

## After Chevron: Environmental Law May Face Hurdles

By **Duke McCall, Ella Foley Gannon and John McGahren** (July 9, 2024, 5:38 PM EDT)

*On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking and litigation across practice areas.*

The U.S. Supreme Court's opinion in the *Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce* cases — overruling the doctrine of deference to agency interpretations of ambiguous federal statutes established 40 years ago in *Chevron USA Inc. v. Natural Resources Defense Council Inc.* — will have far-reaching implications for the interpretation, administration and promulgation of U.S. environmental laws and regulations.

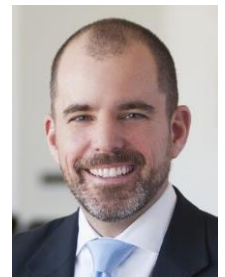
Although not recognized as such at the time it issued, the court's 1984 Chevron ruling proved to be a seminal decision guiding the interpretation of agency regulations by lower courts under virtually every major federal statutory program, including those intended to protect human health and the environment.

The clear, immediate impact of the court's decision in *Loper* and *Relentless* to end Chevron deference will be to render recently promulgated environmental regulations more vulnerable to legal challenges. No longer will courts be required to defer to the agency's construction of an ambiguous statute.

The court's decision in *Loper* and *Relentless*, and its emphasis on the role of courts in reviewing agency actions, also raises broader questions about whether courts are likely to afford deference to challenged agency actions on issues unrelated to the interpretation of ambiguous statutes.

The effect of the court's decision also is likely to extend beyond the interpretation and administration of existing environmental laws and regulations to influence the promulgation of future laws and regulations.

Ultimately, *Loper* and *Relentless* could prove to be a watershed decision as Chevron itself came to be viewed over time.



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## **The Chevron Decision**

The events leading up to the court's decision in Chevron began in 1980, when the U.S. Environmental Protection Agency promulgated a regulation under the Clean Air Act addressing the installation or modification of a major stationary source of air pollution.

The EPA's regulation provided that, for stationary sources in nonattainment areas — areas not meeting national ambient air quality standards — a permit was required "whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant."

The following year, after a change in presidential administrations, the EPA reevaluated its definition of what constitutes a "source" under the Clean Air Act, concluding that a plantwide definition should apply in all areas, including nonattainment areas.

Under the EPA's revised definition, an existing plant with several pollution-emitting components could install or modify a piece of equipment without a permit if the alteration did not increase the total emissions from the plant.

Environmental groups, including the National Resource Defense Council, filed a petition for review of the EPA's revised definition in the U.S. Court of Appeals for the District of Columbia Circuit, arguing that the EPA's action was contrary to law. The court agreed and set aside the 1981 regulation.

Chevron, which had intervened in the proceedings, filed a petition for certiorari in the Supreme Court, which the court granted. In a unanimous decision, the Supreme Court reversed the D.C. Circuit, reasoning:

If ... the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Finding the Clean Air Act ambiguous with respect to what constitutes a stationary source and that the EPA's plantwide definition was a permissible construction of the term "stationary source," the court concluded that the EPA's interpretation of the statute was entitled to deference.

## **The End of Chevron Deference**

The Supreme Court's decision in the Loper and Relentless cases expressly overrules the Chevron deference, albeit not the Clean Air Act holding of Chevron.

Writing for a six-justice majority, Chief Justice John Roberts opined that "Chevron gravely erred" in determining that statutory construction "is fundamentally different just because an administrative interpretation is in play."

The majority reasoned that the Administrative Procedure Act, which Congress enacted as a check on administrative zeal — and on judicial deference to administrative zeal — provides that courts, not agencies, decide "'all relevant questions of law' ... even those involving ambiguous laws."

Accordingly, courts "must exercise independent judgment in determining the meaning of statutory provisions." The majority acknowledged that courts

may seek aid from the interpretations of those responsible for implementing particular statutes [because] [s]uch interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." ... But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

While the majority describes Chevron as a watershed decision, whether the court's decision to end Chevron deference likewise will prove to be of comparable import is uncertain for at least three reasons.

