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The Future of Environmental Regulation After the Supreme Court Decisions in *Loper Bright* and *Corner Post*

Cynthia A. Faur and Michael Mostow*

In this article, the authors focus on the particular impact of two landmark U.S. Supreme Court decisions on environmental matters.

The U.S. Supreme Court has brought out its hammer to again chip away at the administrative state in two landmark decisions: *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce et al.*,[1] which put an end to the 40 years of *Chevron* deference to administrative agency interpretations of federal laws, and *Corner Post Inc. v. Board of Governors of the Federal Reserve System*,[2] which removed the statute of limitations applicable to claims brought under the Administrative Procedure Act (APA) as a bar to challenges brought by plaintiffs recently impacted by long-standing federal regulations.

This article focuses on the particular impact of these two decisions on environmental matters.

The End of *Chevron* Deference May Result in More of the Same

When one thinks of *Chevron* deference, thoughts often turn to environmental regulation. After all, the original *Chevron* decision concerned the U.S. Environmental Protection Agency's (EPA) interpretation of the Clean Air Act, a statute that grants broad but not well-defined authorities to the EPA Administrator. Over the past 40 years, many environmental regulations have been upheld by courts using the two-step test set forth in *Chevron*, where, when a federal statute is ambiguous, the interpretive tie goes to the agency, whose interpretation will be sustained as long as it is reasonable.[3]

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Through *Loper Bright*, the conservative majority wrested back interpretive control. Writing for the majority, Chief Justice John Roberts said "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[4] According to Roberts, there is a best reading of every statute, which is the reading that the court would have reached if there was no agency involved; no other reading is permissible.[5]

The Court, however, left a small opening for courts to give weight to agency interpretations of the laws that they administer. Reaching back to the New Deal era, Roberts quoted *Skidmore v. Swift & Co.*, in which the Court explained that courts could look for guidance to agency "interpretations and opinions" "based upon … specialized experience," even on legal questions.[6] These interpretations, however, only have the power to persuade—not control, and their persuasive weight would depend on a number of factors, including the thoroughness evident in the agency's analysis, the validity of its reasoning, and the consistency of the analysis throughout time.[7]

How courts will apply the *Loper Bright* decision to environmental challenges remains to be seen, but below are a few key takeaways:

- *Loper Bright* did not eliminate all agency deference. Where there is a clear delegation from Congress, courts may defer to an agency's factual determinations and technical judgments, but the scope of this deference is limited. Even where there is a clear delegation in an environmental statute to the EPA Administrator, a court will be looking over EPA's per the majority opinion, the reviewing court fulfills its role as an independent interpreter of the law "by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority' … and ensuring the agency has engaged in 'reasoned decision-making' within those boundaries."[8]
- In recent years, EPA appears to have seen the writing proclaiming *Chevron*'s imminent demise on the wall and has for the most part ceased using the decision to support its administrative regulations.[9] Instead, the agency has been setting forth its best interpretation of the implementing law in the preambles to its rulemakings, so, technically,

the reversal of *Chevron* may have little impact on recent regulations, but the Court's express statement that agency legal interpretations are not controlling in any respect will likely have a long-ranging impact.

- Under *Loper Bright*, the agency's legal analysis, regardless of its soundness, is never controlling, and with courts performing an independent legal analysis of the implementing statutes, other litigants, who like the agency will have both legal and technical expertise, will assert their best interpretation of the statute for the court's consideration. Whether the agency's legal and technical analysis will be persuasive to a court is highly subjective. One judge may find the agency's analysis persuasive, while another judge may not.
- While the Court stated in the majority opinion that its decision to jettison *Chevron* deference does not reverse or call into question any cases that relied on the *Chevron* framework,[10] there is no guarantee that future rulemakings based on a previously upheld interpretation of the law will stand or whether a court will undertake an analysis to determine the best interpretation of a statute and reason that its analysis distinguishes it from prior decisions and their otherwise binding effect.
- Expect challenges in high-dollar cases and where the agency's statutory interpretation relied explicitly on *Chevron*.
- The Court's enunciation of the major questions doctrine may have a more significant impact on future EPA rulemakings than *Loper Bright*. Per the major questions doctrine, courts are to presume that absent clear language in the implementing statute, Congress did not delegate to federal agencies the authority to address issues of major political or economic significance.[11] Many of the major rulemakings proposed by EPA in recent years, including those related to greenhouse gas emissions and emerging contaminants including per- and polyfluoroalkyl substances (PFAS), could fall under the major questions doctrine given their broad economic impact. If that is the case, the question of agency deference does not arise.
- The impact of this decision on continued deference to agency interpretations of ambiguous agency regulations is not clear. The Supreme Court reaffirmed its long-standing

