

COMMENT

VALLADOLID V. PACIFIC OPERATIONS OFFSHORE: SHOULD DEFERENCE TO AGENCY INTERPRETATIONS EXTEND TO SUB-ENTITIES?

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I. INTRODUCTION

In *Valladolid v. Pacific Operations Offshore*, the Ninth Circuit held that it did not owe deference to the interpretation of a statute used by a quasi-judicial sub-entity of the United States Department of Labor (DOL).¹ However, as Section III of this comment will discuss in detail, the quasi-judicial sub-entity used the same interpretation as its parent agency, DOL. Thus, *Valladolid* presents a question of scope: should *Chevron* deference apply to quasi-judicial sub-entity decisions where such decisions rely on a parent agency’s statutory interpretation? Section IV will discuss some of the consequences of this particular form of deference avoidance, primarily in terms of the costs associated with exposing industry to immediate, judicial reversal of otherwise established agency promulgations. Although *Valladolid* involved a quasi-judicial sub-entity of DOL, Section IV will also discuss how these consequences will more directly affect the energy sector, particularly through Environmental Protection Agency (EPA) sub-entity action. However, it is noteworthy that every administrative agency with a quasi-adjudicatory sub-entity is also potentially open to the same immediate judicial reversal of otherwise settled statutory interpretations when decisions by the sub entity are judicially reviewed in the Ninth Circuit.

1. *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 1472 (Feb. 22, 2011) (“Because the [sub-entity] is not a policymaking body, its constructions of the [act] are not entitled to special deference.”).

II. CASE HISTORY

A. *The Facts of the Case, the Central Question, and the Procedural Posture up to the Ninth Circuit*

On June 2, 2004, Juan Valladolid was crushed to death by a forklift while working at a land-based oil flocculation² plant in California.³ The plant's refinement activity involved oil received there by pipeline from offshore platforms.⁴ At the time of his death, decedent was part of a team that was centralizing a two year old accumulation of scrap metal from offshore platforms, which was scattered around the land based facility so that it could be collected by a scrap metal vendor.⁵ The decedent's employer, Pacific Operations Offshore, paid his widow fifty-two weeks of death benefits⁶ in accordance with California law.⁷ At the same time, Ms. Valladolid also sought workers' compensation under the Longshoreman and Harbor Worker's Compensation Act (LHWCA).⁸

With few exceptions, LHWCA benefits are payable only when an employee's death or disability occurs on the navigable waters of the United States.⁹ Thus, because the decedent's injury was sustained at a land-based plant, LHWCA benefits would only be available under an exception to the navigable waters requirement. One such exception may exist in § 1333(b) of the Outer Continental Shelf Lands Act of 1953 (OCSLA), which extended LHWCA benefits to other types of workers and locations (OCSLA benefits).¹⁰ Specifically, OCSLA extended LHWCA benefits for the "death of an employee resulting from any injury occurring *as the result of operations conducted on the outer Continental Shelf*" involving, *inter alia*, extraction of oil.¹¹ However, Ms. Valladolid and DOL had competing interpretations of the emphasized language of the statute, each reflecting different sides in a circuit split.

The parties' different understandings may be paraphrased thus:

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Section 1333(b) means "as the result of operations conducted *while* on the outer Continental Shelf" (OCS). This interpretation imposes a situs-of-injury test,

2. Flocculation is a step in the refinement of crude oil in which contaminants are removed by reacting with an additive, which causes them to rise, settle, or otherwise become filterable from the liquid. *See, e.g.*, DIV. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, MINING PROJECT FACT SHEET: SELECTIVE FLOCCULATION OF FINE MINERAL PARTICLES (2001), available at <http://www1.eere.energy.gov/industry/mining/pdfs/flocc.pdf>.

3. *Valladolid*, 604 F.3d at 1129; Respondent's Appellate Response Brief at 11-13, *Valladolid*, 604 F.3d 1126 (No. 08-73862), 2009 WL 3651946 at *11-*13.

4. *Valladolid*, 604 F.3d at 1129; Respondent's Appellate Response Brief, *supra* note 3, at 9-10.

5. *Valladolid*, 604 F.3d at 1129.

6. *Id.*

7. *Id.*

8. Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (2006).

9. *Id.* § 903.

10. 43 U.S.C. § 1333(b) (2006).

11. *Id.* (emphasis added).

requiring one to have been injured while physically¹² located within the OCS region as defined by OCSLA in order to receive benefits.

Valladolid

Section 1333(b) means “as the result of operations *that were* conducted on the outer Continental Shelf,” which requires the establishment of some sort of causal connection between operations conducted on the OCS and the decedent’s injury.¹³

Obviously, under the DOL interpretation, Ms. Valladolid would not be entitled to benefits because her husband’s death occurred on land. However, if the statute was to be interpreted according to her understanding, she might be entitled to benefits if the causal connection between operations on the OCS and her husband’s injury were sufficient to meet whatever standard a decision making body might apply. In short, Ms. Valladolid’s position was that the question of benefits eligibility should be established by answering the question of whether there was a sufficient link between her decedent’s injury and operations on the OCS rather than by where her decedent became injured. Likely sources for such a connection might be either the fact that (1) the scrap metal decedent was moving at the time of his injury came from offshore platforms, or (2) the facility at which decedent was injured processed oil that came to it by pipeline from offshore platforms. Thus, the central question of the case was whether injuries occurring away from the OCS could be within the scope of the statute’s language.¹⁴

Ms. Valladolid’s claim for OCSLA benefits was denied after informal proceedings before the Department of Labor’s Office of Workers’ Compensation Programs (OWCP).¹⁵ OWCP’s denial of her claim was appealed in proceedings before an Administrative Law Judge (ALJ).¹⁶ The ALJ denied benefits under OCSLA on the grounds that decedent’s injury did not occur in the geographic area of the OCS as defined in OCSLA.¹⁷ Under other statutes, Ms. Valladolid’s claim may have proceeded to judicial review after the ALJ’s decision. However, the LHWCA created a Benefits Review Board (BRB) for the purpose of deciding benefits disputes arising out of LHWCA claims, and the BRB hears cases after they have been decided by an ALJ.¹⁸ Consequently, Ms. Valladolid appealed the ALJ’s decision to the BRB, which subsequently supported the

12. This interpretation follows *Mills v. Director, Office of Workers’ Comp. Programs*, 877 F.2d 356, 359 (5th Cir. 1989) (*en banc*) (denying OCSLA benefits to an employee who was injured during construction of an oil rig platform while it was being constructed in a shipyard). See also *Valladolid*, 604 F.3d at 1130; 43 U.S.C. § 1331(a) (2006) (generally, the seabed three nautical miles off a state’s shoreline); 43 U.S.C. § 1301(a) (2006) (defining terms used in § 1331(a)).

13. This interpretation follows *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 810-811 (3rd Cir. 1988) (adopting a but-for causation test to determine applicability of OCSLA’s extension of LHWCA benefits). *Valladolid*, 604 F.3d at 1130 (“Petitioner contends that the BRB impermissibly applied a ‘situation-of-injury’ requirement for OCSLA workers’ compensation”).

14. *Valladolid*, 604 F.3d at 1129.

15. *Id.*

16. *Id.*

17. *Id.* at 1130; 43 U.S.C. § 1331(a) (generally, the seabed three nautical miles off a state’s shoreline); see also 43 U.S.C. § 1301(a) (defining terms used in § 1331(a)).

18. Establishment of the Benefits Review Board, and the Ninth Circuit’s jurisdiction to review its decisions, is granted by 33 U.S.C. § 921(b)(1), (c).

situs-of-injury test by upholding the decision below.¹⁹ Having exhausted her administrative remedies, Ms. Valladolid invoked judicial review of the BRB's decision.²⁰

B. The Ninth Circuit's Decision and Valladolid's Petition for Certiorari

Valladolid presented a case of first impression for the Ninth Circuit as to whether the geographic location where a worker became injured affected his or her eligibility for OCSLA benefits.²¹ In considering the matter, the Ninth Circuit gave no deference to the BRB's statutory interpretation imposing a situs-of-injury test because the BRB is not a policymaking body.²² This is a key issue because the BRB's interpretation mirrored that of the DOL, which is a policymaking body. However, when the Court gave no deference to the BRB, it did not reach the issue of whether it was also giving no deference to DOL.

