

Tulsa Law Review

Volume 17
Number 3 *Energy Symposium*

Volume 17 | Number 3

Spring 1982

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Recommended Citation

Alan R. Fedman, *Looking behind the Record--An Analysis of Contemporaneous Construction Discovery*, 17 Tulsa L. J. 448 (1982).

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LOOKING BEHIND THE RECORD—AN ANALYSIS OF CONTEMPORANEOUS CONSTRUCTION DISCOVERY*

Alan R. Fedman**

I. INTRODUCTION

The practical construction of an ambiguous regulation by an agency charged with its administration or enforcement is ordinarily accorded great weight in determining its meaning.¹ Courts reviewing administrative actions frequently begin their analysis of a disputed question of construction by assuming that the agency's interpretation of the regulation is correct and then deciding whether other factors outweigh the agency's view.²

In developing criteria for assigning the proper weight to be accorded an agency's construction, courts have found agency enforcement actions which are contemporaneous with the adoption of the regulation to be of particular interpretive value.³ Such "contemporaneous constructions" provide relevant and instructional information in discerning the intent, purpose, and meaning of a disputed regulation.

* The opinions expressed in this article are the author's and do not represent the opinions or policies of the Department of Energy.

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1. *E.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *Gray v. Powell*, 314 U.S. 402, 412-13 (1941). *See also* *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1930). Deference to the agency's interpretation is not an inviolable rule. The weight to be given any administrative interpretation "will depend 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." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

2. *See* *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294 (1933):

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.

Id. at 315 (citations omitted).

3. *See* K. DAVIS, *ADMINISTRATIVE LAW TEXT*, §§ 11.01-.14 (3d ed. 1972).

Therefore, such information is frequently the subject of discovery requests.

This article will examine the circumstances and conditions which result in a reviewing court's authorizing contemporaneous construction discovery. Included in the examination will be a discussion of the recent expansion of this discovery procedure to include the statements and records of lower level agency employees generated in the course of their day to day application of the disputed regulation.⁴ This last development represents a significant modification of the contemporaneous construction doctrine.

II. PROCEDURAL REQUIREMENTS OF ADMINISTRATIVE DISCOVERY

The Federal Rules of Civil Procedure permit "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."⁵ Similarly, under the federal Administrative Procedure Act (APA), "oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence."⁶ In the administrative setting, establishing the relevance and materiality of evidentiary matter is not, in itself, sufficient to justify the granting of a discovery request. Discovery procedures also require the moving party to show that such discovery is necessary or essential to the effective resolution of the matter before the court. A corollary to this requirement is that the information sought must be unavailable except through the discovery process.⁷

Judicial review is generally limited to the existing administrative record. Moreover, discovery requests concerning the meaning of a regulation are not granted in the absence of allegations of ambiguity in the regulation, bad faith in the promulgation of the regulation, or silence within the administrative record.⁸ Under the appropriate circum-

4. For a discussion of the factors underlying this development, see *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1052-56 (Temp. Emer. Ct. App. 1978).

5. FED. R. CIV. P. 26(b)(1).

6. Administrative Procedure Act § 556(d), 5 U.S.C. § 556(d) (1976).

7. These requirements are commonly set out in an agency's procedural regulations. For example, the Administrative Procedures and Sanctions of the Department of Energy (DOE) require that prior to the taking of the testimony of any witness in the proceedings the moving party must file a document stating "the reasons why the testimony of the witness is necessary" and "the reasons why the asserted position can be effectively established only through the direct questioning of witnesses." 10 C.F.R. § 205.199(b)(2), (3) (1981).

8. *Atlantic Richfield Co. [1980 Transfer Binder] ENERGY MGMT. (CCH) ¶ 82,521*, at 85,056 (1980).

stances, however, courts will permit discovery of documents and statements which are not a part of the official record. In these instances, interpretation by agency officials of the meaning of a regulation or ruling is often recognized as an appropriate discovery issue.

Although an agency's interpretation is not binding on the courts, it does "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."⁹ The doctrine of contemporaneous construction is based upon the principle that great deference is to be granted to the interpretation of rules and regulations by the agency charged with their enforcement. This position reflects the distinction made by reviewing courts between the legal and factual elements of a particular case. While courts retain authority for a full inquiry into questions of law, inquiries into the application of the law to specific factual circumstances are restricted.¹⁰ Such a limited scope of review reflects recognition of administrative expertise and the value of such knowledge in the practical construction of statutory terms. This judicial deference to administrative interpretations was illustrated in *Udall v. Tallman*:¹¹

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings"¹²

In deferring to agency interpretations, reviewing courts have observed that such interpretations are often based on more specialized experience, broader investigation, and more information than a judge normally possesses in a given case.¹³ The persuasiveness of an agency's interpretation may be especially significant where the disputed regulations involve a high degree of specialization, have had long-standing effectiveness, or were already in existence at the time of statutory reenactment.¹⁴

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

10. See note 3 *supra*, §§ 30.01-.07, for a discussion of the reasons underlying the law-fact distinction.

11. 380 U.S. 1 (1965).

12. *Id.* at 16 (quoting *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 (1946)).

13. 323 U.S. at 139 (1944).

