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ELIMINATING CHEVRON DEFERENCE – ONE ENVIRONMENTAL LAWYER'S PERSPECTIVE

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KEY HIGHLIGHTS:

- In the wake of the Supreme Court decision ending the *Chevron* deference, businesses opposed to federal agency actions will likely be more emboldened to challenge those actions.
- Plan for greater legal spend: increased uncertainty surrounding federal agency regulatory authority typically goes hand in hand with increased expenses for the regulated community.
- As a result, expect to see more litigants "forum shopping" in search of a sympathetic judge.

Last month the Supreme Court issued a decision in two cases consolidated for appeal captioned *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. The court used the two cases to overturn a long-standing precedent, *Chevron USA, Inc. v. Natural Resources Defense Council,* which had established a principle of law used widely in the field of environmental law.

Specifically, *Chevron* established the principle that federal judges, when confronted with an ambiguous federal law or rulemaking, should defer to the interpretation of that law advocated by the implementing federal agency, so long as it was reasonable. This principle became known as the *Chevron* doctrine, or *Chevron* deference, and it gave agencies a distinct advantage when defending their application of environmental regulations.

The *Chevron* doctrine was established in a Clean Air Act case but was later extended beyond UEPA actions to every other executive branch department, agency and commission. *Chevron* deference gave the agencies a leg up when defending challenges to regulations and enforcement actions based on a claim that underlying statute was ambiguous and the agency made the wrong choice in deciding how it should be interpreted and applied.

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Although unpopular with those of us who lost challenges to agency action based on *Chevron* deference, the notion that federal judges should be guided by the "special expertise" of agencies, particularly as respects highly technical issues presented by some environmental regulations, did not seem inherently unreasonable. Over the past 40 years, it obtained grudging acceptance.

In *Loper Bright*, Chief Justice Roberts wrote for a 6-3 conservative majority and unequivocally kicked *Chevron* and its principle of deference to the curb, finding that it impermissibly abdicated the exclusive role of the federal judiciary to interpret the law, ambiguous or otherwise. The Roberts court was clearly offended by the idea that federal judges should defer to bureaucrats within the executive branch when it came to matters of the law. After all, in our system of government, each branch has its specific role, and the judiciary's only role is to sit in judgment of legal cases and, in doing so, to interpret and apply the law. What was most surprising in the decision is how many words and pages it took the 6-3 majority to dismantle the *Chevron* doctrine, which had been created by a unanimous (six-justice) panel of the Supreme Court just 40 years ago (Justices Rehnquist, O'Connor and Marshall did not participate in *Chevron*).

So, what does it all mean? Theoretically, federal agencies no longer get that leg up on challengers when defending agency interpretations of ambiguous federal laws. It is possible, and many, including the three dissenters, believe it is probable, that those who oppose federal agency actions will be emboldened to sue and, in the absence of *Chevron* deference, the cases will require more development, more evidence and therefore take more time to resolve. This, in turn, will create less certainty surrounding federal agency programs, and uncertainty almost always costs the regulated community a lot of money.

I am sure there will be more challenges, although how many more is anyone's guess. I also note that the "benefit" bestowed by *Loper Bright* on those who would challenge federal action is non-denominational; that is, industry and environmental groups alike are similarly unconstrained. The decision also puts more pressure on Congress to avoid ambiguity in its scripting of laws, and on federal agencies to not walk too far out on a limb when drafting and implementing regulations. Now, court-established principles of statutory construction are once again at the fore for federal judges, including an important one that says: *if Congress didn't say it, it didn't mean it.*

Perhaps the one significant consequence will be forum shopping by litigants, looking for that one judge who happens to see things their way. Finding the right judge might give them a running start at the appellate courts now that the playing field has been leveled. Forum shopping always leads to chaos when federal judges create a patchwork of decisions for and against the very same agency actions.

For those evaluating this issue, it is also important to note that the *Loper Bright*

court cited the Administrative Procedures Act (APA) as support for dismantling of *Chevron* deference, in part because it establishes a well-worn path to the promulgation of federal regulations and significant federal policies, establishing a fulsome record based on comments submitted by all interested parties. But in a decision just a few days later in *Corner Post, Inc., Petitioner v. Board of Governors of the Federal Reserve System*, the same conservative majority lifted the lid off one APA principle, the statute of limitations set forth in § 2401(a). Section 2401(a) barred challenges to federal regulations not filed within six years. The *Corner Post* decision modified the nearly 85-year-old APA by declaring that the six-year limitation period ran from "injury" caused by a regulation, not from its publication for all to read.

To quote Captain Barbosa from the first *Pirates of the Caribbean* movie, it appears that even that six-year limit upon regulation challenges "*was really more of a guideline than a rule*." Now agencies like USEPA will not only face more and more vigorous challenges to their regulatory interpretations, but it appears that they may be required to defend regulatory action indefinitely into the future.