The end of *Chevron*: What's next?

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End of *Chevron* and Other SCOTUS Developments

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Background: *Skidmore v. Swift* (1944)

- Under *Skidmore*, an administrative agency's interpretive rules deserve deference according to the persuasiveness of the interpretation.
- Court review of agency decisions is case-by-case.
- Deference depends on the following factors:
  - The thoroughness of the agency's investigation,
  - The validity of the agency's reasoning,
  - The consistency of the agency's interpretation over time, and
  - Other persuasive powers of the agency.

Background: *Chevron v. NRDC* (1984)

- Under *Chevron*, courts deferred to reasonable agency interpretations of ambiguous statutes
- Agency regulations became more difficult to challenge – gave agencies more power
- Two-step test:
  - Is the statute's meaning clear? Then that meaning controls.
  - Is the statute ambiguous? The agency's interpretation will be upheld if it is reasonable.

Background: *Other Key Decisions*

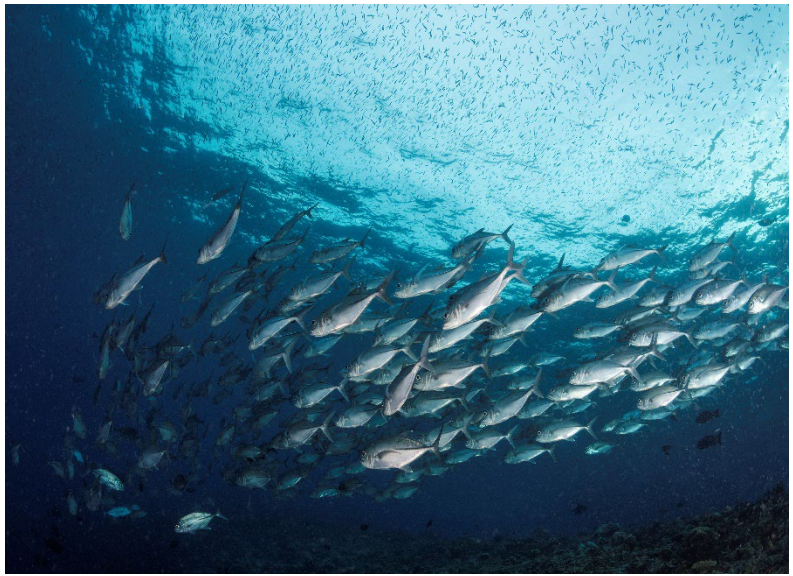
- ***Chevron* Step Zero:** Did Congress delegate authority to the agency to issue binding legal rules, and was the agency's decision promulgated in exercise of that authority? [*U.S. v. Mead Corp.* (2001)]
- ***Chevron* Step Minus One:** Is this a "major question" that goes to the core of the statute or would radically change the state-federal balance? If so, Congress did not intend to delegate. [*West Virginia v. EPA* (2022)]
- **Agency Interpretation of Regulations:**
  - An agency's interpretation of its own regulations should be upheld unless it is plainly erroneous or inconsistent with the regulation. [*Auer v. Robbins* (1997)]
  - A court will only defer to an agency's interpretation reasonable interpretation of an ambiguous regulation. [*Kisor v. Wilkie* (2019)]

Loper Bright (1/2)

- Fully overruled *Chevron.*
- Instead of deferring to agencies, courts will interpret ambiguous statutes with "traditional tools."
- Courts may *consider* agency statutory interpretations to the extent they have the "power to persuade" but cannot defer to them.

Loper Bright (2/2)

- Courts may still afford deference to agency factual determinations.
- Courts may review agency determinations in a more deferential way where Congress has explicitly delegated discretionary authority.
- The Supreme Court's decision in *Loper Bright* does not invalidate prior court opinions that used the *Chevron* framework.



Other Recent Supreme Court Decisions

Ohio v. EPA

- Permissive view of standard for stays / preliminary injunctions
- Eased requirements for commenting and exhausting agency remedies

Corner Post

- Statute of limitations runs from when harm occurs, not from the date the regulation was issued
- Opens door to new challenges of old agency regulations if the harm occurred recently

Implications

General Implications

Courts

- More litigation
- More petitioner success

Agencies

- Careful crafting of rules and preambles
- May shift policy priorities and delay agency action
- States may step up to fill any regulatory gap

Congress

- Draftsmanship
- Could choose to expressly delegate or use "flexible" adjectives