precedent in that area just five years ago.[12] But there are two new Supreme Court justices since that decision, and the holding of *Loper Bright*, which firmly places the legal interpretation of laws in the courts' hands, suggests that this agency deference might not be long for the regulatory world.

More Challenges to Environmental Regulations Possible After the *Corner Post* Decision

While it may not have received the same level of press coverage as the *Loper Bright* decision, the Court's decision in *Corner Post* may have a more destabilizing impact to the regulatory environment. In *Corner Post*, the Court held that the six-year statute of limitations to bring lawsuits challenging agency regulations issued pursuant to the APA does not begin until the challenger is harmed—even if the rule at issue was promulgated more than six years before the suit was brought and regulated entities have already incurred significant costs to comply with the rule's terms.

The six-year statute of limitations that was the subject of the *Corner Post* decision does not apply to regulatory challenges brought under several environmental statutes because these statutes include their own limitation periods for judicial review of regulations. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (RCRA) contain the following limitation periods:

- *Clean Air Act*: 60 days from the date that notice of a rule's promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after the sixtieth day, then any petition for review under this subsection shall be filed within 60 days after such grounds arise.[13]
- *Clean Water Act*: 120 days from the date of the final determination, approval, promulgation, issuance, or denial of the relevant action, or after such date only if such application is based solely on grounds that arose after the one hundred twentieth.[14]
- *RCRA*: 90 days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after the ninetieth.[15]

While these identified statutes are not covered by the *Corner Post* decision, the Court's findings regarding harm to a specific plaintiff as a triggering event could be applied to extend the period for regulatory challenges under these statutes by broadly interpreting when "grounds arose" for purposes of a judicial challenge. The U.S. Court of Appeals for the District of Columbia Circuit in *Honeywell v. EPA*[16] has already found that an adverse decision on a rule is a new ground to challenge an existing regulation even where the statutory limitations period has run. The period for challenges under each of the laws is extremely tight, but a timely challenge could upset years of settled law.

Notes

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1. Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al., 603 U.S. ____ (2024).
2. Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 603 U.S. ____ (2024).
3. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
4. Loper Bright, slip op. at 35.
5. Loper Bright, slip op. at 23.
6. Loper Bright, slip op. at 10, citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).
7. Id.
8. Loper Bright, slip op. at 18 (citations omitted).
9. An August 2022 article from the Brookings Institute found only four EPA regulations issued or proposed during the Biden administration that cited to *Chevron* as a basis for the rulemaking. See James Kunhardt and Anne Joseph O'Connell, Judicial Deference and the Future of Regulation (Aug. 18, 2022), https://www.brookings.edu/articles/judicial-deference-and-the-future-of-regulation/.
10. Loper Bright, slip op. at 34.
11. See West Virginia v. EPA, 597 U.S. 697 (2022).
12. Kisor v. Wilkie, 588 U.S. 558, 588 (2019), affirming Auer v. Robbins, 519 U.S. 452 (1997).
13. 42 U.S.C. § 7607(b)(1).
14. 33 U.S.C. § 1369 (b)(1).
15. 42 U.S.C. § 6975(a)(1).
16. Honeywell v. EPA, 705 F.3d 470 (D.C. Cir. 2013).