14. *Allen M. Campbell Co. Gen. Contractors, Inc. v. Lloyd Wood Constr. Co.*, 446 F.2d 261,

A. *Applicability of the Doctrine*

Contemporaneous construction of an agency regulation has generally been authorized under two conditions. First, where the language of the disputed regulation is subject to two reasonable interpretations, and the agency has not given a more definite meaning in its official pronouncements on the matter; and second, to determine the degree of deference which a particular interpretation should be afforded where the agency has issued conflicting pronouncements concerning the meaning of the disputed regulation.¹⁵

The first situation is exemplified by *Standard Oil Co. v. DOE*.¹⁶ In this case, the Department of Energy (DOE) had issued an interpretation which stated that even though no regulation had so specified, the regulations implicitly prohibited the proportional cost recovery sequence utilized by Standard Oil in calculating the maximum legal price at which it could sell its petroleum products. Although conceding that the regulations promulgated by its predecessor, the Federal Energy Administration (FEA),¹⁷ did not explicitly provide for a particular sequence for the recovery of the various categories of costs incurred in the refining process, DOE claimed that the regulatory scheme compelled that non-product or operating costs be recouped only after the recovery of all production acquisition costs.¹⁸ In April 1976, FEA had revoked this non-product cost requirement retroactively to February 1, 1976, but DOE insisted¹⁹ that such a recovery sequence remained ap-

265 (5th Cir. 1971). In this case, the court refused to substitute its judgment for that of the Small Business Administration in interpreting a highly technical regulation despite the fact that there appeared to be a more reasonable position than that taken by the agency. See also *Philbeck v. Timmers Chevrolet Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974). The court took a similar position in this case involving a Federal Reserve Board interpretation of the Truth in Lending Act. 15 U.S.C. §§ 1601-1691 (1976).

15. See *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913 (E.D. Pa. 1979); *Tenneco v. DOE*, 475 F. Supp. 299 (D. Del. 1979).

16. 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

17. FEA became part of the Department of Energy on October 1, 1977. 42 U.S.C. § 7151(a) (Supp. I 1977). To avoid confusion, it is important to note that while DOE was the agency advocate in this case, FEA actually promulgated the disputed regulations, and it was the interpretation by FEA employees of the regulations that was the subject of discovery.

18. Under DOE regulations, non-product costs represent those manufacturing costs not associated with the actual cost of purchasing crude petroleum, such as refinery maintenance, depreciation, and refinery operation costs. See 10 C.F.R. § 212.83(c) (1981) for definitions of essential terms utilized in DOE regulatory schemes.

19. 596 F.2d at 1052. This distinction was significant because under DOE pricing regulations refiners were initially prohibited from banking unclaimed non-product costs for use in support prices in later sales. In determining maximum legal sales prices under the non-product cost last recovery sequence, non-product costs could only be claimed *after all* product costs. Accordingly, if the sales price of a particular product was below the maximum legal sales price, then it would be

plicable to prior periods.²⁰ Because there was no regulatory provision that addressed cost recovery sequence, the court held that the agency's position could only be upheld if it was, in fact, compelled by the regulations in effect prior to February 1, 1976. In order to determine whether the agency's particular construction was compelled, the court authorized discovery beyond the existing official record,²¹ and permitted inquiry into the interpretations given the regulations at different decision-making levels within FEA. The court reasoned that in order to uphold the contention by DOE that the non-product cost last recovery sequence was compelled, it had to determine whether FEA had consistently adhered to a non-product cost last recovery sequence rather than the "proportional" sequence used by Standard.²² The court's examination of the contemporaneous written and oral statements of FEA officials regarding the regulations revealed that even key agency officials did not consider the non-product cost last recovery sequence to be compelled by the regulatory scheme.²³ As a result, the court upheld Standard's cost recovery method.

Other cases in which courts have resorted to contemporaneous construction have involved similar administrative silence where neither the regulations nor accompanying official agency clarifications addressed the issues in dispute. In *Amoco Production Co. v. DOE*,²⁴ the court was asked to construe certain DOE regulations concerning transfers of natural gas liquid and natural gas liquid products between affiliated entities of various integrated petroleum refining companies. DOE argued that the sales between the affiliated entities were not entitled to "first sale"²⁵ status and the attendant pricing advantages under DOE regulations, even though the regulatory language seemingly authorized

unnecessary to claim non-product costs to support the sales price. Since these costs were not used and could not be banked, these costs were lost for purposes of price support. Under the proportional method, a proportion of non-product cost could be claimed *simultaneously with* the product costs. This would result in the utilization of a much higher percentage of non-product costs. Accordingly, fewer non-product costs would be lost as a result of the prohibition against banking non-product costs.

20. A decision that the non-product cost last recovery sequence did not apply prior to February of 1976 would have permitted the companies to claim unrecouped costs in amounts which could potentially offset any overpricing violations that had occurred during the period of petroleum price controls. Thus, the agency's position on this issue was dictated, in part, by concern for maintaining the viability of the existing regulatory price controls structure.

21. The court noted that the necessity of going beyond the existing record was required because DOE officials had no official documents clarifying the agency's position. *Id.* at 1046.

22. 596 F.2d at 1052-55.

23. *Id.* at 1055.

24. No. 78-463 (D. Del. May 29, 1979).

25. For a definition of "first sale," see 10 C.F.R. § 212.162 (1981) which states: "'First sale'

first sale treatment. DOE maintained that although the regulations were silent on the question, the effective operation of the regulatory scheme compelled a prohibition of such treatment.²⁶ Faced with no express regulatory authority upon which to base its decision, the court authorized contemporaneous construction discovery to provide "assistance in construing the regulation by looking to the statements and actions of the agency personnel who have had the responsibility of implementing and enforcing the contested regulatory provisions."²⁷ In view of the parties' ongoing responsibility for day to day interpretation of the regulations, the court considered their contemporaneous construction significant in evaluating the validity of the agency's regulatory interpretation.²⁸

Similarly, in *Phillips Petroleum Co. v. DOE*,²⁹ the court authorized discovery of the contemporaneous construction given to the statutes and regulations in question from DOE's conduct, statements, and directives.³⁰ The substantive issue in this case involved the method for computing recovery of the increased non-product cost required under DOE regulations then in effect.³¹ As in *Amoco Production Co.*, the regulations were ambiguous and, after expiration of their effective period, DOE announced that the regulations required use of a recovery method to which Phillips took exception. In light of the administrative vacuum created by the absence of a publicly disclosed explanation of DOE's position, the court considered evidence obtained through contemporaneous construction necessary to the establishment of the plaintiff's case.³²

Contemporaneous construction discovery is also used to determine the degree of deference owed to an agency's interpretation. In this context, contemporaneous construction discovery is triggered by a conflict

means . . . the first transfer for value to a class of purchaser for which a fixed price per unit of volume is determined." *Id.*

A determination that such transfers were "first sales" under DOE regulations permits a firm to claim certain additional price increments in its computation of purchase and production costs incurred in a particular month. The inclusion of these amounts would ultimately result in an increase in the maximum lawful selling price charged to third party purchasers of controlled products.