Open Questions

1. Mixed questions of law and fact?

2. Scope of agency delegations?

3. Deference to agency's interpretation of own regs?

4. Which old regs and decisions can be challenged?

Impact on Pending Litigation

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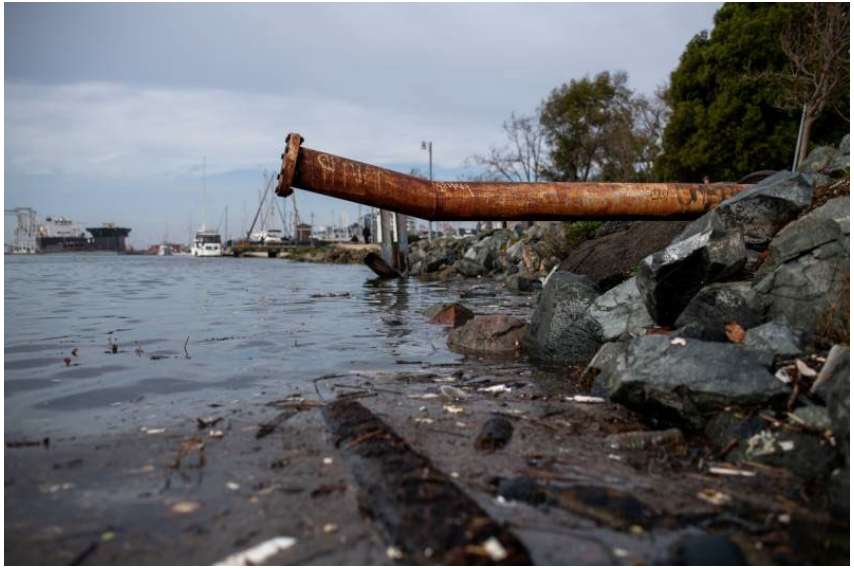
City and County of San Francisco v. EPA (SCOTUS)

- CWA – question is whether the EPA can require wastewater systems to comply with nonspecific or narrative effluent limitations in NPDES permits.
  - EPA sued San Fran for gneric violations of its permit (*e.g.*, the permittee will not "cause or contribute" to pollution), seeking fines in the tens of millions.
  - City of San Fran argues the CWA does not give EPA authority to issue non-numerical limitations – the narrative limits are vague and give the EPA improperly broad enforcement power.
  - EPA argues narrative limits are authorized by the CWA to protect water quality.
- SCOTUS heard argument on Oct. 16.
- Closely watched case to see how *Loper Bright* will play into the decision.



CLF v. EPA (D. Mass.) [1/3]

- Environmental groups petitioned EPA in 2019 and 2020 to regulate stormwater runoff into the Charles, Mystic, and Neponset Rivers. They followed up with a lawsuit in 2022, arguing the agency was failing to act.
  - In response to the litigation, EPA announced that it would exercise "residual designation authority" and require property owners in these watersheds to obtain a stormwater permit.
  - CWA and its regulations allow EPA to regulate stormwater sources on a case-by-case basis where there is a localized adverse impact on water quality. (Only other time EPA has exercised this authority in New England is the Long Creek Residual Designation in SoPo, Maine.)
- The parties agreed to stay the litigation pending issuance of draft stormwater permits. Case is currently stayed through Nov. 29, 2024.

CLF v. EPA (D. Mass.) [2/3]

- *Oct. 31, 2024:* EPA proposed preliminary designation of stormwater discharges and issued a draft NPDES general permit requiring BMPs to meet water quality standards.
  - Impacts commercial, industrial and institutional properties with 1+ acres of impervious surface.
  - Gives permittees up to 12 years to meet newly established WQS for phosphorous (60-65% reduction in the three rivers, collectively).
- Next Steps:
  - Public comments on the draft permit may be submitted through **January 29, 2025.**
  - EPA will hold virtual public hearings on **January 7, 9, 22, and 23, 2025, at 7 p.m.**

CLF v. EPA (D. Mass.) [3/3]

- Potential for continued litigation on both sides!
  - CLF: 12 years is too long, and the permit should also cover multi-family residential properties. *See also* pending RDU petition for the Great Bay Estuary (NH), filed in 2023.
  - Regulated community: CWA does not give EPA authority to regulate stormwater discharges (similar arguments to the San Fran case); there is no justification for additional regulation of stormwater discharges in these watersheds.

Chamber of Commerce v. EPA (D.C. Cir.)

- Chamber and trade groups challenging EPA's designation of PFOA and PFOS under CERCLA Section 102.
  - First time EPA exercised authority under CERCLA to designate "hazardous substances."
- Chamber argues EPA's statutory interpretation is flawed and that EPA's cost-benefit evaluation is flawed.
  - EPA has authority to designate if the substance **"may present substantial danger"** – EPA's designation relies on *any* possibility of substantial danger.
  - Relies on an "association" between PFOA and PFOS and "adverse health effects" – no actual evidence of substantial danger.
- EPA likely to argue that the agency is entitled to deference in making hazardous substance designations based on scientific and technical data.

Questions???

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