Additionally, the Court found no majority among its sister circuits: the only two that had addressed the matter were split, and at opposite ends of the spectrum. The Third Circuit held that the statute's language reached all those injuries the but-for cause of which could be tied to operations on the OCS.²³ The Fifth Circuit found that no part of § 1333 referred to an area away from the OCS and, subsequently, held that Congress intended to regulate areas that were not governed by state law.²⁴ Consequently, the Fifth Circuit rejected the Third Circuit's analysis, and adopted the situs-of-injury test, requiring the injury to have occurred in the geographic region of the OCS described by OCSLA.²⁵

The nature of the connection between the injury and the OCS is critical in determining whether Valladolid's industrial accident was covered under OCSLA's language.²⁶ A but-for analysis might include the circumstances of Mr. Valladolid's death even though his injuries occurred on land if he would not have been injured but for the work he was doing and the work he was doing was "the result of operations conducted on the [OCS]."²⁷ Requiring the injury to occur on the OCS for OCSLA coverage would exclude the decedent because his injuries occurred on land in the state of California.

The Ninth Circuit found neither the Fifth Circuit's examination of Congressional intent nor its own examination of legislative history²⁸ to be

19. *Valladolid*, 604 F.3d at 1130.

20. *Id.* at 1129.

21. *Id.*

22. *Id.* at 1130. The Court also reviewed the ALJ's decision *de novo*, so it had no duty to examine the ALJ's use of the situs-of-injury test.

23. *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 810-811 (3rd Cir. 1988) (agreeing with the Fifth Circuit's earlier view, which adopted but-for causation, although the Fifth Circuit later reversed itself in *Mills*, where the Fifth Circuit required the injury to occur on the OCS).

24. *Mills v. Director, Office of Workers' Comp. Programs*, 877 F.2d 356, 359 (5th Cir. 1989) (*en banc*) (denying OCSLA benefits to an employee who was injured during construction of an oil rig platform while it was being constructed in a shipyard).

25. *Id.* at 358-359, 362.

26. *Valladolid*, 604 F.3d at 1139.

27. 43 U.S.C. § 1333(b).

28. Although the Ninth Circuit was not swayed by legislative documents in the interpretation of § 1333(b), the Fifth Circuit clearly was. *Mills*, 877 F.2d at 359 ("Legislative history from OCSLA . . . supports the narrower reading."). Indeed, the Court found it had a duty to examine legislative history. *Id.* at 358

dispositive.²⁹ Instead, relying on statutory construction, it declined to follow the Fifth Circuit and held that the statute was not concerned with the geographical location where the injury occurred but, rather, the geographical location of the operations that gave rise to the activity during which the injury occurred.³⁰ Thus, the Court also chose not to follow the Third Circuit, holding that its but-for causation analysis was more expansive than Congress intended.³¹

Opting for a scope of covered injuries somewhere between the Third Circuit's but-for causation and the Fifth Circuit's situs-of-injury requirement, the Ninth Circuit created a "substantial nexus" test.³² The substantial nexus test requires a claimant to demonstrate "a substantial nexus between the injury and extractive operations on the shelf."³³ A claimant would meet the requirements of the test by demonstrating "the work performed directly furthers outer continental shelf operations and is in the regular course of such operations."³⁴ The Ninth Circuit remanded the case to the BRB and, presumably, determined that the BRB could find that either (1) working at a refining facility that receives oil from an offshore platform or (2) centralizing a two year old land-based accumulation of scrap metal from offshore platforms furthered OCS operations and was in the regular course of such operations.³⁵

In October of 2010, Pacific Operations Offshore filed a petition for certiorari to the Supreme Court, presenting the question of whether the Third Circuit's but-for test, the Fifth Circuit's situs-of-injury test, or the Ninth Circuit's substantial nexus test reflected the correct interpretation of OCSLA's § 1333(b).³⁶ In January of 2011, Valladolid petitioned the Court to consider the matter not in terms of which Circuit established the correct test, but more openly

(internal citations omitted) ("[W]e follow the Supreme Court's teaching to interpret legislation, ' . . . in light of the language of the Act as a whole, the legislative history [and] the Congressional purposes underlying the Act . . . "). At least one study has found that the Supreme Court refers to legislative history in *Chevron* cases nearly two thirds of the time, and finds such material outside of the statute, itself, to be a determining factor nearly half the time. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1136 (2008).

29. *Valladolid*, 604 F.3d at 1135-1137 ("Considered as a whole, the legislative history is inconclusive on the situs issue, other than establishing that § 1333(b) was not intended to simply fill a gap in workers' compensation law"). The first clause clearly indicates that the Ninth Circuit could not determine Congress' intention with respect to whether the situs-of-injury test was to be imposed. The second clause merely indicates that the Ninth Circuit would not accept an argument that OCSLA's extension of LHWCA benefits implied a situs of injury requirement on the basis that it intended to fill the gap left between the boundaries of state workers' compensation territorial jurisdiction and the places where exploration and extractive workers were located on the OCS. *Id.* at 1135-1136.

30. *Id.* at 1134, 1137-1139, 1141-1142.

31. *Id.* at 1139.

32. *Id.*

33. *Id.*

34. *Id.*

35. The court argued against the situs-of-injury test noting that when a pitcher strikes a batter with a ball, the batter's injury resulted from operations on the mound. *Id.* at 1134. However, the analogy only goes so far in terms of the facts of *Valladolid*. The correct question would be whether a groundskeeper crushed by a forklift in the process of centralizing a two year old accumulation of damaged baseballs was the result of operations on the mound. The Court left it to the BRB to determine if the nexus was substantial enough to meet its test.

36. Petition for Writ of Certiorari, *Pacific Operators Offshore, LLP v. Valladolid*, No. 10-507 (U.S. Oct. 13, 2010), 2010 WL 4035876.

in terms of whether § 1333(b) imposes a situs-of-injury test at all and, “if not, how the ‘occurring as the result of operations conducted on the [OCS]’ test . . . should be interpreted.”³⁷ Additionally, also in January of 2011, the director of OWCP filed a brief arguing that there is no situs-of-injury test imposed by OCSLA.³⁸ In February of 2011, the Supreme Court decided to grant review but did not comment on how it would construe the question at bar.³⁹

Interestingly, other than the Ninth Circuit’s denial of deference to the BRB, deference to an agency’s interpretation of § 1333(b) was not raised again until Pacific briefed the Supreme Court in May of 2011.⁴⁰ However, even then, the issue raised by Pacific was whether an agency interpretation of a statute first raised in litigation was entitled to deference, not whether the Ninth Circuit erred in failing to give or more deeply consider deference to the BRB.⁴¹ Pacific was responding to a new interpretation of § 1333(b) provided in the Director of OWCP’s petition in opposition to certiorari.⁴² The Director responded in May, arguing that the DOL was entitled to *Skidmore* deference to its newly offered interpretation and that the fact that it differed from that of the BRB was of no consequence because the BRB was not entitled to deference.⁴³ Ms. Valladolid did not raise the issue of deference in her brief to the Court in August of 2011, where it described the Ninth Circuit’s decision.⁴⁴ Naturally, because Pacific has not raised the issue of whether it was appropriate for the Ninth Circuit not to give deference to the BRB in light of the fact that BRB’s interpretation of § 1333(b) was parallel to that of DOL, neither the Director of OWCP nor Ms. Valladolid addressed the issue. Consequently, although the reach of OCSLA’s extension of LHWCA benefits will likely be resolved on review, the Court may do so without reaching the issue of deference.

III. DEFERENCE

When a federal court construes a statute that has been delegated to a federal agency for implementation, a question of judicial deference arises as to the agency’s interpretation of the statute. The Supreme Court has established that, where a federal administrative agency interprets the statute assigned to it, a

37. Brief for Respondent Valladolid in Opposition to Petition for Certiorari at i, *Pacific*, No. 10-507, (U.S. Jan. 14, 2011), 2011 WL 178699 at *i.

38. Brief for the Federal Respondent in Opposition at 7, *Pacific*, No. 10-507 (U.S. Jan. 14, 2011), 2011 WL 160861 at *7.

39. *Valladolid*, 604 F.3d 1126, cert. granted, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507).

40. Brief for Petitioners at 35, *Pacific*, No. 10-507 (U.S. May. 23, 2011), 2011 WL 2062345 at *35.

41. *Id.* (petitioner distinguished deference to an agency interpretation of its own *regulation* first advanced in litigation from deference to an agency interpretation of a *statute* first advanced in litigation, citing *Auer v. Robins*, 519 U.S. 452, 461 (1997) (deferring) and *Gonzales v. Oregon*, 546 U.S. 243, 256-258 (2006) (not deferring), respectively).

42. *Id.*; Brief for the Federal Respondent in Opposition at 15 n.10, *Pacific*, No. 10-507 (U.S. Jan. 14, 2011), 2011 WL 160861 at *15 n.10.

