

How Recent Supreme Court Decisions May Impact EHS Agencies and Regulations

Client Alerts

July 15, 2024

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The Supreme Court's recent term is likely to be remembered as one that significantly affected the long-standing roles and responsibilities of federal agencies, including the deference afforded to their interpretations of statutes and their administrative authority to seek and impose penalties. As one dissenting opinion put it, the Supreme Court's majority opinions have opened the door to a "tsunami of lawsuits" with the "potential to devastate the functioning of the federal government." Alternatively, others posit that the Supreme Court's majority opinions merely reset the long-established separation of powers between the three branches of Government.

In this client alert, our lawyers review the recent string of Supreme Court decisions concerning the administrative state and how these decisions may impact environmental, health and safety agencies and regulations moving forward.

A. Overview of Supreme Court Decisions

Four decisions in the waning days of the Supreme Court's term will have potentially far-reaching impacts on administrative agencies.

In *Loper Bright Enters. v. Raimondo*, the Supreme Court overruled *Chevron, U.S.A., Inc. v. NRDC, Inc.*, a long-standing decision requiring federal courts to defer to federal agencies' reasonable interpretations of statutory ambiguities. The Court explained that while federal agency interpretations may assist courts in resolving statutory ambiguities, they are not binding. The Court also clarified that by overruling *Chevron*, it was not calling into question prior cases that relied on *Chevron* deference. Rather, "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite the Court's change in interpretive methodology," and "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such [] holding[s]."

In *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, the Supreme Court held that an Administrative Procedure Act (APA) claim does not accrue for purposes of the federal six-year statute of limitations until the plaintiff is injured by final agency action.

In *Ohio v. Environmental Protection Agency*, the Supreme Court granted a stay blocking the Environmental Protection Agency's (EPA's) enforcement of its federal implementation plan for ozone against states whose own state implementation plans were deemed insufficient to adequately address obligations under the EPA's "good neighbor" rule. The Court reasoned that the applicants are likely to prevail on their argument in the US Court of Appeals for the DC Circuit that the rule is arbitrary and capricious due to the EPA's failure to address certain concerns related to cost-effectiveness.

In *Securities and Exchange Commission v. Jarkesy*, the Supreme Court held that the US Constitution's Seventh Amendment (the right to a jury trial in certain civil cases) entitles a defendant to a jury trial in enforcement matters where the Securities and Exchange Commission (SEC) seeks civil penalties for securities fraud. The Court reasoned that the civil penalties at issue seek to "punish and deter," rather than restore the status quo or compensate victims, and the "public rights" exception to the Seventh Amendment does not apply because of the close relationship between federal and common law securities fraud claims.

Further, on July 2, the Supreme Court denied a writ of certiorari in *Allstates Refractory Contractors, LLC v. Su*, a case that would have asked the Court to consider whether Congress' grant of authority to the Occupational Safety and Health Administration (OSHA) to enact and enforce any workplace safety standard that it deems "reasonably necessary or appropriate" violates the non-delegation doctrine. The non-delegation doctrine limits Congress' ability to cede too much of its legislative power to federal agencies. For a delegation to be constitutional, Congress must provide an intelligible principle, *i.e.*, make the general policy and boundary of the agency's authority clear—not a demanding test. Justice Thomas issued a dissent on the denial explaining that the intelligible principal test should be reconsidered.

B. Implications for Environmental, Health and Safety Regulations

While the Supreme Court and federal agencies have been moving away from direct reliance on *Chevron* for some time, *Loper Bright* represents a significant shift in power from federal agencies to federal judges.

This shift is consistent with "major questions" cases, such as *West Virginia v. EPA* in 2022, that have sought to rein in federal agencies' (including the EPA's) attempts to assert authority over actions of political and economic significance absent clear congressional authorization. The absence of *Chevron* deference will result in federal agency interpretations, including those that may not constitute "major questions," being subject to increased scrutiny by federal courts, and in agencies becoming increasingly cautious in writing regulations as they face greater litigation risk.

As Justice Kagan's dissent explains, some agency interpretations never challenged under *Chevron* now will be. Further, "[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.'"

Recent environmental regulations that may be impacted by *Loper Bright* (or that may be challenged on the basis of *Loper Bright*) include:

- Designation of PFOA and PFOS as CERCLA Hazardous Substances
- Methylene Chloride; Regulation under TSCA
- Procedures for Chemical Risk Evaluation under TSCA
- NEPA Implementing Regulations Revisions Phase 2
- PFAS National Primary Drinking Water Regulation
- Asbestos Part 1; Chrysotile Asbestos; Regulation of Certain Conditions of Use Under TSCA
- Reconsideration of NAAQS for Particulate Matter

While *Chevron* deference is gone, *Skidmore* remains, so federal agencies may still be able to attempt to persuade courts that their statutory interpretations are correct and entitled to respect. As the Supreme Court explained in *Loper Bright*, an agency's interpretation may be especially informative "to the extent that it rests on factual premises within [the agency's] expertise." Further, *Auer* deference, which applies to federal agency interpretations of their ambiguous regulations, remains (although its application was substantially limited by the Supreme Court's 2019 decision in *Kisor v. Wilkie*).

Corner Post provides a pathway to challenge federal actions under the APA long after they were taken, potentially increasing APA challenges to actions taken pursuant to environmental laws such as the Endangered Species Act and National Environmental Policy Act.

Even environmental laws such as the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Safe Drinking Water Act that require certain challenges be brought within specified periods of time may be impacted, as they also permit challenges after such periods when based solely on new grounds. Parties seeking to challenge certain regulations promulgated under these statutes beyond the statutory deadlines will likely argue that new grounds exist.

