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ENVIRONMENT & ENERGY INSIGHTS

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Welcome to the July edition of Nutter's *Environment & Energy Insights*, a monthly update of current trends in environment and energy law. The Supreme Court has been busy lately, issuing several opinions that will impact federal agency law, including environmental and energy law:

- The end of *Chevron* deference for agency statutory interpretations;
- Clarification on when civil penalty actions must be brought in court, rather than before an agency tribunal;
- A stay on EPA's "Good Neighbor" rule limiting ozone pollution; and
- Confirmation on when the statute of limitations runs on challenges to agency regulations.

"Chevron is overruled."

For the last 40 years, federal courts have deferred to an agency's "permissible" interpretation of its statutory authority when a statute is unclear. This so-called *Chevron* doctrine, first applied in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, is no more. Last week, the Supreme Court, in ***Loper Bright Enterprises v. Raimondo***, overturned *Chevron* and held that the federal Administrative Procedures Act requires courts to independently reach their own statutory conclusions without any binding deference to agency determinations. Courts must now use "traditional tools of statutory construction" to reach the "best" meaning and not simply defer to a "permissible" interpretation required under *Chevron*.

What is clear is that there is a new test to assess agency statutory authority, and any court decision deferring to an agency's permissible interpretation under *Chevron*—including the two fisheries cases at issue in *Loper Bright*—are now overturned. (According to the majority, the Supreme Court has not deferred to an agency interpretation under *Chevron* since 2016).

What is less clear is how the new test will be applied and the practical effect on specific agency interpretations. The Supreme Court acknowledged that agency interpretations are still important as an "aid" upon which courts "can resort for guidance," even if the agency's view is no longer controlling. The Court also acknowledged that statutes will also intend to allow an agency "to exercise a degree of discretion." Under the new *Loper Bright* rule, courts are to recognize those delegations consistent with constitutional limits, determine the boundaries of the delegation, and ensure the agency has engaged in reasoned decision making.

It is also unclear if Massachusetts courts will follow suit. Massachusetts currently applies *Chevron*-style analysis to agency authority under *Goldberg v. Board of Health of Granby*. The state Supreme Judicial Court may choose to continue with that approach or adopt the new federal *Loper Bright* test. The state and federal administrative procedures acts are similar, but Massachusetts courts tend to be more deferential to state agency action than their federal counterparts when considering agency rulemaking. For example, Massachusetts courts will permit a regulation if there is any "rational basis" for the rule, even if not articulated as part of the rulemaking process. Federal rulemaking is more stringent, requiring the agency's rationale to be clearly stated during the notice-and-comment process.

Civil penalty actions for securities fraud must be brought in court. Will the same apply to environmental penalty actions?

In *SEC v. Jarkesy,* the Supreme Court found that a defendant facing civil penalties for securities fraud had a right to a jury trial in federal court under the Seventh Amendment. The SEC's prior process for committing it to bring such cases before an administrative tribunal was declared invalid.

The Seventh Amendment protects the right to a jury trial in "[s]uits at common law." In finding that the Seventh Amendment applies to securities fraud under federal securities law, the Court noted that securities fraud closely resembles common law fraud and "money damages are the prototypical common law remedy." When money damages are designed to punish, rather than compensate a victim, the right to a jury trial applies.

Notably, the Court did not overrule *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, which permitted OSHA to impose civil penalties for health and safety violations after an agency adjudication. The Court distinguished *Atlas Roofing* primarily because the OSHA violations had no basis in common law.

Normally, we don't write about securities cases in an energy and environment newsletter. But *Jarkesy's* reasoning could implicate other penalty actions that are currently heard by administrative tribunals. For example, EPA and the Massachusetts Department of Environmental Protection can impose civil penalties after administrative proceedings in environmental cases. Those practices may need to be reassessed after *Jarkesy.*

The Supreme Court stays EPA's "Good Neighbor" rule limiting ozone pollution.

In ***Ohio v. EPA***, the Court overturned the EPA's attempt to reduce ozone pollution in certain "upwind" states under the Clean Air Act.

As brief background, the Act regulates air quality through federal-state collaboration whereby the EPA will set the pollution standard, and states then have three years to submit a State Implementation Plan (SIP) to implement the standard. A requirement in developing a SIP is that upwind states must limit emissions that will impair a downwind state's ability to meet the relevant air-quality standard. This is known as the Good Neighbor Provision.

EPA can disapprove plans that do not meet the requirements of the Act, including the Good Neighbor Provision. In such an event, EPA shall issue a Federal Implementation Plan (FIP) for a noncompliant state, unless the state corrects the deficiencies.

In 2015, EPA revised its air-quality standards for ozone, which required states to submit new SIPs. EPA ultimately disapproved of 23 SIPs as not meeting the requirements of the Good Neighbor Provision and proposed a single FIP to bind all 23 states. (Massachusetts was not one of the 23 states and is downwind to many of these states).

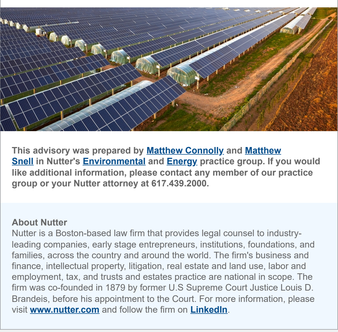
The Supreme Court granted the applicants' request to stay the FIP, finding that they were likely to succeed on the merits. An important aspect of the Court's decision is that the cost effectiveness analysis underlying the FIP depended on all 23 states participating. If some states dropped out—and some did—the cost effectiveness of pollution abatement programs for the other states likely would shift too. But the Court claimed that EPA could not provide a reasoned response as to what would happen if states left or why the resulting cost effectiveness analysis would remain correct regardless of the number of participating states.

For now, the case will return to the D.C. Circuit for argument on the legality of the FIP while the stay remains in place. Presumably, however, EPA will revise the FIP to better account for the effects when states drop out of the plan or at least better explain why the existing FIP is appropriate regardless of the number of participating states.

The Supreme Court clarifies the statute of limitations on challenges to regulations.

In ***Corner Post, Inc. v. Board of Governors of the Federal Reserve System***, the Supreme Court resolved a circuit split as to when the statute of limitations runs on facial challenges to federal regulations under the Administrative Procedures Act. Most appellate courts had held that the statute of limitations expires six years after the regulation was promulgated. The Supreme Court disagreed, instead finding that the statute of limitations expires six years after a plaintiff is injured by an agency's action. In the underlying case, Corner Post (a truckstop and convenience store) did not exist within six years of when the challenged regulation, which set credit card transaction fees, was finalized. The Court found that Corner Post's challenge—10 years after the rule's final promulgation—was timely.

The most significant implication of the decision is that a regulation can be challenged at any future time, as long as the plaintiff first became injured within six years of the suit—a concern emphasized by the Board and the dissent. The majority believes this concern is overblown because (i) there never really has been "finality" in regulations because regulated parties are always free to challenge an enforcement action against them; and (ii) most regulations are challenged immediately and will create binding precedent that can be applied to later challenges.



This advisory was prepared by Matthew Connolly and Matthew Snell in Nutter's Environmental and Energy practice group. If you would like additional information, please contact any member of our practice group or your Nutter attorney at 617.439.2000.

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