43. Brief for the Federal Respondent at 17 n.8, *Pacific*, No. 10-507 (U.S. Aug. 31, 2011), 2011 WL 3873254 at *17 n.8.

44. Brief for Respondent Luisa L. Valladolid at 16-19, *Pacific*, No. 10-507 (U.S. Aug. 31, 2011), 2011 WL 3873255 at *16-*19.

reviewing court owes some level of deference⁴⁵ to the agency's interpretation unless the meaning of the statute was unambiguously clear or the agency's interpretation was impermissible or unreasonable.⁴⁶ In other words, a court will first look to see if a statute is clear (*Chevron* step one), and if it is not clear, the court must give some level of deference to the agency's interpretation of that statute (*Chevron* step two).⁴⁷ However, sub-entities of administrative agencies that are not policymaking organizations are not entitled to any deference.⁴⁸ Quasi-judicial bodies like the BRB, created as sub-entities of larger agencies like the DOL, are not typically policymaking bodies and therefore receive no deference from the courts.⁴⁹ Even so, the BRB used the same interpretation of § 1333(b) as that created by or adopted by the DOL,⁵⁰ which was a policymaking body.⁵¹ Consequently, when the Court gave no deference to the BRB, it concurrently gave no deference to the DOL. And, although avoiding deference is not new,⁵² the purpose of this comment is to challenge whether this form of deference avoidance makes good law.

45. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (giving some weight to agency interpretation even where it lacked "power to control"); *see also* *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (agency interpretations still have persuasive power where *Chevron* step two deference does not apply).

46. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

47. *Id.* As will be clarified below in this section, the level of deference is not always as great as shown in *Chevron*, but once a court acknowledges that a statute is ambiguous, it must at least consider the agency's rationale and persuasive arguments under the *Skidmore* doctrine. Naturally, a court of appeals retains the most control over a case and the future course of litigation in its jurisdiction by finding the statute unambiguous.

48. *Id.* *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010). The Court also reviewed the ALJ's decision *de novo*, so it had no duty to examine the ALJ's use of the situs-of-injury test.

49. *Valladolid*, 604 F.3d at 1130.

50. The BRB quasi-judicial reference materials match those of other DOL programs and the DOL's own quasi-judicial reference materials for its ALJs. Under 5 U.S.C. § 301 (2009), the Secretary of Labor created the Office of Workers' Compensation Programs (OWCP), 20 C.F.R. § 1.1 (2011), within the department of labor. OWCP administers LHWCA, including its OCSLA extension, 20 C.F.R. § 1.2(e) (2011), 20 C.F.R. § 701.201 (2011). The OWCP, in turn, has a Division of Longshore and Harbor Workers' Compensation that is responsible for LHWCA administration. DEP'T OF LABOR, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, LONGSHORE PROCEDURE MANUAL § 0-300(5)(d)(3), available at <http://www.dol.gov/owcp/dlhw/lsmp/pmtoc.htm> [hereinafter *Longshore Procedure Manual*] (the DOL's procedure manual links the workers' activity to the location where it is performed: "Workers involved in the exploration, development, removal, and transportation of natural resources from the seabed and subsoil of the Outer Continental Shelf."). *See also* DEP'T OF LABOR, LONGSHORE DESKBOOK (2011), available at http://www.dol.gov/brb/References/Reference_works/lhca/lsdesk/main.htm [hereinafter *Longshore Deskbook*]. The desk book is a reference manual provided by the BRB. The BRB was created by LHWCA and is administered as a program of the DOL. 33 U.S.C. §§ 921(b), 939(a); *see also* 20 C.F.R. § 801.101 (2010); DEP'T OF LABOR, JUDGES' BENCHBOOK: LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT (Apr. 16, 2002), available at [http://www.oalj.dol.gov/PUBLIC/LONGSHORE/REFERENCES/REFERENCE_WORKS/USDOL_OALJ_LHWCA_BENCHBOOK_CONTENTS_\(2002\).HTM](http://www.oalj.dol.gov/PUBLIC/LONGSHORE/REFERENCES/REFERENCE_WORKS/USDOL_OALJ_LHWCA_BENCHBOOK_CONTENTS_(2002).HTM) [hereinafter *Judges' Benchbook*] (a reference manual provided by the DOL's office of ALJs).

51. 29 U.S.C. § 551 (2006); 29 U.S.C. § 552 (2006); 29 U.S.C. § 553 (2006); 33 U.S.C. §§ 921(b), 939(a). It is noteworthy that the Ninth Circuit authority relied on by the *Valladolid* Court to give no deference to the BRB, *Valladolid*, 604 F.3d at 1130, went on to give significant weight to OWCP's construction of LHWCA because OWCP administers the act: "However, we accord considerable weight to the construction of the [LHWCA] urged by the Director of the Office of Workers' Compensation Programs, as he is charged with administering it." *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 1047 (9th Cir. 2009) (internal quotations omitted).

52. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446 (2005) ("Of course, courts have indulged in *Chevron* avoidance for as long as there has been

For that purpose, this comment will assume that the Ninth Circuit *may* have owed deference to the BRB's interpretation of § 1333(b) in light of the fact that it was the same interpretation as that used by the DOL. If the Ninth Circuit did not immediately seize on the BRB's status as a non-policymaking body, and thereby avoid a deference analysis, it may have spent more time considering the clarity of the statute.

Despite the Ninth Circuit's holding that § 1333(b) is unambiguous, the meaning of the language can and has been challenged. Indeed, that the Fifth and Third circuits disagreed as to the scope of OCSLA benefits coverage strongly suggests that § 1333(b) was not unambiguously clear. Consequently, by adding a third interpretation of § 1333(b) to the mix, the Ninth Circuit ironically created an even stronger appearance of ambiguity than the very clarity of language the court held to exist. Even so, where, as here, there is an absence of clear error in the Courts' reasoning, such an analysis of the Third, Fifth, and Ninth circuit decisions could be the topic of a paper in its own right.⁵³ Instead, this analysis assumes that § 1333(b) harbors ambiguity, and that the Ninth Circuit should have more strongly considered deference to the DOL through the BRB's interpretation.

A. *The DOL's Position on the Situs-of-Injury Requirement*

The DOL's interpretation of § 1333(b), requiring a situs-of-injury test, was based on its analysis of Congressional intent, United States Supreme Court dicta, and historical considerations arguing against the Third Circuit's "but-for" interpretation. The DOL contemplated the situs-of-injury requirement in light of its understanding that Congress extended LHWCA benefits through OCSLA *because* there were no state workers' compensation programs available outside of state jurisdiction for mineral exploration and extraction workers in 1953.⁵⁴ The DOL also considered Supreme Court dicta stating that Congress intended OCSLA's coverage to be principally determined by location.⁵⁵ Moreover, the DOL cautioned that the Third Circuit's "but-for" holding was based on old law that was heavily weighted toward favoring LHWCA coverage in borderline

Chevron deference. Courts . . . have refrained from expressly determining whether interpretations . . . were 'reasonable' under Chevron, 'persuasive' under Skidmore, 'correct' as a matter of statutory construction, all, some, or none of the above.").

53. Indeed, there is significant industry and space dedicated to analyzing the process of construction and the methodologies employed in particular cases. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 340 n.5 and associated text (2005). The literature is rich with such material because individual judges and courts take different approaches to the process of statutory construction. *Id.* at 339; *see also* Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 347 (2007). But the purpose of this paper is not to predict what interpretation the Supreme Court will favor or to argue the merits of either circuit's interpretation, specifically. It is a sufficient sign of ambiguity for the matter at hand that two highly competent groups of jurists came to completely different interpretations of the same statute without making a clear error of logic or law. As the analysis will argue in detail, the *Valladolid* Court owed some level of deference to the DOL's interpretation of the statute unless it was impermissible or unreasonable.

54. *Judges' Benchbook*, *supra* note 50, § 1.10.1, at 1-95. This is the gap-filling argument expressly declined by the Ninth Circuit. *See supra* note 29.

55. *Id.* § 60.3.2, at 60-15 (citing *Offshore Logistics v. Tallentire*, 477 U.S. 207, 219 n.2 (1986)). The Ninth Circuit determined that the relevant dicta was "unconsidered" and gave it no weight. *Valladolid*, 604 F.3d at 1131-1132.

cases.⁵⁶ Thus, the Third and Ninth circuits' respective holdings are distinguishable. Because the Third Circuit's but-for analysis is outmoded, the Court might arrive at a different conclusion today if it were faced with the same question. In contrast, the Ninth Circuit's contradiction of the DOL's interpretation is based on the current state of the law, so the Ninth Circuit would likely rule in the same way if it faced the same question. Additionally, although the Third Circuit held that it owed the BRB no deference, it nonetheless stipulated that it would respect a reasonable interpretation by the BRB. Thus, it gave *some* level of deference, whereas the Ninth Circuit gave none.⁵⁷

Based on its understanding of § 1333(b), the DOL instructs its ALJs to use the situs-of-injury test.⁵⁸ The DOL's Longshore Benchbook for ALJs gives a three-step analysis for OCSLA benefits coverage to natural resource workers.⁵⁹ The first step pertains to the nature of the apparatus upon which the employee was injured.⁶⁰ The second step inquires as to whether the injury occurred on the OCS or upon in-state territorial waters.⁶¹ The third step requires a "but-for" nexus between the accident and extraction of minerals on the OCS.⁶² The first step excludes land-based work and directs the ALJ to consider the type of vessel upon which the worker was injured.⁶³ The second step interprets OCSLA such that it does not overlap state workers' compensation coverage. In light of the DOL's related text on the matter described above, the first two steps of its analysis unambiguously express the DOL's requirement of the situs-of-injury test as an element of OCSLA benefits coverage.

