling on *Chevron* Deference: Impact on FEMA Dispute Resolution

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Historically, the courts have had little involvement in review of the Federal Emergency Management Agency's (FEMA) decisions regarding the billions of dollars of federal disaster recovery funding that FEMA administers annually. Legal professionals typically discourage pursuing judicial review of a FEMA denial of funding due to the discretionary nature of most of FEMA's programs and also the high level of deference given to FEMA's interpretation and application of the laws that apply. However, the United States Supreme Court is expected to issue a ruling this month that may nullify years of precedent through the anticipated overturn of the namesake case for "*Chevron* deference." If this occurs, pursuing relief from an offensive FEMA denial through an action for judicial review in the courts could emerge as a new option.

For decades, federal agencies, like FEMA, have enjoyed significant deference from the courts regarding their interpretation of laws and regulations applicable to the program(s) they administer, a principle known as "*Chevron* deference" after the 1984 decision in *Chevron v. National Resources Defense Council*. In short, *Chevron* and its progeny establish that courts give deference to an agency's interpretation of the applicable law so long as the interpretation is: (i) issued by the agency charged with administering it; (ii) generally rational or reasonable; and (iii) given in a form that would have the force of law, like an adjudication or formal notice-and-comment rulemaking. Now this long-standing doctrine is under intense scrutiny as the Supreme Court of the United States considers two pivotal cases[1] that could dismantle it.

What Led Us Here?

Recently, the Supreme Court heard arguments in two cases that put the future of the *Chevron* deference doctrine on the chopping block. In both cases, Petitioners are challenging a National Marine Fisheries Service regulation requiring commercial fishing boat owners to pay for an onboard observer. About 70 interested non-parties filed Amicus Briefs for these cases, with the majority urging that *Chevron* deference be overturned or, at the very least, clarified. The core argument is that *Chevron* deference violates the Constitutional principles of Separation of Powers and Due Process by allowing executive branch agencies to pass presumptively controlling rules, regulations, and policy-level guidance, thereby usurping legislative authority and improperly shifting judicial interpretive authority to the executive branch.

While it is not yet clear how the Court will decide the pending cases, the prevailing view is that the ruling(s) will include overturn of *Chevron* deference at least on some level, setting the stage for possible broadening of the availability of judicial review, the likes of which we have not seen since the original decision was handed down in *Chevron* 40 years ago.

Possible Impact to Review of FEMA's Program Decisions

The governing statute for FEMA's Public Assistance; Building Resilient Infrastructure and Communities (BRIC), and Hazard Mitigation Grant Program (HMGP), the Robert T. Stafford Disaster Relief and Emergency

Assistance Act (Stafford Act) is written almost exclusively in permissive terms. Because of this and the specific language found in the Stafford Act Section 305, Nonliability of the Federal Government, courts have generally ruled that FEMA's eligibility determinations are discretionary and therefore immune to judicial review. The few actions that have been accepted for review have almost universally failed to overcome the very high level of deference granted to agency decisions. For these reasons, it has traditionally been extremely difficult, if not impossible, to successfully challenge FEMA's decisions to grant, or not to grant, funding under the Programs it administers.

The reach of the *Chevron* doctrine is as vast as the reach of federal regulations. Any industry subject to federal regulations could be impacted by the Supreme Court's decision. However, because the Stafford Act is fairly limited in terms of specifics for FEMA's programs, with FEMA instead deciding eligibility in the vast majority of cases based on policy guidance it has issued independently, FEMA's denials may be prime targets for judicial review in the event the high deference currently applied by courts is no more. This in turn would certainly result in a higher level of scrutiny of FEMA's decisions and policies.

There is no provision in the Stafford Act authorizing judicial review of agency actions. As a result, the availability of judicial review is based primarily on the general provisions of the Administrative Procedures Act (APA). With respect to judicial review, the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. However, the general right to judicial review granted by the APA is subject to exception when: (1) the governing statute precludes judicial review; or (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). FEMA has generally argued in Stafford Act litigation that its decisions to provide grant funding are not subject to judicial review because they are committed to agency discretion by law.

However, multiple courts have distinguished between FEMA's initial (arguably) discretionary decision to obligate funding, and later decisions that reverse those discretionary grant decisions after the funds have been spent. There are also other areas of the Stafford Act that are noticeably less permissive. Finally, following a specific event, there may be directives from Congress, or the President him/herself, that provide more direct instructions regarding the things FEMA is to fund under its programs. In the event a situation is presented in which FEMA may have lost its discretion, the question will then become – should a court defer to what FEMA decided to do, including how it may have interpreted the Stafford Act, regulations, its own policies, or Congressional/Presidential directives, or is the court allowed to review those authorities and issue its own opinion?

Federal courts have generally observed a very high level of deference to agency decisions, based largely on *Chevron*, evaluating first "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress's intent is clear from the statutory language, courts would find "we must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. If, however, Congress has not spoken and the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. This is effectively what is commonly referred to as "*Chevron* deference."

If the Supreme Court overturns *Chevron*, or reduces its impact in some meaningful way, applicants under FEMA's programs may consider asking the courts to weigh in when there is a perceived conflict between the Stafford Act and/or other applicable laws or directives, and FEMA's interpretation of same. Depending on what the Supreme Court does this month, the consideration could extend as far as opening the door to a court's review of FEMA's policy guidance, and possibly rejecting it if the court determines it in conflict with higher applicable authority.

How Should You Prepare?

1. **Stay Informed**: Ensure you understand how the Supreme Court's decision on *Chevron* deference might impact any pending or past FEMA grant funding you have received or have claimed. The rulings expected this month could alter how federal regulations, and FEMA policy guidance, are interpreted and enforced.
2. **Assess the Potential Impact**: Identify which Stafford Act sections, federal regulations, and FEMA policy guidance are at issue in any disputes you have with FEMA. Be mindful to also consider past disputes or large denials. The time limit applicable to filing for judicial review of FEMA decisions under the Stafford Act is provided by 28 U.S.C.A. § 2401; Time for Commencing Action Against the United States. Subsection (a) of this Section provides: "(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues…."
3. **Understand the Differences in FEMA's Appeal Process, CBCA Arbitration, and Seeking Judicial Review in Federal Court**: Know the requirements of each process, the applicable deadlines, the eligibility considerations, and consider how the processes fit together in order to identify the best option for your circumstances.
4. **Engage Legal Counsel**: Consult with counsel to develop a strategy for potential regulatory or policy challenges. This includes understanding new compliance requirements or exploring opportunities to challenge existing regulations or policies that may no longer hold under the new legal framework.
5. **Advocate in Collaboration**: Consider joining industry groups, associations, or coalitions that are actively engaging in discussions about regulatory and policy-level reforms. Collaborate with peers to advocate and petition for favorable public policy and legislative outcomes.

Baker Donelson's Disaster Recovery and Government Services professionals work proactively with state and local governments, governmental agencies and authorities, non-profits, and infrastructure providers to provide regulatory compliance, grant management, and legal representation that maximize access to federal funding, assure its effective use, and, as needed, coordinate and negotiate with other governmental entities to maintain funding previously received. If you have questions about current or expected FEMA grant funding, or how the Supreme Court's anticipated consideration and rulings involving *Chevron* may impact any current or past disputes, please reach out to Wendy Huff Ellard, Charles F. Schexnaildre, or any member of Baker Donelson's Disaster Recovery and Government Services Group.

[1] *Loper Bright Enterprises v. Gina Raimondo, No. 22-451 and Relentless, Inc. v. United States Department of Commerce, No. 22-1219.*