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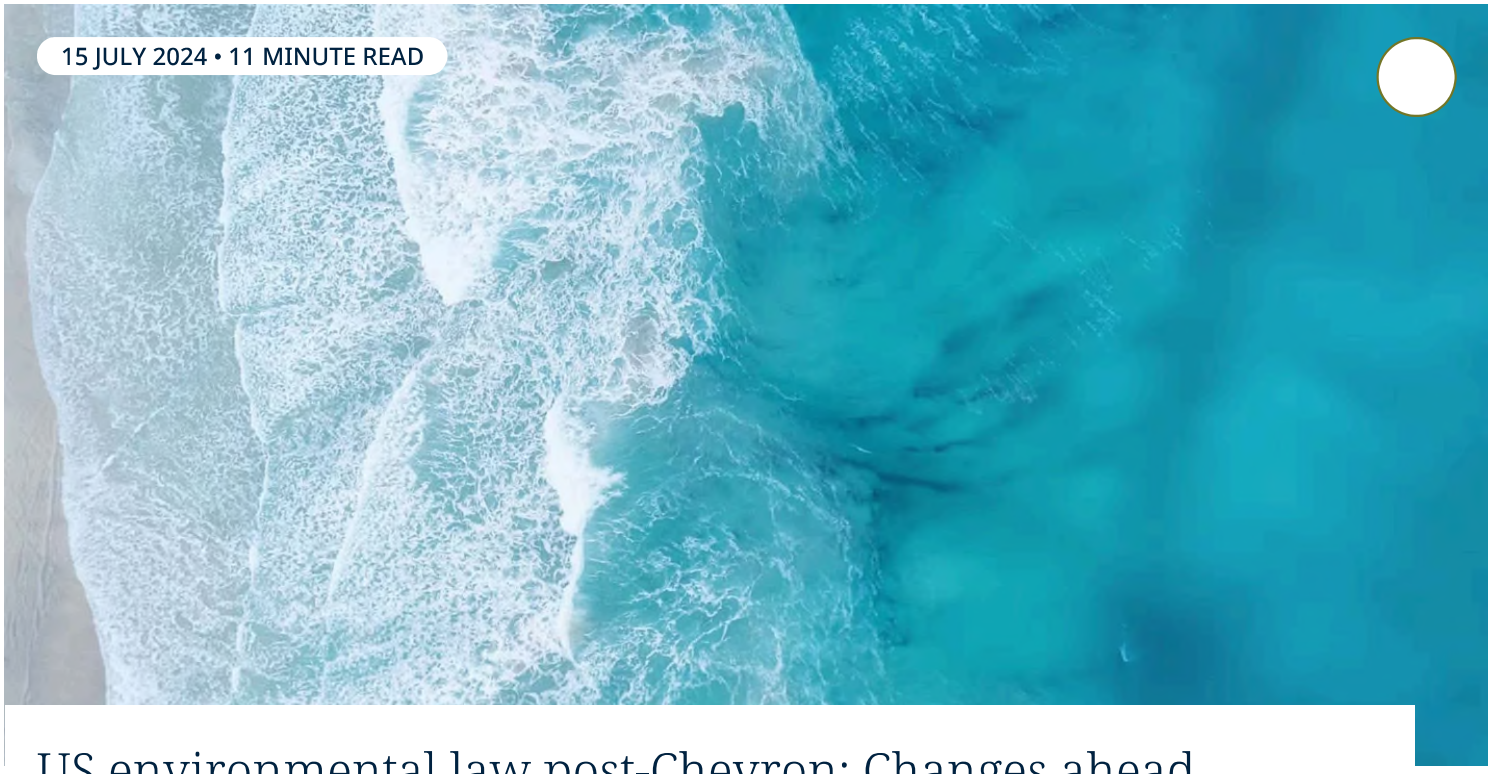

US environmental law post-Chevron: Changes ahead

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A landmark new Supreme Court ruling substantially boosts the power of federal courts to set aside agency rules and actions across the federal government landscape. The effects of this watershed decision on environmental law will be particularly significant.

Many federal environmental statutes provide only general frameworks and directives, leaving the specifics to be developed by agencies and their specialized technical and scientific experts. From air and water governance to contamination cleanups, waste management, toxic substance and pesticide control, and beyond, active federal agencies have driven the development and execution of extensive and complex environmental regulations since the advent of modern American environmental policy.

Those characteristics make the Supreme Court's recent ruling in the consolidated cases *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* (*Loper Bright*) especially impactful for federal environmental agencies and the businesses they regulate. Loper Bright also creates new opportunities for regulated entities to challenge environmental agency regulations and actions.

Loper Bright **overrules** ***Chevron***

The 1984 *Chevron* decision required reviewing courts to defer to federal agencies' reasonable interpretation of ambiguous statutes. In the intervening 40 years, this "*Chevron* deference" doctrine led to federal courts ruling in favor of agencies in most challenges to regulations implementing statutes that were ambiguous or silent on a relevant issue.

