

After Chevron: NRC Is Shielded From Loper Bright's Effects

By **Ryan Lighty** and **Scott Clausen** (August 5, 2024, 3:53 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.



Ryan Lighty

The U.S. Supreme Court's recent *Loper Bright Enterprises v. Raimondo* decision overturned its 1984 decision in *Chevron v. Natural Resources Defense Council*, which, over the last 40 years, had become a fundamental doctrine in administrative law.

The doctrine of Chevron deference had instructed reviewing courts to defer to agency interpretations of ambiguous statutory provisions if they were a permissible construction of the statute. While many agencies relied on Chevron deference to defend challenges to their rulemakings and other regulatory actions, the Nuclear Regulatory Commission has rarely needed to do so.



Scott Clausen

Even before the Chevron decision, courts granted the NRC broad deference, in recognition of Congress' unique delegation of discretionary authority in 1954 via the Atomic Energy Act, or AEA. Comparatively, this unique posture could insulate certain commission actions from the additional judicial scrutiny that other federal agencies will face in the post-Chevron era.

Below, we examine the AEA's delegations of authority to the NRC, court decisions granting deference to the commission, and the Supreme Court's recognition in *Loper Bright* that Congress may delegate specific authority to agencies — within limits — that will affect judicial review going forward.

The Atomic Energy Act

The AEA differs from many federal agency organic statutes because of its broad delegation of discretionary regulatory authority to the NRC — and its predecessor, the U.S. Atomic Energy Commission.

For example, Section 161(b) of the AEA authorizes the NRC to "establish by rule, regulation, or order, such standards ... as the Commission may deem necessary or desirable to promote the common defense

and security or to protect health or to minimize danger to life or property." Similarly, the AEA directs the commission to establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material, source material and byproduct material.

This broad delegation — which came on the heels of the end of World War II, and enabled the hoped-for transition to peaceful uses of atomic energy — was consciously deferential to the technical expertise of the dedicated, independent agency.

Notably, Congress declined to set specific guidelines or requirements for how the NRC should proceed in achieving the statutory objectives of promoting the common defense and security and protecting public health and safety. As a result, the commission has viewed the statute as supporting its broad discretion to enact regulations, so long as it determines the regulations are necessary to achieve those statutory objectives.

The NRC thus typically includes in many of its rulemakings a statement that it has made such a determination, and it provides the bases for this determination in a regulatory analysis document.

Long-Standing Pre-Chevron Deference to the NRC

In 1961, shortly after Congress passed the AEA, the Supreme Court recognized that the act conferred broad authority to the AEC to issue regulations it determined necessary for radiological safety, in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*.

Following that decision, reviewing courts have regularly highlighted that Congress bestowed broad discretion on the NRC, and specifically authorized it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the AEA. The U.S. Court of Appeals for the D.C. Circuit described this congressional authorization as "virtually unique" in its 1968 decision in *Siegel v. Atomic Energy Commission*, because Congress provided no instructions to the commission on how to achieve the statutory objectives.

In 1991, the D.C. Circuit further noted, in *Massachusetts v. NRC*, that in recognition of the broad regulatory authority granted to the commission, courts have bestowed "heightened deference" to the agency "that flows from its broad statutory mandate" without relying on, or citing, *Chevron*.

As the U.S. Court of Appeals for the Third Circuit put it in 1979, in *Westinghouse Electric Corp. v. NRC*, Congress "delegated authority in the delicate area of nuclear energy" to the NRC. Even though "[s]ome of the decisions it makes to further its statutory mandate may be unpopular in the nuclear industry, among environmentalists, or with other groups of citizens," Congress "decreed that the agency be independent."

Thus, "it would subvert this design were we to invalidate the challenged NRC action when it appears to be consonant with statutory dictates and not an unreasonable exercise of its discretion."

Accordingly, courts have deferred to the NRC in challenges to the NRC's new reactor licensing rules, safety regulations, adjudicatory decisions, findings of reasonable assurance and enforcement discretion decisions, decisions to grant an operating license, and decisions on whether to modify, suspend, or revoke a license without needing to invoke *Chevron* deference.[1]

In fact, since 1984, fewer than a third of the federal appellate decisions involving challenges to NRC

actions have mentioned Chevron — and in only a small subset of those cases did Chevron affect the outcome.

Loper Bright Seemingly Leaves Intact Judicial Deference to the NRC

The Supreme Court's Loper Bright decision does not appear to disturb the broad deference courts have historically granted to NRC decisions and regulations based on the unique statutory history and text.

To the contrary, the high court recognized that Congress may authorize agencies to "exercise a degree of discretion ... to give meaning to a particular statutory term, ... prescribe rules to 'fill up the details' of a statutory scheme," or "regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'"

In recognizing Congress' ability to delegate discretionary authority to agencies, the court included in a footnote an example referencing AEA Section 206(a)(2) as an example of delegated discretion to an agency to define a statutory term in its regulations.

The court went on to explain that, when the "best reading of a statute is that it delegates discretionary authority to an agency," a reviewing court should "independently interpret that statute and effectuate the will of Congress subject to constitutional limits."

The court later explained that when a court determines Congress delegates discretionary authority to agencies, judges should "independently identify and respect such delegations, police the outer statutory boundaries of these delegations, and ensure that agencies exercise their discretion consistent with the APA." Future cases are likely to shed additional light on the impact and contours of judicial review of administrative exercises of delegated authority — including at the NRC.

Based on these statements, and considering the long-standing recognition of the breadth of AEA's delegation of authority to the NRC, a reviewing court would likely continue to recognize the unique and broad congressional delegation of authority to the NRC to regulate nuclear activities.

At bottom, the NRC is well-versed in tying its regulations and decisions to its delegated authority under the AEA, and providing justifications for those decisions. As a result, the overturning of Chevron appears less likely to materially affect future challenges to NRC actions compared to its sister agencies.

Ryan Lighty is a partner and Scott Clausen is an associate at Morgan Lewis & Bockius LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See *Nuclear Information Resource Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992); *Pub. Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009); *Massachusetts v. U.S.*, 522 F.3d 115 (1st Cir. 2008); *Cnty. of Rockland v. NRC*, 709 F.2d 766 (2d Cir. 1983); *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991); and *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979).