26. *See Amoco Prod. Co. v. DOE*, No. 78-463, slip op. at 3-4 (D. Del. May 29, 1979).

27. *Id.* at 4.

28. *See id.* at 4-6.

29. 449 F. Supp. 760 (D. Del.), *aff'd sub nom. Standard Oil Co. v. DOE*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

30. *See id.* at 783-85.

31. *See id.* at 769-70.

32. *Id.* at 783. *See also Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913 (E.D. Pa. 1979).

between official agency pronouncements relative to the disputed interpretation, rather than the absence of administrative clarification of the regulation.

The standards for determining the degree of deference to which a particular agency's interpretation is entitled were clearly set out in *Skidmore v. Swift*.³³ The *Skidmore* court faced the question of whether "waiting" time constitutes "working" time for purposes of the Fair Labor Standards Act.³⁴ The Administrator of the Act had stated that it could, in an interpretation bulletin and informal rulings.³⁵ The Court, in affirming the Administrator's decision, stated that the degree of deference to which a particular agency interpretation is entitled is dependent "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."³⁶ The first two factors, the thoroughness and validity underlying the agency's position, can be ascertained by reference to the agency's interpretations and articulated rationales. No contemporaneous construction discovery is needed to apply these two elements of the *Skidmore* test. It is the application of the third element of the *Skidmore* test, however, which may give rise to a factual inquiry necessitating contemporaneous construction discovery.

In applying the *Skidmore* test to the substantive issues in a case, the court should sustain the agency's interpretation if it is a reasonable construction of the regulatory requirements and is consistent with the agency's earlier pronouncements.³⁷ Most courts' interpretations of

33. 323 U.S. 134 (1944). The Court considered that "the rulings, interpretations, and opinions of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 140.

34. 29 U.S.C. §§ 201-219 (1976).

35. 323 U.S. at 138.

36. *Id.* at 140.

37. See *National Distrib. Co. v. United States Treasury Dept.*, 626 F.2d 997 (D.C. Cir. 1980). In applying the *Skidmore* test in this case, the court commented,

In the circumstances of this case the Bureau's interpretation has little power to persuade. Not only is it at odds with the language of the statute and with the legislative history, but it is also at odds with the interpretation adopted by the Bureau's predecessor agency at least as early as 1949 and maintained by the Bureau until 1974. Even in 1974 the Bureau apparently engaged in no thorough consideration of the need for a change in interpretation, and provided no persuasive reason to believe that its change of heart accurately reflects the intention of Congress.

Id. at 1019. See generally *Eirhart v. Libbey-Owens Ford Co.*, 616 F.2d 278, 281 (7th Cir. 1980); *Good Samaritan Hosp., Corvallis v. Mathews*, 609 F.2d 949, 954 (9th Cir. 1979); *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 657 (D.D.C. 1978).

"reasonableness" are generally very liberal. For example, in *University of Southern California v. Cost of Living Council*,³⁸ which involved the application of Phase I of the Cost of Living Council's price "freeze" to sales of tickets to college football games, the Council had issued certain circulars as part of its enforcement program which were intended to provide general guidelines for compliance with its price stabilization regulations. In a number of the circulars, the agency interpreted the term "transaction" in such a manner as to permit retroactive application of price controls to ticket sales occurring before the promulgation of the controls. In upholding the agency's position, the court noted that the Executive Order³⁹ establishing the controls laid only the "barest foundation" to key words such as "prices," "services," and "transaction." The court reasoned that such a broad delegation of authority was the result of the "great deference" afforded the agency administrator, who knew "better than most the causes of inflation, the reasons for the freeze, and the purpose and intent of the Executive Order."⁴⁰ Similarly, in *Camp v. Pitts*,⁴¹ the Supreme Court held that an administrative record consisting entirely of two explanatory letters written by the Comptroller of the Currency to an applicant for a new bank charter was a sufficient basis for an agency determination so long as it contained the determinative reasons for the decision.⁴²

It is only upon a threshold showing "that different courses of conduct might reasonably have been perceived to be prescribed under the regulations in dispute, [that] the consistency of the agency's interpretation with earlier and later pronouncements becomes a valid subject of inquiry."⁴³ Contemporaneous construction discovery is sought under these circumstances to demonstrate that the disputed agency interpreta-

38. 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973). *See also* *Power Reactor Develop. Co. v. International Union of Elec. Workers*, 367 U.S. 396, 408 (1961), where the Court stated that administrative agencies were given great deference when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (quoting *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933)).

39. Exec. Order No. 11,615, 3 C.F.R. § 199 (1971).

40. 472 F.2d at 1068-69.

41. 411 U.S. 138 (1973). *See also* *Sterling Drug, Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 706 (D.C. Cir. 1971). In this case, the court reasoned that the materials prepared by agency employees were "probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from, the sum of its 'parts.'"

42. *See* 411 U.S. at 140-42.