56. *Judges' Benchbook*, *supra* note 50, § 60.3.2, at 60-16. By suggesting that the BRB could find the circumstances of the decedent's injuries to have a substantial nexus to operations on the OCS, the Court invites one to question whether the substantial nexus test raises the bar substantially compared to but-for causation. See also *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 811 (3d Cir. 1988) (internal citations omitted) ("We believe that our interpretation of 43 U.S.C.A. § 1333(b) is correct in light of the administrative, legislative and judicial policy of resolving doubtful LHWCA coverage questions in favor of coverage. . . . (broad language of 1972 amendments suggests courts should take expansive view of LHWCA coverage to avoid harsh and incongruous results)").

57. *Curtis*, 849 F.2d at 808 (internal citations omitted) ("We owe no deference to the [Benefits Review] Board's interpretation of the OCSLA; however we will respect that interpretation if it is reasonable.").

58. *Judges' Benchbook*, *supra* note 50, § 1.10.1, at 1-96 (editor's note).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. In *Herb's Welding*, the Court made clear that claims under LHWCA and claims under the OCSLA extension of LHWCA had to be made on different grounds.

We also went on to examine the legislative history of [OCSLA] and noted (1) that Congress was of the view that maritime law would not apply to fixed platforms unless a statute expressly so provided; and (2) that Congress had seriously considered applying maritime law to these platforms but had rejected that approach because it considered maritime law to be inapposite, a view that would be untenable if drilling from a fixed platform is a maritime operation. The history of [OCSLA] at the very least forecloses the Court of Appeals' holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes.

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 422 (1985). *Herb's Welding* also appears to be controlling in the Court's description of the purpose of OCSLA's extension of LHWCA benefits: "With the 1953 passage of [OCSLA], Congress extended LHWCA coverage to oil workers more than three miles offshore." *Id.* at 419 (citing 43 U.S.C. § 1333(b)). OCSLA does not extend LHWCA benefits to the "master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1).

B. *How Much Deference?*

Occupying the space between no deference and *Chevron* step two deference lays *Skidmore* deference. *Skidmore* requires a court to lend weight to the agency's interpretation of a statute in light of 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."⁶⁴ Later, the *Chevron* case created a two step analysis:⁶⁵ (1) if the intent of Congress is clear, then Congress' intent is controlling, (2) if Congress' intent is ambiguous, then apply the agency's interpretation if it is reasonable and permissible before engaging in judicial statutory interpretation.⁶⁶ It might immediately appear that *Chevron* effectively overruled *Skidmore*, but the Supreme Court later held that the two could, and would, live together.⁶⁷ Thus, the natural question is how to determine when to apply *Skidmore* and when to apply *Chevron*. Two cases, *Christensen* and *Mead*, have begun to further reveal the Court's vision of judicial deference to administrative interpretations of statutes.⁶⁸

Mead can be viewed as the progeny of *Christensen*, so *Christensen* is the natural starting place for a discussion of post-*Chevron* deference law.⁶⁹ *Christensen* concerned an agency interpretation of the Fair Labor Standards Act (FLSA). Under FLSA, hourly private sector employees must be paid one and one half times their normal hourly pay rate for hours worked above forty in a given workweek (overtime).⁷⁰ However, in the public sector, employees may be paid with compensatory time off (comp time) for hours worked above forty in a given workweek.⁷¹ The DOL opined that comp time usage could be compelled only if there was a provision in an agreement with the employee permitting it to do so.⁷² Even so, *Christensen*'s employer, Harris County, instituted a policy of forced comp time utilization absent such an agreement.⁷³ The DOL argued that it was entitled to *Chevron* step two deference and that the prior agreement requirement should stand.⁷⁴ The Court disagreed:

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations

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

65. See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (addressing the Court's approach or non-approach to determining if *Chevron* is applicable in any particular case).

66. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

67. *United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001).

68. *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000); *Mead*, 533 U.S. 218.

69. Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1878, 1878 (2006).

70. 29 U.S.C. § 207(a) (2006).

71. See, e.g., WAGE AND HOUR DIV., DEP'T OF LABOR, FACT SHEET #7: STATE AND LOCAL GOVERNMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2011), available at <http://www.dol.gov/whd/regs/compliance/whdfs7.pdf>.

72. *Christensen*, 529 U.S. at 581 (citing Dep't of Labor, Wage and Hour Div., Opinion Letter (Sept. 14, 1992), 1992 WL 845100).

73. *Id.* at 581.

74. *Id.* at 586.

contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.⁷⁵

Christensen was widely interpreted to mean that *only* agency interpretations created by notice and comment rulemaking or a more formal process had force of law subject to *Chevron* step two deference.⁷⁶

However, the *Mead* Court held that agency promulgations resulting from less formal activity may be subject to *Chevron* step two deference and, even where not, *Skidmore* deference would likely apply.⁷⁷ The *Mead* Court noted that Congress required the Secretary of the Treasury to promulgate rules creating classifications and rates for import taxes.⁷⁸ The Secretary's regulations authorized United States Customs (Customs) to determine tariff classifications in ruling letters,⁷⁹ which could be issued by any port-of-entry Customs office.⁸⁰ *Mead* was challenging a Customs ruling letter that classified a *Mead* product in such a way as to subject *Mead* to higher import taxes than it had been required to pay in the past. *Mead* challenged the Customs ruling letter and Customs sought *Chevron* step two deference.⁸¹ The *Mead* court declined Customs' request for deference, but not simply because Customs ruling letters were arrived at by an insufficient process.⁸² Instead, the *Mead* Court's holding gave the more generalizable rule underlying *Christensen*: whether Congress "delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁸³ In short, the Court held that Customs ruling letters were not created under a delegation of authority to make rules carrying the force of law.⁸⁴

So what help did *Christensen* and *Mead* provide? At the very least, they clearly indicated that the *Skidmore* multi-factor analysis can generally be expected to apply where *Chevron* step two deference does not, and that there is no clear principle for a court to apply as to when *Chevron* step two deference is more appropriate than *Skidmore* deference if the agency interpretation is not embodied in a regulation created by notice and comment rulemaking or more formal process.⁸⁵

75. *Id.* at 587.

76. "Interpretations such as those in opinion letters-like interpretations contained in policies statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.*

77. *United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001).

78. 19 U.S.C. § 1500(b) (2006).

79. 19 C.F.R. § 177.8(a) (2011).

80. 19 C.F.R. § 177.11(a) (2011).

81. *Mead*, 533 U.S. at 224-226.

82. *Id.* at 231.

83. *Id.* at 226-227.

84. *Id.* at 231-232.

85. *Christensen v. Harris Cnty.*, 529 U.S. 576, 590 (2000) (Scalia, J., concurring) ("[W]e have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats") (internal citations omitted). See also Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 *FORDHAM L. REV.* 1877, 1899 (2006) ("[T]his area of administrative law appears to be in a state of disarray."). Although *Mead* does provide factors for consideration as to when *Chevron* step two deference might apply to an interpretation arrived at by informal means, it does not provide a bright line rule. *Mead*, 533 U.S. at 226-227, 231-234.

In *Valladolid*, the Ninth Circuit expressed its standard of review and level of deference to the BRB in a single paragraph:

The BRB's decisions on questions of law are reviewed de novo. Because the BRB is not a policymaking body, its constructions of the LHWCA are not entitled to special deference. However, the court must "respect the [BRB's] interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute."⁸⁶

Based on its own statement of law, the Ninth Circuit likely found the BRB's interpretation of the statute to be either unreasonable or incongruent with underlying policy. This sentiment is manifest by the simple fact that the Court engaged in a *Chevron* step one analysis, found Congress' intent to be clear, and arrived at a different interpretation than that of the BRB.⁸⁷ Specifically, the *Valladolid* court embarked upon a statutory construction project, holding that the language of § 1333(b) was "unambiguous" in its lack of a situs-of-injury requirement, despite the fact that its interpretation was the third distinct interpretation to be promulgated by a federal circuit court.⁸⁸

Accordingly, the true question is whether the Ninth Circuit was entitled to ignore the underlying DOL interpretations relied on by the BRB. If the court had acknowledged the DOL's role in the BRB's interpretation, and considered how a circuit split may indicate ambiguity in § 1333(b), it likely would have been bound to consider *Chevron* step two deference under *Mead* and, if it found *Chevron* step two deference did not apply, engage in a *Skidmore* analysis.⁸⁹

C. An Analysis of *Valladolid* Under *Mead*

Because Congress delegates authority to administrative agencies in so many different ways, and with so many varying degrees of magnitude, the Supreme Court has recognized multiple signals that Congress intended *Chevron* deference.⁹⁰ Thus, the purpose of a *Mead* analysis is to determine whether *Skidmore* or *Chevron* deference is applicable.⁹¹ This section will examine the *Mead* Court's analysis and apply it to *Valladolid* as if the Ninth Circuit had found § 1333(b) to be ambiguous, which would clear the *Chevron* step one hurdle. This exercise is important to undertake because, if a *Mead* analysis suggests that *Chevron* step two deference was appropriate in *Valladolid*, then the law in the Ninth Circuit would have been different had the Court considered that DOL and BRB used the same interpretation of § 1333(b).