Writing for the dissent in *Jarkesy*, Justice Sotomayor called the decision "a devastating blow to the manner in which our government functions." While the case deals with the SEC and federal securities fraud, it may impact the environmental, health and safety space too, as the EPA and similar agencies have authority to seek and impose administrative penalties in a variety of contexts. For example, the EPA's use of Administrative Law Judges ("ALJs") and the Environmental Appeals Board may be challenged, and the issue may wind its way to the Supreme Court, where the Court may conclude that the EPA's use of ALJs to collect fines and penalties is unconstitutional. However, administrative enforcement under certain EPA statutes, such as the Comprehensive Environmental

Response, Compensation and Liability Act (“CERCLA”), may avoid impact because CERCLA is intended as a cost-recovery statute rather than a means to punish defendants. Further, almost every US state has language in its state Constitution granting the right to a jury trial in civil actions, and states will now have to determine how the *Jarkesy* decision impacts administrative enforcement moving forward.

The occupational safety and health arena also remains ripe for challenges given the broad scope of federal and state oversight. How *Jarkesy* impacts OSHA determinations remains to be seen, as the Supreme Court explicitly noted in its ruling that the decision did not reach the fundamental question of whether *Atlas Roofing v. OSHA* need be overruled. In *Atlas*, the Court previously held that OSHA could impose civil penalties without requiring a jury trial. Justice Thomas’ dissent to the denial of writ of certiorari in *Allstates*, however, is likely to embolden parties to continue challenging legislative delegations of authority under the nondelegation doctrine, particularly challenges to the authority delegated to OSHA. As Thomas stated, “[t]he Occupational Safety and Health Act may be the broadest delegation of power to an administrative agency found in the United States Code. If this far-reaching grant of authority does not impermissibly confer legislative power on an agency, it is hard to imagine what would.”

Agencies may hesitate before pursuing administrative resolution to matters, potentially deferring what would otherwise be straightforward actions to avoid the time and expense of a jury trial. *Jarkesy* may also hinder the EPA’s use of administrative settlements with a cooperating defendant if there is a risk that the EPA will be unable to enforce that settlement at the administrative level.

Plaintiffs are already seeking to rely on the *Ohio* ruling in pending cases challenging the EPA’s rulemaking authority. In *West Virginia v. EPA*, a case currently before the US Court of Appeals for the D.C. Circuit, the state plaintiffs similarly sought to stay implementation of the EPA’s power plant greenhouse gas rule pending a ruling on the merits because the EPA allegedly offered no reasoned response to commenter concerns. On July 2, the plaintiffs in that case requested the court follow the Supreme Court’s lead in *Ohio* and stay the EPA’s rule. As Justice Barrett wrote in dissent, another immediate impact from *Ohio* may be that the decision “leaves large swaths of upwind States free to keep contributing significantly to their downwind neighbors’ ozone problems for the next several years . . . based on an alleged procedural error that likely had no impact on the plan.” The EPA may seek to alleviate this procedural error in the interim while the litigation continues.

C. Future Impacts on Agency Regulatory and Enforcement Actions

Notwithstanding the Supreme Court’s statement in *Loper Bright* that it was not calling into question prior cases that relied on *Chevron* deference, as Justice Kagan suggests in her dissenting opinion, the majority’s decision will likely lead to emboldened plaintiffs and more legal challenges to federal regulations and agency authority.

As Justice Jackson cautions in her *Corner Post* dissent, the Supreme Court's recent decisions may lead to a "tsunami of lawsuits" with the "potential to devastate the functioning of the Federal Government." The rulings may also upend long-held industry practice. As Justice Jackson further explains, "the constant churn of potential attacks on an agency's rules by new entrants can harm all entities in a regulated industry. At any time, anyone can come along and potentially cause every entity to have to adjust its whole operations manual, since any rule (no matter how well settled) might be subject to alteration."

In this new legal landscape, federal agencies are likely to exercise even more caution when promulgating regulations and perhaps not take positions that they would have in the past to better ensure that their regulations withstand more exacting judicial review. Agencies will also have to be more methodical in their responses to public comments during regulatory notice and comment periods, ensuring that APA requirements are satisfied. The Supreme Court's decision in *Jarkesy* may also have far-reaching implications that limit federal agencies' ability to use administrative proceedings as an enforcement tool.

There may also be renewed emphasis on Congress to pass laws that more specifically delineate how federal agencies are to meet statutory objectives, a challenge in today's Congressional climate that could in the short-term hinder federal agencies' enforcement ability, particularly for actions wherein a statute currently only allows for administrative enforcement. Should the Supreme Court grant certiorari in a future case to make the intelligible principle test more demanding, we may start to see successful constitutional challenges to statutory provisions that allow federal agencies to promulgate regulations with little guidance from Congress.

Finally, *Ohio* likely will empower challengers to use the Supreme Court's emergency procedures to circumvent the regular process of judicial review. Observers have argued that the Court essentially used this proceeding for a substantive determination without the benefit of extensive briefings and a lower court decision. It is likely that future plaintiffs will pursue the same relief as litigation proceeds through a lower court.

D. Conclusion

The latest Supreme Court decisions continue what has been a cycle of Supreme Court actions aimed at the federal administrative state, and particularly EPA authority, and this trend is likely to continue as similar challenges make their way through lower courts. While the decisions may lead to more scrutinized Congressional action and delegation of authority, the current landscape may also create near-term uncertainty for the regulated community as agencies determine how to proceed in light of the recent decisions, and emboldened plaintiffs on both sides take this opportunity to challenge long-standing agency practice.

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