43. *Atlantic Richfield Co. [1980 Transfer Binder] ENERGY MGMT. (CCH) ¶ 82,521*, at 85,073 (1980). *See also* *Exxon Corp. v. DOE*, 4 ENERGY MGMT. (CCH) ¶ 26,149 (N.D. Tex. June 8, 1979); *Tenneco Oil Co. v. DOE*, 4 ENERGY MGMT. (CCH) ¶ 26,156 (D. Del. July 6, 1979).

tion is not entitled to judicial deference because it is inconsistent with prior and subsequent agency pronouncements. The showing of such facial ambiguity cannot be made, however, merely by presenting evidence that members of the regulated industry interpreted the regulation differently from the agency or that the industry's custom and usage varied from the agency's position.⁴⁴ Moreover, the argument that any showing of ambiguity in the application of regulatory language to particular facts justifies a factual inquiry as to the meaning of the regulations in dispute has also been rejected.⁴⁵

Whether an agency's current interpretation is consistent with its prior interpretations is generally determined by reference to other official sources and documents, such as "the relevant statute and its legislative history, related regulatory provisions taken as a whole, regulatory preambles, the agency's decisional law, [and] interpretive rulings, or interpretations issued pursuant to the agency's formal mechanism for such actions."⁴⁶ Inconsistent positions in such documents, as well as prior and subsequent positions of the agency, will generally create sufficient interpretative ambiguity to justify contemporaneous construction discovery.⁴⁷

44. In *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161 (1945), the parties sought a declaratory judgment concerning what constituted "working time" for purposes of the Fair Labor Standards Act. The plaintiff argued that custom and practice prevailing in the bituminous coal industry included in the workday only time spent "face to face" with the seam of the mine. *Id.* at 162-63. The Court held, however, that time spent in underground travel was also to be included. In rejecting the company's position, the Court stated that the basic purpose of the Act was to achieve a uniform national policy of guaranteeing compensation for all work engaged in by employers covered under the Act. The Court further noted that "[a]ny custom or contract falling short of that basic policy" could not be used to deprive employees of their statutory rights. *Id.* at 167.

45. In *Atlantic Richfield Co.*, the court noted that

[a]lmost no statute or regulation, however skillfully drafted, can be written with the kind of foresight that would eliminate all disputes as to its meaning in all circumstances. To subject agencies to the burden of contemporaneous construction discovery whenever the regulations in dispute fail to compel a particular result can render the execution of the agencies' statutorily mandated tasks a practical impossibility.

[1980 Transfer Binder] ENERGY MGMT. (CCH) ¶ 82,521, at 85,073.

46. *Id.* at 85,074 (citation and footnotes omitted).

47. *Tenneco Oil Co. v. DOE*, 475 F. Supp. 299 (D. Del. 1979), illustrates the conditions under which a court will authorize contemporaneous construction discovery to evaluate the consistency of a particular agency position. *Tenneco* presented affidavits from parties closely associated with the application of the disputed regulations to demonstrate that the provisions were subject to differing, reasonable interpretations, and that various DOE pronouncements suggested different views of the meaning of the subject provision. Noting the continued uncertainty about the proper meaning of certain essential regulatory terms, the court was persuaded that contemporaneous construction would be relevant and necessary to the task of construing those terms. The judicially authorized discovery request required the production of agency information concerning the construction given to the regulations at the time of their issuance and subsequent to their application by the agency. *Id.* at 316-18.

The recently decided case of *In re Department of Energy Stripper Well Exemption Litigation*,⁴⁸ is perhaps the most comprehensive application of this doctrine to date. The issue was whether injection wells should be included in the computation of average daily production for purposes of qualifying for "stripper well" exemptions.⁴⁹ Under DOE crude oil pricing regulations, any lease covering a well with an average daily production of less than ten barrels per day qualified as a "stripper well" lease. All crude oil produced from such a lease was exempt from price control regulations and could be sold at unrestricted market prices.⁵⁰ The inclusion of injection wells in the well count was significant in that it substantially lowered the average daily production from a lease, thereby qualifying many leases for the stripper well exemption. The plaintiff oil companies argued that injection wells were properly included in the well count because they were an integral part of secondary recovery operations used to produce additional crude oil from a particular lease.⁵¹ DOE, however, argued that since no crude oil was produced directly from injection wells they should be excluded from average production computations.⁵² The pertinent statutes and rulings were vague, merely providing that all wells which resulted in the recovery of crude oil should be included in the stripper well exemption.⁵³

In rejecting DOE's interpretation of the pertinent statutes and rulings, the court noted that "[t]here raged within the agency a great debate as to whether injection wells were within the statutory exemption."⁵⁴ The court recited the testimony of various DOE employees and noted apparent conflicts in their expressed views. The court concluded that the evidence showed no "consistent and uniform application of the statute and regulation to exclude injection wells."⁵⁵ In support of this conclusion, the court noted instances of lower level DOE employees advising certain oil producers to count injection wells in their stripper computations.⁵⁶ The court noted that it made its decision as a result of inconsistent agency statements even though the record before it had disclosed "that perhaps the bulk of the advice given

48. No. 378, slip op. (D. Kan., filed July 14, 1981), *appeal docketed*, No. 10-39 (Temp. Emer. Ct. App. Aug. 13, 1981).

49. *Id.* at 5.

50. *Id.* at 21-24.

51. *Id.* at 3-4.

52. *Id.* at 42.

53. *Id.* at 24.

54. *Id.* at 27.

55. *Id.* at 28.