As DLA Piper's *Loper Bright alert* details, the Supreme Court's recent decision in *Loper Bright* overruled *Chevron*, holding that the Administrative Procedure Act (APA) requires reviewing courts to independently determine the best controlling interpretation of a statute with no special deference to an agency's interpretation.

Courts may *consider* an agency's interpretation, which "may be especially informative to the extent it rests on factual premises within the agency's expertise," but "courts must exercise [their] independent judgment in determining the meaning of statutory provisions" in most instances. The majority further concluded that "agencies have no special competence in resolving statutory ambiguities" whereas "[c]ourts do."

While the Court noted an exception "when a particular statute delegates authority to an agency consistent with constitutional limits," even then, it cautioned that "courts must respect the delegation, while ensuring that the agency acts within it."

Impact on pending challenges to agency regulations

Like the *Chevron* case, *Loper Bright* involved an agency interpretation of an environmental statute (here, a commercial fishing regulation by the National Marine Fisheries Service). And *Loper Bright*'s impacts are already apparent in environmental cases.

Following the *Loper Bright* decision, the Supreme Court vacated and remanded to the lower courts nine pending cases, including two related to climate and environmental regulation.

Moreover, numerous currently pending challenges to environmental rules and regulations will likely be impacted by Loper Bright's mandate for independent, non-deferential judicial review.

Examples of pending judicial review of environmental regulation that may be affected by Loper Bright's overruling of Chevron include challenges to:

- A US Environmental Protection Agency (EPA) rule defining "toxic waste" under the Resource Conservation and Recovery Act
- An EPA rule delineating notification requirements under the Toxic Substances Control Act (TSCA)
- An EPA rule prohibiting manufacturing, processing, and distribution of methylene chloride for all consumer uses and most industrial uses under the TSCA
- An EPA rule regulating hydrofluorocarbons under the American Innovation and Manufacturing Act
- A Federal Energy Regulatory Commission order finding that a proposed hybrid solar energy facility is a qualifying small power production facility pursuant to the Public Utility Regulatory Policies Act of 1978

- A US Department of Agriculture determination that a pool of water on Petitioner's property constituted a "wetland" under 16 USC § 3822 (the Swampbuster Act), and
- An EPA rule banning the import of chrysotile asbestos under the TSCA.

Looking ahead: Future of environmental policymaking, rulemaking, and regulation

The *Loper Bright* decision is expected to significantly impact the environmental regulatory landscape, influencing the scope and application of existing regulations, how future laws and regulations will be developed and implemented, and the roles of each branch of the federal government and private actors in environmental law and regulation.

Key impacts and affected areas include:

Stricter judicial review of environmental laws

Most directly, the *Loper Bright* decision emphasizes that courts, not executive agencies, hold the power and responsibility to interpret federal statutes. Going forward, courts will independently review and interpret federal environmental statutes, deciding on the *best* interpretation of those laws even where multiple reasonable interpretations may exist. This may result in more frequent invalidation of agencies' interpretations of environmental laws and related regulatory actions.

Potential congressional action

Loper Bright makes clear that ambiguities in federal statutes are *not* invitations for agencies to supply their own interpretations or expand statutes' reach to matters Congress did not address, including new and developing environmental challenges and issues. Congress – not executive agencies – is tasked with enacting federal laws, and courts are responsible for interpreting those statutes.

To the extent that Congress intends to facilitate agencies promulgating valid environmental regulations, Congress will need to enact or amend statutes with greater clarity and specificity than has been the norm. At a minimum, Congress might provide more express and specific delegations of authority to environmental agencies where it determines that agency expertise is essential to the implementation of the statute.

Agency rulemaking restraint

Facing stricter judicial review, executive agencies may over time become more circumspect and restrained in adopting regulations, addressing statutory gaps, and utilizing rulemaking to address situations and new phenomena that Congress either did not anticipate or did not address.

Agencies may also be less likely to implement environmental policies not clearly or specifically founded in a statute.

Agencies remain subject to political pressure to fulfill their regulatory agendas, however, and may forge ahead – at least in the short term – with ambitious regulatory initiatives unless and until they suffer setbacks in court.

***Loper Bright* preserves discretion where expressly delegated or involving fact determinations**

The *Loper Bright* majority maintained that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion" to fill in various details, and specifically noted that several environmental statutes provide some flexibility to EPA to define and enforce certain terms.

While *Loper Bright* emphasized that it is the judiciary's role to determine the constitutional limits of such delegation, the Court also recognized that a reviewing court's role is to "ensur[e] the agency has engaged in reasoned decisionmaking within" the scope of properly delegated authority.

Many federal courts likely will maintain deferential treatment when agencies act pursuant to express delegations – *eg,* when EPA acts under its Clean Water Act (CWA) authority to prescribe effluent limitations that, in its "judgment," are "reasonably … expected to" help attain or maintain "water quality."