Under *Mead*, a court must give *Chevron* step two deference where Congress delegated the authority to make rules carrying force of law to the agency and a pronouncement by an agency seeking such deference was created

86. *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010), cert. granted, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507) (modification in original, internal citations omitted).

87. *Valladolid*, 604 F.3d at 1133 ("[W]e are presented with a straightforward question of statutory construction.").

88. *Id.*

89. "[T]hat Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever." *Mead*, 533 U.S. at 234.

90. *Id.* at 236-237.

91. *Id.* at 234-235.

in the exercise of that authority.⁹² That is, the agency (1) must have a Congressional delegation of authority to make rules, (2) must have a Congressional delegation giving such rules force of law, and (3) must have exercised that delegation of authority in rendering the statutory interpretation at issue.⁹³

The delegation to make rules is often a straightforward statutory matter. And where Congress has explicitly left a gap for an agency to fill with regulation, the force-of-law power in that delegation is also clear.⁹⁴ However, whether rulemaking authority was intended to carry force of law may require a more nuanced approach because the Supreme Court accepts that such power may occasionally be impliedly delegated or such power may be acceptably within an agency's reach even without Congress having intended it.⁹⁵ Moreover, the Court held that a Congressional delegation of authority to make rules intended to have force of law may be shown in a variety of ways.⁹⁶ A Congressional delegation of force-of-law rulemaking may be shown by rulemaking power or adjudicatory power or other authority indicating a "comparable congressional intent."⁹⁷ In both *Valladolid* and *Mead*, the agency had rulemaking authority but was not filling a gap explicitly left by Congress, so the primary question was whether each agency's action was within the scope of a Congressional delegation of force-of-law power.

In finding against U.S. Customs' bid for *Chevron* step two deference, the *Mead* Court gave primary consideration to four factors that might have indicated a force-of-law delegation. The Court considered (1) that enforcement of ruling letters were subject to review with no deference as a matter of statutory law, (2) that Customs did not behave as if their ruling letters had force of law, (3) that the quantity of ruling letters issued each year was voluminous, and (4) that Customs ruling letters were not within the scope of Custom's delegation of rulemaking authority.⁹⁸ The Court held that ruling letters were not subject to *Chevron* step two deference, although it vacated the lower court's judgment and remanded for proceedings to include a *Skidmore* analysis.⁹⁹

The *Mead* Court found the subjugation of ruling letters to review by the Court of International Trade (CIT) to be "at odds with the *Chevron* regime."¹⁰⁰ Although the Court did not elaborate much on this part of its rationale, a review of the law it referenced is illuminating.¹⁰¹ The CIT will typically presume that

92. *Id.* at 226-227.

93. *Id.*

94. *Id.* at 227.

95. *Id.* at 229 (Even without an explicit delegation of Congressional authority, "it can still be apparent from the agency's conferred authority . . . that Congress would expect the agency to be able to speak with force of law.").

96. *Id.* at 227. The court did not provide an exhaustive list of factors or elements to make such a determination. However, rulemaking, adjudication, and the *Mead* factors addressed in the following paragraphs could all be sufficient.

97. *Id.*

98. *Id.* at 231-234.

99. *Id.* at 238-239.

100. *Id.* at 232-233.

101. *Id.* at 232 (citing 28 U.S.C. §§ 2638-2640 (2006)).

Customs is correct.¹⁰² However, where Customs seeks to collect civil penalties or customs duties, it receives no such deference.¹⁰³ A statutory obligation to give no deference is the precise opposite of a judicial self-restraint giving deference in light of Congress' intent. Consequently, if an agency's pronouncement is subject to review by an entity that is *specifically* directed to give the agency no deference when its enforcement efforts are challenged, then the pronouncement is less likely to be given *Chevron* deference.

The Court found that Customs never "set out with a lawmaking pretense in mind when it undertook to make classifications like these."¹⁰⁴ In rendering that conclusion, the Court considered that Customs did not generally engage in notice and comment procedures in their creation.¹⁰⁵ Customs also did not consider ruling letters to have precedence over any party other than the party to whom it was issued.¹⁰⁶ In fact, Customs could change the ruling and would only need to notify the party to whom the original letter was issued.¹⁰⁷ Moreover, third parties are warned against relying on the reasoning or end result in ruling letters not issued to them.¹⁰⁸ The Court is less likely to consider a pronouncement to have force of law if the agency making the pronouncement does not couch the pronouncement in terms of a rule of general applicability.

The Court also considered the sheer volume of ruling letters created each year in conjunction with the fact that they were promulgated from various, dispersed offices around the country.¹⁰⁹ The Court's opinion reflected that it did not find much analysis was necessary: it found the sheer quantity of letters produced from such widely dispersed offices was itself "self-refuting" of the proposition that they should be accorded the weight of substantive law.¹¹⁰ The Court's incredulity that so many ruling letters could possibly have been intended by Congress to have force of law was expressed well in a note aimed at Justice Scalia's dissenting view: "[T]here would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways."¹¹¹ This factor will be called the "volume test."

An administrative agency's powers to engage in adjudication or notice and comment rulemaking could be sufficient to show a Congressional delegation of authority to make rules with force of law.¹¹² However, any such rule would have to be within the scope of the agency's delegation of authority.¹¹³ The Court found that, although Customs was empowered to engage in some general

102. 28 U.S.C. § 2639(a)(1) (2006).

103. *Id.* § 2639(a)(2). *See also* 28 U.S.C. § 1582 (2006).

104. *Mead*, 533 U.S. at 233.

105. *Id.*

106. *Id.*

107. 19 C.F.R. § 177.9(a), (c) (2011).

108. *Id.* § 177.9(c).

109. *Mead*, 533 U.S. at 233.

110. *Id.*

111. *Id.* at 238 n.19.

112. *Id.* at 227.

113. *Id.* at 231-232.

rulemaking, ruling letters creating customs classifications were not within that delegation.¹¹⁴ Consequently, the language of an agency's enabling statute is a key source of information as to whether there was an authorization to make the rule at issue and whether it was within the scope of a congressional delegation of law-like rulemaking authority.

The conversation now turns to whether DOL's situs-of-injury test is reasonably distinguishable from Customs ruling letters. If not, then DOL's test is only entitled to *Skidmore* deference. If so, then *Chevron* step two deference would be likely. This analysis is facilitated by dividing the *Mead* factors into two parts. The first part applies the first three non-rulemaking factors of *Mead* to the situs-of-injury test. The second part examines the fourth *Mead* factor, whether the situs-of-injury test is within the scope of DOL's rulemaking delegation and if such delegation was intended to give DOL rules force-of-law authority.

1. Two of the First Three Factors Distinguish *Mead* from *Valladolid*, and the Third is of Dubious Value in Either *Mead* or *Valladolid*.

Under the first three factors of *Mead*, it is immediately clear that the situs-of-injury test is of a decidedly different character from that of Customs ruling letters. First, Customs' enforcement efforts are subject to review by courts with jurisdiction more limited than federal circuit courts and in which no deference is accorded as a matter of statutory decree.¹¹⁵ In contrast, DOL workers' compensation rulings under LHWCA are subject to review by federal circuit courts, but only after administrative adjudicatory means have been exhausted.¹¹⁶ Once in a federal court, DOL rules are accorded a level of deference that depends upon the court's analysis of *Mead* under the circumstances.¹¹⁷

Second, the *Mead* Court considered an agency's own treatment of a rule as evidence of the force-of-law nature of the rule.¹¹⁸ In contrast to Customs ruling letters, which were individually tailored by product and company, DOL's situs-of-injury rule was treated like a law of general applicability and promulgated in manuals for administrators and ALJs.¹¹⁹

Third, regarding the volume of pronouncements on the topic, Customs creates 10,000 to 15,000 ruling letters per year.¹²⁰ Customs promulgates more ruling letters each year than there are individual pages in the DOL's *Longshore Procedure Manual*, *Longshore Benchbook*, and the *Longshore Deskbook*, combined.¹²¹ Although that comparison favors a law-like view of DOL's

114. *Id.*

115. The Court of International Trade (CIT) determines such matters based on the record before the court and not only on the record created by Customs. Moreover, the CIT may consider the issues on any grounds, not just those raised below. *Id.* at 233, n.16 (citing 28 U.S.C. 2638-2640).