56. *Id.*

by the agency was to the effect that injection wells should not be counted.⁵⁷

B. *Appropriate Agency Spokesman*

As a general rule, institutional decisions may only be explained by those having the delegated authority to speak on behalf of the institution.⁵⁸ If an agency does not state a rationale for its actions, officials to whom Congress has delegated no "responsibility for elaborating and enforcing statutory commands"⁵⁹ may not provide a rationale. Moreover, factual inquiries cannot extend to all constructions offered by agency employees because not all of their opinions and advice "reflect the position of the agency as a whole."⁶⁰

The basis of this limitation was discussed in *SEC v. National Student Marketing Corp.*⁶¹ The court denied the defendant's request to compel the agency to provide internal agency documents reflecting the views of individual agency employees. In justifying its refusal of the defendant's request, the court stated:

The intent of a governmental agency, such as the Securities and Exchange Commission, is a rather limited concept which cannot be determined from a random search of documents authored by agency staff or individual Commissioners. The SEC consists of five appointed Commissioners who are assisted by staff members. While Commissioners may in fact respect the staff's recommendations, they are not bound by them nor do such recommendations necessarily reflect the position of the agency itself on any given topic. Similarly, the views of an individual Commissioner will not invariably reflect the position of the agency as a whole. The great bulk of

57. *Id.* at 31.

58. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *SEC v. National Student Mktg. Corp.*, 68 F.R.D. 157 (D.D.C. 1975), *aff'd*, 538 F.2d 404 (D.C. Cir. 1976), *cert. denied sub nom. White & Case v. SEC*, 429 U.S. 1073 (1977). In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), the court stated that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review."

59. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971).

60. *SEC v. National Student Mktg. Corp.*, 68 F.R.D. 157, 160 (D.D.C. 1975). See also *Sterling Drug Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971). In *Sterling*, the court reasoned that the material prepared by agency employees "was probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from, the sum of its 'parts.'" *Id.* at 706.

61. 68 F.R.D. 157 (D.D.C. 1975).

the documents requested by the defendants are not "Commission-authored" but rather, they consist, with few exceptions, of memoranda among individual Commissioners, their legal assistants, and the Commission staff. Therefore, they are of little, if any value, and cannot be considered as an official expression of the will and the intent of the Commission.⁶²

In *Bowles v. Seminole Rock & Sand Co.*,⁶³ the defendant relied on constructions given the firm by various lower level agency employees of the Office of Price Administration (OPA) as authorization for its actions. In determining that such constructions were not binding on the agency, the Court stated that "[o]ur only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."⁶⁴ In designating which agency documents represented relevant interpretations, the Court identified three sources: (1) a bulletin published by the Administrator; (2) the Administrator's quarterly report to Congress; and (3) published interpretations.⁶⁵ As published, circulated materials expressing the Administrator's interpretation, these documents represented the ultimate criteria in resolving questions of construction and were of controlling weight unless "plainly erroneous or inconsistent with the regulation."⁶⁶

There is a general prohibition against determining the meaning of a regulation by a *post hoc* inquiry into the mental processes of the decision making group.⁶⁷ The purpose of such a prohibition is to preserve the free and uninhibited flow of frank assessments from lower level officials performing analysis and making recommendations to the decision maker.⁶⁸

There are, however, certain recognized conditions under which the views of lower level agency officials are considered within the scope of

62. *Id.* at 160.

63. 325 U.S. 410 (1945).

64. *Id.* at 414.

65. *Id.* at 417-18.

66. *Id.* at 414. See also *International Paper Co. v. FPC*, 438 F.2d 1349, 1358 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *SEC v. National Student Mktg. Corp.*, 68 F.R.D. 157 (D.D.C. 1975).

67. See *United States v. Morgan*, 313 U.S. 409 (1941); *Renegotiation Bd. Corp. v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168 (1975).

68. Although probing the mental processes of an administrative decision maker is not considered an appropriate function of the court, such inquiries may be warranted where a showing of bad faith or improper conduct has been made. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Court indicated that where administrators had explained their decisions with contemporaneous findings or memoranda supporting the decision, an inquiry would be permitted only on a showing of bad faith or improper conduct. If such findings were unavailable, however, the Court indicated that examination of the decision makers themselves might be necessary for effective judicial review. *Id.* at 420.

contemporaneous construction discovery. The interpretations of a lower level official may be entitled to deference if they received the sanction of the Administrator as an official interpretation.⁶⁹ Such a position is consistent with the inclusion in administrative records of documents written by lower level officials that are ultimately adopted as the agency's position.⁷⁰

In addition, where the language of a regulation is inherently inconsistent with the agency's interpretation of its regulatory scheme, courts, in an attempt to resolve this conflict, have looked to the statements and actions of those agency employees vested with the responsibility of enforcing the contested regulatory provisions. For example, in *Standard Oil Co. v. DOE*,⁷¹ the court, in determining the weight to be given DOE's regulatory interpretation, authorized discovery of statements of auditors and other enforcement personnel which were inconsistent with DOE's interpretation.⁷² The court considered the statements of these lower level employees valuable because of their technical expertise, their exposure to industry practice, and their responsibility to interpret the contested regulations in the course of day to day enforcement. In *Amoco Production Co. v. DOE*,⁷³ the court relied on similar considerations in examining the views of agency personnel who had participated in the development of the disputed regulations. The court reasoned that the expertise and knowledge of such individuals made their interpretations of the regulatory language during the developmental stages of the regulation of "substantial value in resolving the construction question in much the same way that Congressional committee proceedings are of value in determining legislative intent."⁷⁴ The *Standard* and *Amoco* cases should not be viewed, however, as departures from the doctrine which limits discovery only to statements of personnel authorized to speak for the agency. The courts in each case noted that an administrative vacuum existed due to a complete absence of official agency pronouncements clarifying the disputed regulations.⁷⁵ Both courts authorized inquiries into the interpretation

69. See *National Courier Ass'n v. Board of Gov. of Fed. Reserve Sys.*, 516 F.2d 1229, 1241-42 (D.C. Cir. 1975).

70. *Southern Goods Corp. v. Bowles*, 158 F.2d 587 (4th Cir. 1946).

