



Environmental Update

July 2024

Supreme Court's Overruling of *Chevron* Delivers Blow to Federal Administrative State

In *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep't. of Commerce*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882 (June 28, 2024), a 6-3 decision, the U.S. Supreme Court signaled that it would inter the *Chevron* doctrine, a 40-year-old administrative law principle that required lower federal courts to defer to "permissible" agency interpretations of the federal statutes they administer, plunging regulated entities into a new era of multijurisdictional legal uncertainty.

The justices' pathway to reach this new era of a more muted administrative state came by way of a rather obscure issue involving a National Marine Fisheries Service (NMFS) rulemaking under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). In both *Loper* and *Relentless*, groups of fishermen challenged a NMFS rule that allowed the New England Fishery Management Council to require payment for observers to monitor whether a fishery was adhering to the council's fishery management plan. They argued that the Magnuson-Stevens Act did not authorize NMFS to compel them to pay for observers required by the fishery management plan. At the appellate level, the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of Appeals for the First Circuit rejected the fishermen's challenges, citing the application of *Chevron* deference. The Supreme Court thereafter granted certiorari on the limited question of whether the *Chevron* doctrine should be overruled or its application clarified.

Chevron Doctrine

The so-called "*Chevron* doctrine," eponymous for the Court's decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), required federal courts reviewing federal agency actions under the Administrative Procedure Act (APA) to apply a two-step analytical

framework in determining when to defer to an agency's interpretation of a "silent" or "ambiguous" statutory question. See, e.g., *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009) (the "discharge of any pollutant" under the Clean Water Act); *Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("underground injection" under the Safe Drinking Water Act); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 840 (1984) ("stationary source" under the Clean Air Act); *Nw. Ecosystem All. v. United States Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) ("species" under the Endangered Species Act); *In re ACF Basin Water Litig.*, 554 F. Supp. 3d 1282, 1297 (N.D. Ga. 2021) ("major" and "seriously affect" under the Water Supply Act); *Teva Pharms. USA, Inc. v. FDA*, 514 F. Supp. 3d 66, 93 (D.D.C. 2020) ("protein" under the Public Health Service Act); *Relentless, Inc. v. Dep't of Comm.*, 62 F.4th 621, 629 (1st Cir. 2023) ("observers" and "at-sea monitors" under the Magnuson-Stevens Act).

At the first step,¹ a judge determined "whether Congress had directly spoken to the precise question at issue ... employing traditional tools of statutory construction." *Loper Bright Enters.*, 2024 U.S. LEXIS 2882, at *39 (citing *Chevron*). But if the "statute was silent or ambiguous with respect to the specific issue[.]" then the judge moved to the second step, which required deference "to the agency if it had offered a permissible construction of the statute, even if not the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at *39-40 (citing *Chevron*). Specifically, federal courts deferred to regulators when an agency acted through notice-and-comment rulemaking or formal adjudications. See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Examples of

such action in the environmental context are commonplace and include:

- The designations of endangered species under the Endangered Species Act by the U.S. Fish and Wildlife Service (see *Nw. Ecosystem All.*, 475 F.3d at 1140)
- Formal adjudicatory decisions by the Environmental Appeals Board (see *Resisting Envtl. Destruction on Indigenous Lands v. EPA*, 716 F.3d 1155, 1161 (9th Cir. 2013); *In re Lyon Cnty. Landfill*, 406 F.3d 981, 984 (8th Cir. 2005))
- Decisions by the EPA to conduct a removal action under CERCLA (see *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1233 (9th Cir. 2005))
- Approval or disapproval of State Implementation Plans under the Clean Air Act (see *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 845 (5th Cir. 2013))
- Approval of a Title V stationary source operating permit program under the Clean Air Act (see *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 845 (5th Cir. 2013))
- Determinations of the scope of National Pollutant Discharge Elimination System permits (see *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001))

But no longer. To “embrace[] the [Constitution’s] Framers’ understanding of the judicial function...” and because the framers envisioned that courts would have the final say on the interpretation of laws – the justices found the *Chevron* doctrine inconsistent with these separation of powers principles. 2024 U.S. LEXIS 2882 at *24. The Court reached back to the era of The New Deal, which was the time of the expansion of the administrative state and found nothing in the case law that approximated the *Chevron* doctrine. What’s more, even then, courts “continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.” *Id.* The justices found that even the text of the APA enacted in 1946 failed to support the doctrine. Section 706 directs that “to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706.