In the majority opinion, Chief Justice John Roberts further noted that judicial review of agency *factfinding* is not altered by *Loper Bright*; deferential review under the "arbitrary and capricious," "abuse of discretion," and "substantial evidence" standards are also dictated by the terms of the APA.

Factual determinations are central to many environmental programs, and the development of the factual record will remain critically important for parties to agency enforcement actions, rulemaking participants, and other stakeholders.

Agencies' "power to persuade"

Loper Bright expressly preserves the option for courts to consider agencies' views in determining the "best reading" of a statute.

As set forth in the Supreme Court's 1944 *Skidmore v. Swift* decision, and affirmed in *Loper Bright*, the persuasiveness of an agency's interpretation will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

We therefore expect environmental agencies to more thoroughly flesh out their own interpretive bases in rules, regulations, and informal guidance, to influence courts' interpretive processes as much as possible. We also are likely to see continued, and perhaps increased, input from agencies in the legislative process where they see appropriate opportunities.

It is commonplace for agency staff to assist legislators in drafting bills related to subjects the agency is charged with administering.

Fewer regulatory shifts between presidential administrations

Changes in presidential administrations typically bring changes in agency leadership, policy priorities, and, therefore, agency efforts to interpret statutes. Because it reduces the weight accorded to agency interpretations, the *Loper Bright* decision likely will reduce the amplitude of changes in environmental regulatory or rulemaking positions when there is a change in political administrations.

For example, transitions between Democratic and Republican administrations have often led to changes in EPA's interpretation of the CWA's jurisdiction over "Waters of the United States."

After *Loper Bright*, when courts determine the *best* interpretation of a statute, subsequent administrations will have less flexibility to alter related regulations to align with different administrations' policy goals.

Increased and potentially divergent state environmental regulation

When federal agencies pull back from environmental regulation for any reason, some states' environmental agencies typically fill the breach. After *Loper Bright,* this dynamic may become more prominent.

As federal environmental agencies now face more challenges in regulating industry, state agencies may seek more active roles filling in environmental regulation, including addressing new issues through regulation under state environmental laws (to the extent they are not preempted from doing so by federal statutes). This may lead to more state regulation, but also more variability among state environmental rules and standards.

States notoriously differ in the scope and standards of their environmental laws and requirements, and state courts vary in their degree of deference to state agencies. Disparities in state environmental policies and their scopes and stringency may continue to increase throughout the country.

More opportunities for regulated entities to influence regulation

After *Loper Bright*, congressional offices and judges' chambers will bear more responsibility for how environmental law is implemented than they did under *Chevron*. In addition to participating in agencies' public notice-and-comment processes to influence federal law and policy, regulated entities, environmental organizations, and others may therefore have heightened interest in giving input to lawmakers on the front end or clarifying statutes in court on the back end.

Looking ahead: Environmental litigation and enforcement

The odds have typically been against parties challenging agencies' implementation of environmental statutes. With *Chevron* deference removed and more potential value in appealing to the courts, regulated entities may be more willing to challenge agency rules and decisions.

The Supreme Court in *Loper Bright* specified that preexisting decisions applying *Chevron* deference "are still subject to statutory stare decisis." But the Court's subsequent ruling in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* opens the door to some fresh challenges to long-established regulations.

Corner Post clarified that facial challenges to agency action must be brought within six years of injury to the complaining party, rather than within six years of the agency's final action. The *Corner Post* decision may have limited or no effect on laws that prescribe a specific statute of limitations that is not subject to the APA's general statute of limitations at issue in *Corner Post.* Nonetheless, *Corner Post,* in tandem with *Loper Bright*, is expected to increase the potential for successful challenges to existing federal environmental regulations.

Following *Loper Bright* and other recent Supreme Court decisions, regulated entities and environmental interest groups are more likely to seek out sympathetic courts in pursuit of favorable interpretations of the scope, limits, and impacts of environmental statutes.

In turn, agencies may be more interested in informal resolution of disputes (*eg,* via settlement of court petitions) to avoid precedents that could more broadly limit their regulatory and litigation capabilities against other parties.

Finally, despite *Loper Bright*'s affirmation that a statute may expressly delegate authority to an agency to interpret and implement certain provisions, the Court has made clear that the scope of such delegation is limited by the major questions and other doctrines. See our *Loper Bright* alert.

Broader application of these doctrines could further constrain agency power to regulate under federal environmental statutes. See*, eg*, the Supreme Court's 2022 *West Virginia v. EPA* ruling (applying major questions doctrine to limit EPA authority to regulate emissions under the Clean Air Act).

Watch for our upcoming alert discussing these developing limitations on agency regulatory authority.

DLA Piper's Environmental practice group advises clients across numerous regulated industries, including in environmental and administrative litigation, agency enforcement defense, complex regulatory counseling, and ESG and environmental justice strategy and compliance. We continue to monitor the evolving post-*Chevron* environmental legal landscape. Please contact the authors with any questions or for assistance.

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