71. 596 F.2d 1029 (Temp. Emer. Ct. App. 1978). See also *California Molasses Co. v. California Hawaiian Sugar Co.*, 551 F.2d 1230 (E.D. Pa. 1979); *Petrolane Inc. v. DOE*, 79 F.R.D. 115 (C.D. Cal. 1978).

72. 596 F.2d at 1056.

73. No. 78-463, slip op. (D. Del. May 29, 1979).

74. *Id.* at 5.

75. 596 F.2d at 1056.

of lower level officials as a last resort in attempting to discern the agency's position.

Other recent cases, however, have authorized inquiries into the statements of lower level officials without the administrative vacuum that existed in the *Standard* and *Amoco* cases.⁷⁶ In *Gulf Oil Corp. v. Schlesinger*,⁷⁷ the court, relying on *Citizens to Preserve Overton Park v. Volpe*,⁷⁸ ordered the deposing of former agency officials concerning their understanding of a regulatory term in the absence of a contemporaneous administrative record, even though the agency had subsequently issued an official interpretation of the provision. In reasoning characteristic of these cases expanding the use of contemporaneous construction discovery, the court concluded that the privilege traditionally given agency decision makers was outweighed by the need for the information sought.⁷⁹ Moreover, without such information, there would have been no basis upon which to evaluate the validity of the plaintiff's case.

In *Phillips Petroleum Co. v. DOE*,⁸⁰ the court upheld discovery requests for various statements and internal memoranda prepared by DOE auditors regarding the statute and regulations in dispute. In entering its order, the court, despite the existence of a pertinent regulatory amendment and an accompanying preamble, noted the inadequacy of the administrative record and the need for additional clarification of the agency's position in order to guide construction of the statute.⁸¹

A similar case, *Exxon Corp. v. DOE*,⁸² involved a dispute concerning the definition of the term "transaction"⁸³ as it pertained to the pricing of crude oil under DOE regulations. In its determination of pricing violations DOE excluded certain sales which were made under "varia-

76. See *California Molasses Co. v. California & Hawaiian Sugar Co.*, 551 F.2d 1230 (Temp. Emer. Ct. App. 1977); *Exxon Corp. v. DOE*, 4 ENERGY MGMT (CCH) ¶ 26,149 (N.D. Tex. 1979); *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913 (E.D. Pa. 1979); *Tenneco Oil Co. v. DOE*, 4 ENERGY MGMT (CCH) ¶ 26,156 (D. Del. 1979); *Petrolane Inc. v. DOE*, 79 F.R.D. 115 (C.D. Cal. 1978); *Getty Oil Co. v. DOE*, 1 ENERGY MGMT. (CCH) ¶ 9741 (D. Del. 1978); *Phillips Petroleum Co. v. FEA*, 1 ENERGY MGMT (CCH) ¶ 9739 (D. Del. 1977).

77. 465 F. Supp. 913 (E.D. Pa. 1979).

78. 401 U.S. 402 (1971).

79. 465 F. Supp. at 916.

80. 449 F. Supp. 760 (D. Del. 1978).

81. *Id.* at 784.

82. 4 ENERGY MGMT (CCH) ¶ 26,149 (N.D. Tex. 1979).

83. "Transaction" is defined in 10 C.F.R. § 212.31 (1981) as "an arms-length sale between unrelated persons . . . considered to occur at the time and place when a binding contract is entered into between parties."

ble price"⁸⁴ contracts. As a result of their exclusion, the maximum lawful price which Exxon could charge third party purchasers was reduced. In excluding these contracts, DOE relied upon Ruling 1977-5,⁸⁵ issued by it after the promulgation of price control regulations. DOE argued that its interpretation of "transaction" was entitled to great deference, and that its ruling should be sustained as a rational interpretation of its regulation.⁸⁶ In contrast, Exxon contended that the language of the regulation included variable price contracts and that prior to the issuance of the ruling even DOE auditors had interpreted it in such a manner.⁸⁷ In holding for the company, the court stated that the meaning of the regulation was not ambiguous and that DOE's interpretation of the term was not due any deference because it was patently inconsistent with the regulation.⁸⁸ Moreover, the court noted that statements of DOE auditors showed that prior to the issuance of the ruling DOE had interpreted the regulation in the same manner as Exxon. The court concluded that the depositions and affidavits of DOE auditors and other lower officials were entitled to consideration in determining the consistency of earlier and later agency pronouncements.⁸⁹ After all, these exhibits clearly indicated that officials in responsible positions within the agency consistently advised the plaintiff and the agency's own auditors that variable price contracts were included in the "transaction" definition.⁹⁰

In *Tenneco Oil Co. v. DOE*,⁹¹ there was an allegation that the terms "inequity" and "gross inequity", as they were used in connection with DOE exception procedures,⁹² were ambiguous and subject to multiple interpretations. In light of the relevance and necessity of Tenneco's request for contemporaneous construction discovery, the court held that discovery need not be limited to the statements made to the public but was also to include internal memoranda, directives, and

84. A variable price contract "prescrib[es] a specific unit price that may fluctuate over the duration of the contract based on changes in a specified reference price or other objective standard." 4 ENERGY MGMT (CCH) ¶ 26,149, at 27,317 n.4.

85. 42 Fed. Reg. 15,302 (1977).

86. 4 ENERGY MGMT (CCH) ¶ 26,149, at 27,318.

87. *Id.* at 27,319.

88. *Id.* at 27,318-19.

89. *Id.* at 27,319.

90. *Id.*

91. 475 F. Supp. 299 (D. Del. 1979).