First, the court stated that its decision to overrule Chevron "do[es] not call into question prior cases that relied on the Chevron framework." Reliance on Chevron is "just an argument that the precedent was wrongly decided," which is not enough to overrule such precedent.

Second, as the majority discussed at length, the court has "spent the better part of four decades imposing one limitation on Chevron after another." Indeed, the Supreme Court has not itself applied Chevron in deciding a challenge to agency regulations in nearly a decade — although lower courts have continued to apply Chevron, albeit inconsistently.

Finally, recent decisions of the Supreme Court articulating and applying the major questions doctrine, including the 2022 ruling in *West Virginia v. EPA*, have called into question the authority of federal agencies to regulate on issues of national political or economic significance absent clear authorization from Congress.

Ultimately, whether the end of Chevron deference proves to be a breaking point in the interpretation, administration, and promulgation of our nation's environmental laws, as some predict, it undoubtedly will have a significant impact, both in the near term and in the future, in each of these areas.

### **Interpretation of and Legal Challenges to Existing Environmental Regulations**

Because it eliminates the ability of the executive branch to argue that a court should defer to the agency's construction of an ambiguous statute, the court's decision to overrule Chevron deference will render recently promulgated regulations more vulnerable to legal challenges.

In the environmental context, this includes a number of important laws and programs such as the recently adopted amendments to:

- National Environmental Policy Act regulations;
- The EPA's fossil fuel regulations for power plants, as well as its tailpipe emissions and corporate average fuel economy standards;
- The Bureau of Ocean Energy Management's offshore wind regulations;
- The definition of the "waters of the United States" under the Clean Water Act;
- Toxic Substances Control Act risk evaluations;

- Numerous regulations interpreting the climate change provisions in the Inflation Reduction Act; and
- Regulations related to per- and polyfluoroalkyl substances under the Safe Drinking Water Act, Comprehensive Environmental Response Compensation and Liability Act, Resource Conservation Recovery Act and Toxic Substances Control Act.

For challenges to such regulations brought under the APA, a six-year statute of limitations should apply, although this timeline may be expanded even further considering the Supreme Court's July 1 decision in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, which held that the APA statute of limitations period may be tolled until the plaintiff is injured by a final agency action.

Other statutory programs, such as the Clean Air Act, have a more limited statute of limitations, so it will be critical to consider the authorizing legislation to determine which regulations are subject to challenge.

The elimination of Chevron deference also raises questions about the respect courts should — and will — accord challenged agency decisions on issues unrelated to the interpretation of ambiguous statutes.

For example, while the court recognized in overruling Chevron deference that fact-finding remains the job of the agency, it also acknowledged that there will be complex issues involving mixed questions of law and fact, requiring courts to parse questions of statutory interpretation from agency factual determinations.

Similarly, the court acknowledged that courts must respect express congressional delegations of authority to an agency, but observes that it is the role of the courts to ensure that the agency acts within the authority delegated to it.

Both questions present the potential for a further erosion of agency authority and are likely to engender significant legal challenges and potentially conflicting decisions from lower courts.

In the environmental regulatory context, this could prove significant, particularly for the regulated community, which often faces compliance requirements in multiple jurisdictions.

### **Promulgation of New Environmental Regulations**

For agencies tasked with implementing U.S. environmental laws, the impact will extend beyond defending existing regulations to the promulgation of new regulations.

Agencies likely will devote significant additional effort to creating an administrative record for new regulations to support the reasonableness of decisions made, to support the correctness of those decisions, and to confirm that the agency is acting within the scope of the authority Congress delegated to it.

This is likely to be particularly true for regulations addressing issues of significant public interest such as climate change.

## **Enactment of New Environmental Laws**

The court's decision ending Chevron deference is likely to affect the enactment of new environmental laws as well.

Congress likely will seek to be more explicit in the future when and in how it grants agencies authority to promulgate regulations under new laws — something that also is necessary to address the major questions doctrine articulated in *West Virginia v. EPA*.

Congress also may seek to amend existing laws to effectuate congressional intent on issues where current laws are silent or ambiguous — a task that is likely to prove challenging in the current political environment.

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