116. 33 U.S.C. § 921(c).

117. *Mead*, 533 U.S. at 236-237.

118. *Id.* at 233.

119. The DOL treats its situs of injury test in a law-like fashion, rather than as an individually tailored ruling on a specific matter regarding a specific employer. See discussion *supra* Part III(A).

120. *Mead*, 533 U.S. at 233.

121. *Longshore Procedure Manual*, *supra* note 50, § 0-300(5)(d)(3); *Longshore Desk Book*, *supra* note 50; *Judges' Benchbook*, *supra* note 50.

statutory interpretation, the power of the argument diminishes when ruling letters are instead compared to the number of final dispositions arrived at by ALJs. In fact, the total number of ALJ decisions rendered each year is many times more than the number of Customs ruling letters issued annually.¹²² Consider that, on average, each of the approximately fifty offices issue 200 to 300 ruling letters per year.¹²³ Many individual ALJs dispose of more cases than that per year.¹²⁴ Thus, the volume test may not be as weighty an indicator of the force-of-law nature of ruling letters that the *Mead* Court attributed to it, given that ALJ rulings generally have force-of-law effect. Thus, this factor is neutral as to this analysis and perhaps should have been neutral or disregarded in *Mead*.

The first three *Mead* factors favor moving the situs-of-injury rule closer to *Chevron* step two deference. Specifically, and in contrast to Customs ruling letters, no statute required a court reviewing the DOL situs-of-injury test to give no deference to the agency, and the test was treated in a law-like fashion by its general application. Although the *Mead* court held that Customs ruling letters failed its volume test, the entire ALJ process may also reasonably be held to fail the volume test. Consequently, the importance of the volume test may be somewhat less than indicated by the amount of space taken to discuss it in the *Mead* Court's opinion, and it is therefore treated here as a neutral factor.

2. The Fourth Factor Distinguishes *Mead* from *Valladolid*.

The remaining question in applying *Mead* to the facts of *Valladolid* is whether the situs-of-injury rule is within the scope of DOL's rulemaking authority. If an agency has a Congressional delegation of authority to adjudicate or engage in notice and comment rulemaking, it may be able to invoke *Chevron* step two deference if its pronouncement is within the scope of its delegation.¹²⁵ Therefore, to understand the scope of DOL's power, Congress' statutory delegation of authority to administer its provisions must be examined. DOL is provided with broad regulatory power in its administration of LHWCA: "Except as otherwise specifically provided, the Secretary [of Labor] shall administer the provisions of this chapter, and for such purposes the Secretary is authorized (1) to make such rules and regulations . . . as may be necessary in the administration of this chapter."¹²⁶ Moreover, the DOL also maintains control over administrative adjudication of LHWCA claims, because the BRB was created by the LHWCA, which is subject to DOL regulation.¹²⁷ Because Congress'

122. Even considering only Social Security Administration decisions. See, e.g., *ALJ Disposition Data*, SOCIAL SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html (last visited Oct. 1, 2011).

123. *Mead*, 533 U.S. at 233 (10,000 to 15,000 divided by 50 yields 200 to 300 letters).

124. Even considering only Social Security Administration decisions. See, e.g., *ALJ Disposition Data (FY 2011)*, SOCIAL SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html.

125. *Mead*, 533 U.S. at 231-232.

126. 33 U.S.C. § 939(a). With such a broad delegation to administer LHWCA, it is certainly arguable that statutory language extending LHWCA benefits are within the scope of DOL's authority. Otherwise, extension language could inadvertently leave DOL powerless to effectively administer LHWCA as it pertains to the beneficiaries intended by the extension. OCSLA's extension language, ". . . shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act," expressly includes the provisions of the Act, including DOL's enabling act. 43 U.S.C. § 1333(b).

127. 33 U.S.C. § 921(b).

delegation of authority to DOL for the administration of LHWCA is so broad, anything reasonably related to LHWCA's administration would satisfy the standard for a force-of-law delegation of authority.¹²⁸ Naturally, the scope of individuals covered by § 1333(b) is reasonably related to LHWCA's administration, and therefore a pronouncement on the matter would likely meet the fourth *Mead* factor.

3. *Mead* is Distinguishable from *Valladolid*.

Based on the above argument discussing the four *Mead* Factors, it is reasonable to conclude that the *Valladolid* court may have owed *Chevron* step two deference to a § 1333(b) interpretation adopting the situs-of-injury test. But such deference is not guaranteed. First, like the Fifth Circuit, it would have to have passed *Chevron* step one by finding some ambiguity in the statute, which was merely assumed for the purposes of this comment. Second, *Mead* does not give us a bright line test for determining when an administrative agency's statutory interpretation should be afforded *Chevron* step two deference when the interpretation was arrived at by a process less formal than notice and comment rulemaking. On the one hand, the Court spoke at length about the many ways in which Congressional intent to give force-of-law authority to an agency may manifest itself and how the agency's informal pronouncements may therefore be afforded *Chevron* step two deference.¹²⁹ On the other hand, the *Mead* court also explicitly supported the very language from *Christensen* that begged the question it sought to answer: "[C]lassification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'"¹³⁰ That is, after suggesting that informal pronouncements may deserve *Chevron* step two deference in some cases, the *Mead* court went on to reinforce the idea that informal pronouncements are beyond the scope of *Chevron* step two deference.

Because the situs-of-injury test is not the result of notice and comment rulemaking, the question arises as to whether it is more likely than not that that DOL would be accorded *Chevron* step two deference by a court that found ambiguity in the language of § 1333(b). The *Mead* Court referenced *NationsBank* to help the reader understand where informal pronouncements may be afforded *Chevron* step two deference.¹³¹ The determining factor in *NationsBank* was the reasonableness of the agency's interpretation. As of *Valladolid*, there are three interpretations of § 1333(b) representing two opposing views on the reasonableness of the situs-of-injury test. Advocating the reasonableness of the situs-of-injury test are the Fifth Circuit and DOL. Arguing the opposite view are the Third and Ninth Circuits. The only meaningful arbiters

128. "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States*, 488 U.S. 361, 372-373 (1989) (internal citations omitted).

129. *Mead*, 533 U.S. at 228-232.

130. *Id.* at 234 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

131. *Id.* at 231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995)).

of the reasonableness of DOL's interpretation are Congress and the Supreme Court.

IV. IMPACT OF THE DECISION

Valladolid created a range of new concerns in two broad categories for businesses in the Ninth Circuit's jurisdiction. The first broad category includes uncertainty in future Ninth Circuit deference rulings. The second broad category includes uncertainties in the future of employers' workers' compensation liabilities and costs. These cost implications should particularly concern Companies that operate mineral exploration or extraction operations in the geographical area of the OCS and which also have land based operations. The concern stems from the fact that land based employees may now be within the scope of outer Continental Shelf insurance requirements that would not have likely been contemplated prior to *Valladolid* given the DOL's situs-of-injury test. The common thread between the two types of consequences is increased regulatory uncertainty in the marketplace, which imposes costs on businesses. The less stable the regulatory environment, the more cost businesses must absorb as they try to track, predict, and respond to changes.

A. *Impact on Reliability of Other Agency Promulgations*

Despite the Supreme Court's ruling in *Mead*, the *Valladolid* Court gave no deference to the DOL by giving no deference to an adjudicatory body within DOL, the BRB.¹³² The result was an uncertain but potentially vast increase in the scope of persons covered by OCSLA's extension of LHWCA benefits, because the Ninth Circuit admits of no temporal or spatial limitations on the scope of injuries covered by OCSLA benefits.¹³³ Undoubtedly, employers with mineral related operations on the OCS and their insurers must recalibrate costs in light of their changed risks. However, the ripples of the Ninth Circuit's deference decision will lap upon the shores of multiple agencies, affecting business and insurance decisions far beyond the scope of workers' compensation.

For example, like the DOL's BRB, the Environmental Protection Agency (EPA) contains an Environmental Appeals Board (EAB).¹³⁴ Also like the BRB, which is the final DOL decision maker for administrative appeals under LHWCA, the EAB is "the final [EPA] decision maker for administrative appeals under *all major environmental statutes that [EPA] administers.*"¹³⁵ That is, every time an energy sector enterprise seeks to exhaust its administrative remedies from an EPA enforcement action of a major environmental statute, it will eventually be heard by the EAB, assuming the matter was not resolved at an earlier stage. But, because, like the BRB, the EAB is not a policymaking body, even though it likely relies on EPA interpretations of statutes, EAB interpretations of statutes administered by EPA will receive no deference in the

132. *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507).