92. The statutory procedure for obtaining exception relief under DOE regulations is at 10 C.F.R. §§ 205.50-69E (1981) (exception relief is generally granted where the application of the regulation results in extreme hardship or gross inequity).

guidelines generated at various levels within the agency.⁹³ Similarly, in *Dorchester Gas Producing Co. v. DOE*,⁹⁴ the court used contemporaneous construction discovery to consider statements of lower level agency employees prior to ruling on the legal issues in the case,⁹⁵ and in *Getty Oil Co. v. DOE*,⁹⁶ the court ruled that lower level contemporaneous constructions were discoverable, although it declined to hold that such evidence was essential to deciding the case.⁹⁷

To the extent that these cases authorize discovery of contemporaneous constructions when regulations are alleged to be ambiguous, they are departures from the prevailing view on this issue. This departure appears to be based on a new assessment of the proper balance between the need for essential evidence and the erosion of the agency's evidentiary privileges.⁹⁸ In the absence of other available guidance concerning the meaning of an ambiguous regulation, courts increasingly are authorizing the construction of an administrative record based on the statements of lower level agency personnel responsible for applying the disputed regulations. Courts view the relevancy and importance of this information as outweighing the burden placed upon the agency in providing it.

C. *Scope of Contemporaneous Construction Discovery Evidence*

In defining the scope of extrinsic evidence necessary to discern the intent and meaning of a disputed regulation, courts generally have limited contemporaneous construction discovery to two areas: rulemaking history materials, and official and unofficial agency interpretations.⁹⁹ Rulemaking history materials consist of source documents relied on by decision makers in formulating the agency's position.¹⁰⁰ The courts' assessment of the validity of the reasoning expressed in these documents has a substantial bearing on the deference given to the regulation

93. 475 F. Supp. at 318. *See* *Robins & Weill, Inc. v. United States*, 63 F.R.D. 73, 76-77 (M.D.N.C. 1974). The District Court ordered the Internal Revenue Service to make available to the plaintiff internal "instructions to staff, and general policy statements or interpretations adopted by the I.R.S. affecting members of the public on the specific issue of depreciation involved herein."

94. No. CA-3-75-0836-W, slip op. (N.D. Tex. Oct. 24, 1978)

95. *Id.* at 3.

96. 1 ENERGY MGMT (CCH) ¶ 9741 (D. Del. 1978).

97. *Id.* at 9893.

98. In *Gulf Oil Corp. v. Schlesinger*, the court stated that in deciding whether a protective order is warranted, the court must determine whether the privilege is outweighed by the need for the information sought by the moving party. 465 F. Supp. 913, 916 (E.D. Pa. 1979).

99. *See, e.g.*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952).

100. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 5.01-.06 at 123-38 (3d ed. 1972).

in dispute. Such materials are analogous to legislative history and are designed to aid the court in deciding questions of law.¹⁰¹

Discovery of internal predecisional deliberations generally is considered irrelevant for purposes of contemporaneous construction discovery. There is a substantial body of law which supports the general proposition that "[t]he analysis and recommendations of agency staff members need not be divulged to the parties in proceedings before the agency itself."¹⁰² Exceptions to the rule apply only where the agency explicitly has adopted an internal memorandum as the basis of its decision or where the memorandum contains purely factual material which should be part of the administrative record.¹⁰³ In addition, a substantial body of case law does not consider draft documents relevant subjects for discovery.¹⁰⁴

The principle of nondisclosure of internal memoranda has been elevated by public policy to a generally recognized evidentiary privilege. In determining whether a privilege exists, the courts generally have applied two standards. The first is the facts-opinions dichotomy which does not extend any privilege to factual information.¹⁰⁵ The second is a predecisional/post-decisional distinction. Under this test, agency memoranda, prepared during the deliberative process preceding the issuance of a formal agency pronouncement, are considered predecisional and are privileged from disclosure. Post-decisional information, however, whether in written or testimonial form, generally is not privileged. This distinction is based on the assumption that documents which contain internal recommendations and advice submitted for consideration in the performance of decision- and policy-making functions must be protected from disclosure, so that the agency's final position will reflect a full and frank exchange of opinions which would be impossible if all internal communications were made public.¹⁰⁶

101. See B. SCHWARTZ, ADMINISTRATIVE LAW § 60 at 161-65 (1976).

102. National Courier Ass'n v. Board of Gov. of the Fed. Reserve Sys., 516 F.2d 1229, 1242 (D.C. Cir. 1975) (citations omitted). *Accord*, Action for Children's Telev. v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977); Montrose Chem. Corp. v. Train, 491 F.2d 63, 67-71 (D.C. Cir. 1974). See Rodway v. United States Dep't. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); National Nutri. Foods Ass'n v. Matthews, 418 F. Supp. 394 (S.D.N.Y. 1976).

103. See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973); 516 F.2d at 1242.

104. See Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Helvering v. New York Trust Co., 292 U.S. 455 (1934); Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973).

105. See Machin v. Zuckert, 316 F.2d 336, 339-40 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

106. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151-54 (1974); Bristol-Meyers Co. v. FTC, 598 F.2d 18, 22-25 (D.C. Cir. 1978).