Aside from the textual and separation of powers concerns, the Court reasoned that despite its long-standing precedent, principles of stare decisis indicated that the

Chevron doctrine should be overturned. In the Court’s mind the decision was poorly reasoned because it conflicts with the text of the APA and separation of power principles because “an ambiguity is simply not a delegation of law interpreting power.” *Id.* at *42 (internal citation omitted). The doctrine also proved unworkable in practice because the concept of ambiguity continually evaded “meaningful definition.” *Id.* at 52. Moreover, the Court remarked that “permissible” agency interpretations were useless if a court could render a better interpretation after applying “all relevant interpretive tools.” The Court also reasoned that the doctrine failed to provide those affected with legal certainty because a “permissible interpretation” from the same agency can differ across presidential administrations and often not have any relation to a matter within the agency’s technical expertise. For many of the reasons discussed, the Court has not deferred to an agency interpretation since 2016.

Now, under *Loper Bright*, federal courts “may not defer to agency interpretations of the law simply because a statute is ambiguous” or silent on an issue. *Id.* at *62. Instead, the courts “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority[.]” *Id.* at *61-62. Eliminating *Chevron* deference, however, does not mean that courts may **ignore** agency interpretations. *Loper Bright* catapults the administrative state back to “*Skidmore* deference,” the default established by the Supreme Court during the Roosevelt administration in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Traditionally, *Skidmore* deference is applied to non-binding agency interpretations “while not controlling upon the courts by reason of their authority, [agency interpretations] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case 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.” *Id.* at 140.

Reading the Tea Leaves in a Post-Chevron Landscape

It is unlikely that *Loper Bright* is the end of administrative law, but federal agencies are definitely on the ropes – and

have been for past eight years. The official end of *Chevron* deference means it will be harder for federal agencies to issue rulemakings and enforce them due to more exacting judicial review. It also means that regulated entities will more aggressively challenge agency rules and decisions and that now agencies will more often lose these battles in court. Federal agencies, however, are already grappling with this reality given the waning application of *Chevron* before the Court's *Loper Bright* decision. The administrative state will hobble along, however, because it must continue to issue regulations required by most federal environmental statutes. Federal agencies will just have to be more careful, deliberate, and nimble and learn to regulate in the absence of *Chevron* deference.

The *Loper Bright* decision will make it more difficult for the executive branch to achieve national uniformity on climate action, a major focus of the current administration. The expansion of the Major Questions Doctrine in cases like *West Virginia v. EPA* already provides the courts with a basis to determine that Congress did not delegate authority to address issues of major political or economic significance without a clear statement. But now, with courts the final arbiter on the "best interpretation" of ambiguous statutory terms, efforts by agencies like the EPA and SEC to address climate change may be splintered and reduced to appellate circuit level splits, if even allowed to proceed to a ruling on the merits. Further, regulated entities that operate across multiple federal circuits will find themselves more likely the subject of contradictory interpretations of the same federal law. For instance, the First Circuit's interpretation of "discharge" under the Clean Water Act might conflict with the Eleventh Circuit's or the Ninth Circuit's.

Any action by Congress in response to the decision seems extremely unlikely. For one, the current congressional state of play and mechanisms like the Senate's filibuster rule already make it difficult for Congress to pass legislation. Second, pronouncements that Congress at some future point in time should just speak up to diffuse statutory ambiguity or silence on a particular issue, ignore that it

already possesses the capability to overturn rules promulgated by federal agencies under the Congressional Review Act.

The outer limits of the *Loper Bright* decision are murky. While the Court left intact agency discretion to make factual and technical determinations based on express delegations by Congress, it provided less clarity on what the "full interpretative toolkit" comprises and what the roadmap is for a court to reach the "best" reading of a statute that is silent or ambiguous on a particular term. There likely will be additional litigation on these points.

Overarchingly, the *Loper Bright* decision is an invitation for the regulated community to challenge agency rulemakings and adjudications on everything from clean water to clean air and beyond. While things settle, the Court's reluctance to overrule precedent based on *Chevron* deference will leave both the environmental and regulated communities unsure of which already settled environmental regulations to revisit.

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¹ We note that Justice Roberts, writing for the Court, articulates an initial threshold step referred to as Step 0. "We have said that *Chevron* applies only 'when it appears that 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.'" *Loper Bright Enters.* at 2024 U.S. LEXIS at *49 (internal citations omitted).