133. *Id.* at 1134.

134. 40 C.F.R. § 1.25(e) (2011).

135. EAB's own statement of purpose on its website. *Environmental Appeals Board*, EPA.GOV, <http://www.epa.gov/eab/> (last visited Oct. 1, 2011) (emphasis added).

Ninth Circuit. This same analogy will apply to the decisions of every similar non-policymaking sub-entity of every federal administrative agency that is reviewed in the Ninth Circuit.

An example will help illustrate why the parallel application of *Valladolid* to other agencies can be unsettling to the energy sector. Assume the EPA makes a pronouncement concerning the meaning of a statute it is charged with administering. Further assume that the pronouncement was not formed as the result of a notice and comment process. If that pronouncement becomes an issue in a proceeding before the EAB, the EAB is likely to rely on the EPA's pronouncement for its ruling. Similarly, many businesses will have relied on the EPA's pronouncement for determining their legal obligations. However, assuming the Ninth Circuit would use the same rationale as it used in *Valladolid*, the Ninth Circuit would give no deference to the EAB, because it is not a policymaking body.¹³⁶ In turn, that would mean the Court would also give no deference to the EPA's pronouncement, placing businesses at risk of liabilities they were unlikely to have foreseen.¹³⁷

EPA currently administers thirty-three different statutes,¹³⁸ from which emanate untold numbers of statutory interpretations. Where those interpretations come up in EAB proceedings, EPA's pronouncements would be subject to no deference in the Ninth Circuit, except where they are formalized as regulations. Consequently, EPA pronouncements relied upon in business policy formulation are subject to abrupt change if EAB rulings are challenged in the Ninth Circuit. For example, consider the hypothetical case where an energy sector entity prevails over an environmental activism group in a hearing before the EAB on an issue involving an EPA interpretation of a statute that is not the basis of a regulation or other formal pronouncement. That same energy sector entity could lose its case on judicial review and thereby find itself retroactively out of compliance with the law, notwithstanding the EAB's decision and the EPA's pronouncement upon which both it and the EAB relied.¹³⁹

For an alternative example of how *Valladolid* can create uncertain risks in compliance, consider that new regulations governing air and water pollution are being contemplated, commented upon, or in revision for final publication.¹⁴⁰ Under the reasoning of *Valladolid*, and in view of what one writer has called a "crackdown" in Clean Air Act enforcement, it is possible that a hard fought concession in an EPA interpretation could be subsequently lost if raised in an EAB proceeding and subsequently reviewed in the Ninth Circuit because the EAB is not a policymaking body.¹⁴¹

136. *Valladolid*, 604 F.3d at 1130.

137. The risk can be mitigated to the extent that the Ninth Circuit's future decisions can be predicted.

138. CQ PRESS, FEDERAL REGULATORY DIRECTORY: THE ESSENTIAL GUIDE TO THE HISTORY, ORGANIZATION, AND IMPACT OF U.S. FEDERAL REGULATION 73-75 (Steve Pazdan ed., CQ Press, 14th ed. 2010).

139. See, e.g., *Sierra Club, Inc. v. Sandy Creek Energy Assocs., LLP*, 627 F.3d 134 (5th Cir. 2010).

140. See, e.g., Proposed Rule, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Pollutants Reviews, 76 Fed. Reg. 52,738 (Aug. 23, 2011) (to be codified at 40 C.F.R. pts. 60, 63).

141. Gabriel Nelson, *Benefit of Clean Air Act Rules to Reach \$2T, EPA Says*, N.Y. TIMES, Mar. 1, 2011, <http://www.nytimes.com/gwire/2011/03/01/01greenwire-benefits-of-clean-air-act-rules-to-reach-2t-ep-41433.html>.

Naturally, economic policy considerations are invoked whenever judicial activity imposes new risks on existing businesses. Judicially imposed regulatory changes are categorically different from typical administratively imposed regulatory changes. Many administrative activities must be published in the Federal Register,¹⁴² which businesses and their attorneys are able to easily monitor. Moreover, where notice and comment rulemaking is involved, publication is required,¹⁴³ and the process can take a long time before a final rule results.¹⁴⁴ Arguably, similar processes are at work in the judiciary, because many records are publicly available and judicial processes can take a long time, allowing for people to discover litigation that is in process. However, regulatory updates are published in the Federal Register, where they may be reviewed by category, but court cases are typically published chronologically by region, except where a specialized slip reporter is available. Consequently, monitoring regulatory change can often be easier than monitoring changes in the law occasioned by judicial decisions. Moreover, most significant regulatory changes involving notice and comment rulemaking are subject to a thirty-day notice by publication prior to the earliest effective date of the regulation.¹⁴⁵ Federal judicial judgments are often of immediate effect. Additionally, a judgment that changes the way an agency interprets a statute also creates exposure to liability for past actions that were in compliance with the agency but not in compliance with the court's new interpretation. The less visible notification, retrospective exposure to liability, and sudden impact of judgment differentiates court action from administrative action.

Jeffrey Pfeffer and Gerald Salancik's classic theory on the external control of organizations illuminates the economic dangers imposed on businesses by sudden changes in regulatory obligations:¹⁴⁶

[O]rganizations survive to the extent that they are effective. Their effectiveness derives from the management of demands This problem would be simplified if organizations were in complete control of all the components necessary for their operation. However, no organization is completely self-contained. Organizations are embedded in an environment comprised of other organizations. They depend on those other organizations for the many resources they themselves require. Organizations are linked to environments by . . . a social-legal apparatus defining and controlling the nature and limits of these relationships. . . . When environments change, organizations face the prospect either of not surviving or changing their activities in response to these environmental factors.¹⁴⁷

Theoretically, business entities cannot ignore regulatory changes or manage their responses to such changes poorly and still survive.¹⁴⁸ So, one measurement of organizational effectiveness is an entity's management of an environment of uncertainty caused by sudden changes in regulatory requirements.

142. 5 U.S.C. §§ 552(a), 553(a) (2006).

143. *Id.* § 553(a).

144. *Id.* § 553(c).

145. *Id.* § 553(d).

146. JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* (1978).

147. *Id.* at 2-3.

148. *Id.* at 3.

However, there are special challenges in forecasting how businesses might manage a future large and abrupt change in regulatory obligations. Organizations vary in available capital to spend on scanning the environment. The cost of monitoring every Federal Register entry and every federal court case concerning an agency interpretation is beyond most businesses. Generally, attempting to protect against all risks could be more expensive than protecting against none. If protecting against no risks can theoretically lead to organizational demise,¹⁴⁹ certainly protecting against all risks could have the same effect by directing too many resources away from an organization's core business activities and toward risk avoidance activities.¹⁵⁰

Arguably, business organizations could take a middle path to reduce their exposure by staying abreast of activities in regulatory areas having a foreseeable nexus with their operations. However, many clients do not like to pay directly for legal research.¹⁵¹ Even so, legal research is often consumed indirectly by paying employees to attend training sessions and conferences that include legal updates. An external control theory of organizational action suggests that the more a business is exposed to sudden regulatory change, the more likely it will acquiesce to increased information costs in order to better manage that threat to its existence.¹⁵² The question for Congress and the Supreme Court to address is whether this is an acceptable court-imposed burden on businesses. If the burden is not acceptable, the law of deference to agency statutory interpretations must be clarified in order to avoid the costs imposed on businesses by sudden changes in regulatory obligations. One possible solution is to prevent the judiciary from avoiding deference merely because the decision under review was made by a non-policymaking sub-entity if the sub-entity's interpretation was shared by a policymaking body.

B. Impact on Employers' Insurance Costs and Liabilities

The impact of *Valladolid* on workers' compensation risks and expenses should not be underestimated. Whether injuries occurring outside of the geographic scope of the OCS are covered by OCSLA benefits has substantial liability and cost implications. These ramifications of increasing the scope of OCSLA benefits coverage to employees on land will be most burdensome to companies engaged in mineral exploration and extraction activities on the OCS that also have operations on land to or from which employees, material, and minerals may move. One clear cost implication arises from the fact that OCSLA benefits are greater than state workers' compensation benefits, which relate to higher premium costs for coverage.¹⁵³ Because of the insurance industry

149. *Id.*

150. The possibility of overly zealous risk avoidance behavior is real. For example, there is evidence that individuals are prone to choosing insurance costs well above the expected value of the insurance benefit. Justin Sydnor, *(Over)insuring Modest Risks*, 2 AM. ECON. J.: APPLIED ECON. 177, 177 (2010), available at <http://www.aeaweb.org/articles.php?doi=10.1257/app.2.4.177>.

151. Ian Gallacher, "Aux Armes, Citoyens!:" *Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. TOL. L. REV. 1, 10 n.50 (2008).