This privilege was applied by the court in *Getty Oil Co. v. DOE*.¹⁰⁷ Getty challenged a Notice of Probable Violation and Remedial Order issued by DOE, alleging that the Notice and Order were not supported by substantial evidence, and that apparently the enforcement documents were issued erroneously for the purpose of discriminating against Getty.¹⁰⁸ Getty sought, through discovery, a number of internal policy recommendations and advisory opinions. The court held that Getty could compel production of the documents only if the administrative record presented by the agency was insufficient to explain the decision, and a strong showing of bad faith or improper conduct was made.¹⁰⁹ In limiting the scope of Getty's discovery request, the court noted that the material sought by Getty was not a reflection of any official policy nor part of any administrative record. The court went on to hold that the administrative record adequately explained the basis for the agency's decision, and that the agency's discriminatory actions did not constitute bad faith or improper conduct.¹¹⁰ Absent these two conditions, the court ruled that the company's need for the information did not outweigh the need to preserve the integrity of the administrative decision-making process.¹¹¹

In construing regulations, courts also rely on interpretations of regulations issued by the agency having expertise in the area. Materials in this category include rulings, interpretations, final enforcement documents, and exception decisions. Such documents are generally matters of public record and therefore contemporaneous construction discovery is not necessary. This category also generally would include enforcement materials and instructions, as well as directions of general applicability, issued by appropriate agency management personnel through the agency's formal mechanism for issuing such documents.¹¹²

Courts are generally very reluctant to rely upon the regulatory interpretations in written documents, notes, and letters of individual agency employees. As the court stated in *Marine Engineers' Beneficial Association No. 13 v. NLRB*:¹¹³

107. 1 ENERGY MGMT (CCH) ¶ 9741 (D. Del. 1978).

108. *See id.* at 9890-91.

109. *See id.* at 9892-93.

110. *Id.* at 9894.

111. *Id.* at 9893.

112. *See, e.g.,* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), where the Court relied on agency (EEOC) opinion letters interpreting a statute at the time of its enactment in declining to follow a later conflicting EEOC guideline. *Id.* at 142-43.

113. 202 F.2d 546 (3d Cir.), *cert. denied*, 346 U.S. 819 (1953).

The interpretation of its enabling act by an administrative body is, of course, important as bearing upon the effect of a statute, but interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention.¹¹⁴

Recent cases reveal a more liberal view by the courts about evidentiary materials are appropriate subjects for contemporaneous construction discovery. In *Standard Oil Co. v. DOE*,¹¹⁵ the court authorized discovery concerning not only opinions and directives in operation manuals, but also explicit indicators of agency actions, such as the practice of auditors and the reactions of administrators having knowledge of industry practice in applying the regulations. The court relied on internal DOE memoranda issued to field auditors in upholding a pre-enforcement challenge of a regulation governing the sequence of recovery of certain costs computed under DOE regulations.

In *Amoco Production Co. v. DOE*,¹¹⁶ the court adopted a similar view in ordering discovery of "evidence reflecting the views of agency personnel who . . . participated in the development of the disputed regulation."¹¹⁷ The court also concluded, however, that plaintiff's discovery request went too far, and held that DOE was not required to provide the plaintiffs with administrative records of interpretive rules or contemporaneous DOE documents that were generated more than four years after the contested regulation.¹¹⁸

In *Petrolane, Inc. v. DOE*¹¹⁹ and *Phillips Petroleum Co. v. DOE*,¹²⁰ two different United States District Courts authorized the taking of depositions of lower level DOE officials concerning their interpretations of contested regulations. The courts in these cases determined

114. *Id.* at 550.

115. 596 F.2d 1029 (Temp. Emer. Ct. App. 1978). The court concluded "that the statements by FEA auditors and other lower level officials are entitled to weight in determining the thoroughness of the FEA's consideration of its regulations, the validity of its reasoning, and its consistency with earlier and later pronouncements." *Id.* at 1056.

116. No. 78-463, slip op. (D. Del. May 29, 1979).

117. *Id.* at 5. In this case the court entered an order granting a discovery motion because of the expertise and knowledge involved in the opinions of those agency personnel. For a discussion of evidentiary privilege in the administrative context, see Comment, *Discovery in Litigation With Federal Agencies—Seeking Information In The Challenge Of Interpretive Rules*, 28 U. KAN. L. REV. 487, 492-502 (1980).

118. *Amoco Prod. Co. v. DOE*, No. 78-463, at 8.

119. 79 F.R.D. 115 (C.D. Cal. 1978).

120. 449 F. Supp. 760 (D. Del.), *aff'd sub nom.* *Standard Oil Co. v. DOE*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

such testimony to be appropriate where the existing administrative record did not address the specific question in controversy and a showing of facial ambiguity had been made.¹²¹

III. CONCLUSION

Although they have recognized contemporaneous construction discovery as a useful interpretive guide, courts have been hesitant to extend such discovery beyond statements made by supervisory employees of agencies. Executive privilege and the general prohibition against probing the mind of the administrative decision maker often have limited the application of the doctrine to inquiries concerning the practical constructions given disputed regulations by supervisory officials at or near the time of promulgation.

Recent developments, however, signal a broadening of this discovery procedure. Faced with ambiguous regulations and no official clarification, courts, in a number of recent decisions, have authorized the examination of interpretations given the regulation by lower level enforcement personnel in the course of their duties. This expansion has been justified primarily by the absence of an official pronouncement, and the relevance of the evidence in determining the deference due a particular agency interpretation.

A probable result of this development will be closer scrutiny by agency officials of informal agency processes for dispensing information, both within the agency and to regulated parties. The adverse impact on administrative litigation resulting from interpretive contradictions among agency officials and enforcement personnel will likely result in a curtailment of the informal explanations of agency positions given in the course of day to day enforcement. Such a prospect also will encourage agency officials to utilize formal administrative interpretive and rulemaking procedures to clarify an agency's position, thereby reducing the chance of having these positions scrutinized later through contemporaneous discovery.

This development of contemporaneous construction discovery offers opportunities to parties facing agency enforcement actions. The disclosure of intra-agency inconsistencies may prove to be a valuable

121. 79 F.R.D. at 121; 449 F. Supp. at 784. The court in *Phillips Petroleum Co.* stated that it would not "discount the importance of statements of the FEA's auditors and compliance officials simply because they were not authorized to issue formal interpretations of the agency's regulations." *Id.* at 784.

means of discrediting an agency's position and thereby reducing the advantages of the courts' general deference to agency interpretations.