152. JEFFREY PFEFFER & GERALD SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE 3 (1978).

153. California's workers' compensation benefits amounted to fifty-two weeks of payments. *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126 (9th Cir. 2010); Petitioner's Appellate Brief, *Valladolid*,

practice of experience rating, it is not possible to say what any one employer's cost increase might be because insurer experience rating practices and individual insureds' risk profiles differ.¹⁵⁴ Under experience rating, insurers adjust workers' compensation premiums according to the insurer's experience with claims by the company's employees.¹⁵⁵ Premiums are likely to increase significantly based on the assumption that premiums will increase proportionally to claim costs.¹⁵⁶

Liability for workers' compensation claims invokes another multitude of risks. It is fair to say that the Ninth Circuit's holding invokes a wider scope of coverage for OCSLA benefits than the DOL's situs-of-injury requirement because it permits coverage of injuries without regard for where the injury occurred. This sudden increase in the scope of covered employees could result in an insurance gap. Specifically, employers may have land based employees who are not covered by OCSLA qualified insurance,¹⁵⁷ or whose jobs are not rated for OCSLA risks,¹⁵⁸ yet whose injuries may be found to be OCSLA qualified under *Valladolid*.

This poses three problems for businesses. First, assuming an insurance company grants a claim for OCSLA benefits to an employee whose risk category did not contemplate such a hazard, the employer will face an increase in premiums for every similarly situated employee during the next premium audit. Second, the employer may face cancellation of its workers' compensation coverage for failing to properly classify the risk category of an injured land-based employee.¹⁵⁹ Third, the claim may be denied or incompletely covered,

604 F.3d 1126 (No. 08-73862), 2009 WL 3651945 at *4. OCSLA death benefits continue for the entire period of widowhood, which could continue for decades. 33 U.S.C. § 909(b). Under similar facts as *Valladolid*, a period of widowhood exceeding two years begins accruing a higher total cost of the death benefit under OCSLA compared to the California state workers' compensation scheme.

154. NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., EXPERIENCE RATING (2004), available at http://www.ncci.com/media/pdf/abc_Exp_Rating.pdf

155. *Id.*

156. A substantial increase would likely occur because the cost of providing benefits for the entire period of widowhood under LHWCA will often likely substantially exceed the cost of providing benefits for only two years under state workers' compensation. This concern is somewhat mitigated by the fact that not every land based employee's workplace injury is likely to be found to result from operations on the OCS. The Ninth Circuit and Third Circuit rulings leave open where, exactly, the line should be drawn. Under but-for causation or the Ninth Circuit's substantial-nexus test, subject to statutory exclusions, a court could hold that every employee injury was a result of operations on the OCS shelf and eligible for OCSLA benefits if the employer's entire revenue stream involved mineral exploration or extraction on the OCS. Neither but-for causation nor the substantial nexus test invoke any sort of *Palsgraf*-like temporal or spatial scope of coverage to help employers and insurers understand who must be covered by OCSLA benefits and who needs only to be insured under the state's workers' compensation program. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928).

157. See generally 20 C.F.R. §§ 703.101-120 (2011); see also DEP'T OF LABOR, LONGSHORE AUTHORIZED CARRIERS AND SELF-INSURED EMPLOYERS (2011), available at <http://www.dol.gov/owcp/dlhwc/lscarrier.htm>.

158. *Zurich Specialties London, Ltd. v. Bickerstaff, Whatley, Ryan & Burkhalter, Inc.*, 650 F. Supp. 2d 1064, 1068 (C.D. Cal. 2009) (under California law, insurers may exclude risks if the risk is clearly and unmistakably listed in the policy).

159. If the insurance company concludes that the employer's risk assignment to the employee making the claim was fraudulent, the claim might not be paid and the policy might be cancelled, depending on the terms of the contract and the jurisdiction in which a party seeks its enforcement.

leaving the employer with direct liability for the uninsured hazard.¹⁶⁰ This is possible because not every insurer is rated to cover OCSLA benefits.¹⁶¹ Additionally, not every workers' compensation policy covers every risk.¹⁶²

V. CONCLUSION

Ordinarily, a tragedy like Mr. Valladolid's workplace accident would not impact nine states and Guam.¹⁶³ However, the Ninth Circuit's decision in *Valladolid* has left Gulf Coast and West Coast businesses operating under different hazards and insurance costs because the scope of OCSLA's LHWCA benefits extension differs between the jurisdictions. Moreover, court deference to agency statutory interpretations remains an area of the law likely to result in circuit splits. The majority in *Mead* found that Justice Scalia's dissent, seeking to simplify the legal topic of judicial deference to agency statutory construction, is incompatible with varying degrees of deference communicated to the Court by Congress.¹⁶⁴ Consequently, the co-existence of *Skidmore* and *Chevron* is likely to continue to demand some level of deference analysis from courts in every case where Congressional intent is unclear.¹⁶⁵ Naturally, Congress can step in and clarify the scope of OCSLA's extension of LHWCA. However, it is not clear Congress can set the ground rules for Article III courts' deference to administrative rules without running into problems with separation of powers doctrine¹⁶⁶ and non-delegation doctrine.¹⁶⁷

160. See, e.g., *Pacific Island Navigation Co. v. Fireman's Fund Ins. Co.*, 406 F.2d 1179, 1180, 1183 (9th Cir. 1969) (insured's claim was denied because the policy covered *only* LHWCA hazards and, presumably, the opposite is also possible; that a claim may be denied because a policy excludes LHWCA claims. Prior to *Valladolid*, an employer may reasonably have had one policy for OCS situated employees and another for its land based employees that excluded LHWCA hazards.)

161. See generally 20 C.F.R. §§ 703.101-120; see also DEP'T OF LABOR, LONGSHORE AUTHORIZED CARRIERS AND SELF-INSURED EMPLOYERS (2011), available at <http://www.dol.gov/owcp/dlhwc/lscarrrier.htm>

162. See, e.g., *Pacific Island Navigation Co.*, 406 F.2d at 1180, 1183 (9th Cir. 1969) (insured's claim was denied because the policy covered *only* LHWCA hazards and, presumably, the opposite is also possible; that a claim may be denied because a policy excludes LHWCA claims. Prior to *Valladolid*, an employer may reasonably have had one policy for OCS situated employees and another for its land based employees that excluded LHWCA hazards).

163. 28 U.S.C. § 41 (2006).

164. *United States v. Mead Corp.*, 533 U.S. 218, 238 (2001); see also *id.* at 239 (Scalia, J., dissenting) (arguing in favor of empowering agencies under *Chevron* wherever a statute may be ambiguous, Justice Scalia lamented that the Court will be sorting out the much more complex *Mead* doctrine for years to come).

165. *Id.* at 238.

166. Although some administrative agencies have adjudicatory powers, federal agency adjudications are subject to judicial review. 5 U.S.C. § 702 (2009). A Congressional enactment requiring federal courts to defer to administrative agency interpretations of statutes would put agencies in the traditional role of courts as interpreters of laws, because Article III, § 1 of the Constitution vests judicial power of the federal government in a single Supreme Court. *Marbury v. Madison*, 5 U.S. 137, 177 (1807). It seems likely that the Supreme Court would find any Congressional effort to control Article III courts' deference to agency interpretations as a violation of the separation of powers doctrine, and strike it down as "repugnant to the constitution." *Id.* at 177, 180.

167. Specifically, if Congress were to statutorily require some level of judicial deference to agency interpretations, it could be seen as elevating agency interpretations nearer to enacted legislation. Such an elevation could be construed as an overly powerful delegation of legislative authority in violation of Article I, § 1 of the Constitution, which vests *all* legislative powers of the federal government in Congress (not its administrative agencies).

The *Valladolid* case brought to light a problem in the doctrine of judicial deference. The situs-of-injury rule was accorded no deference for the fortuitous reason that it came under judicial review through the BRB rather than the DOL. Consequently, the Court gave the situs-of-injury rule no deference and arrived at a completely different interpretation through statutory construction. This is a significant problem for businesses that rely on agency pronouncements to determine how to conduct their operations. Every agency rule that is not arrived at in a manner at least as formal as notice and comment rulemaking, and which is subject to judicial review after adjudication by a non-rulemaking sub-entity of the agency, will receive no deference from the court. Consequently, the agency's rule that businesses have relied on to manage their affairs will be subject to abrupt change, which may open the door to liability for past acts that *were in compliance with agency rules*, and which will impose the costs of changing current practices to comply with the reviewing court's ruling. DOL's interpretation of the scope of OCSLA's extension of LHWCA benefits is only one example of this problem. Of course, the logic of *Valladolid* could be applied in other circuits, pertaining to other agency sub-entities. However, the Ninth Circuit's treatment of EAB decisions that rely on informally promulgated EPA rules will be of particular importance to the energy sector.

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