Financing the Energy Transition Amid New Regulatory Uncertainty

September 17, 2024

Stephen J. Humes, Partner
New York City Office

Holland & Knight

New York Energy Forum
Fostering understanding of energy since 1982

Beyond Chevron Deference: The Post-Decision Landscape

New York Energy Forum
Fostering understanding of energy since 1982

Disclaimer

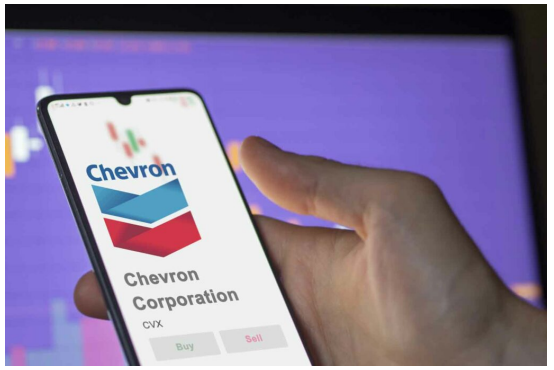
This power point presentation has been prepared for general guidance on matters of interest only and does not constitute professional advice.

You should not act upon the information in this power point presentation without obtaining specific advice.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this power point presentation.

The *Chevron* Doctrine

- *Chevron v. NRDC* (1984) involved interpretation of the term "stationary source" under the Clean Air Act Amendments of 1977.
- The EPA, in a decision considered favorable to industry, held that stationary source can include an entire power plant.
- The Supreme Court upheld the agency's interpretation under a new legal formulation.
- Established a 2-step analysis for Reviewing Agency Interpretation of its statutory authority
  - **Step 1**: Has Congress directly spoken to the precise question at issue?
  - **Step 2**: If not, courts will defer to an agency's interpretation if it is based on a permissible construction of the statute.



New York Energy Forum
Fostering understanding of energy since 1982

The *Chevron* Doctrine

- Federal courts have used the Chevron doctrine for decades to defer to an agency's reasonable interpretation of an ambiguous statute.
- Used for 40 years in over 18,000 judicial opinions
- Surveys show that courts get to step two in 60-70% of the cases under the *Chevron* doctrine.
- The Supreme Court had been cutting back on *Chevron* deference in recent years, but lower courts continued to rely on *Chevron*.
- The doctrine was challenged in two cases before the U.S. Supreme Court.

Challenges to the Doctrine

- Two cases challenged the doctrine
  - *Loper Bright Enterprises v. Raimondo*
  - *Relentless, Inc. v. Department of Commerce*
- U.S. Courts of Appeals upheld the regulation
  - D.C. Circuit and First Circuit
  - Regulation is a reasonable interpretation of a federal statute under *Chevron*
- In a 6-3 decision written by the Chief Justice, the Court overruled *Chevron* in its decision of *Loper Bright Enterprises v. Raimondo*.

New York Energy Forum
Fostering understanding of energy since 1982

The *Loper* Decision

- The Court relied on APA § 706, which states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."
- *Skidmore* deference continues.
  - Courts look to the agency's expertise and give it weight depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control."
- The Court stated that the holdings of prior cases that relied on *Chevron* remain subject to *stare decisis.*
- *Auer* deference intact: courts defer to agencies' interpretations of their own regulations
- ***Loper* decision**:
  - When statutory delegation of authority is clear: respect delegation, but police the outer bounds of reasonable interpretation.
  - When the statute is ambiguous: look to the statute's best meaning and view agency interpretation as persuasive, but not controlling.
- **The Court stated that the holdings of prior cases that relied on *Chevron* remain intact under *stare decisis*.**

New York Energy Forum
Fostering understanding of energy since 1982

The *Corner Post* Decision

- The question before the Court was whether the default six-year statute of limitations applicable to suits against the United States, 28 U.S.C. § 2401(a), runs from the date of the final agency action or when the plaintiff was injured by that action.
- The plaintiff, a truck stop that opened in 2018, challenged a 2011 Federal Reserve Board regulation on debit card interchange transaction fees.
- ***Corner Post* decision**:
  - A claim accrues when the plaintiff suffers an injury, not when the agency issues its regulation.
- Regulated parties could always challenge a regulation in enforcement proceedings, however this decision expands the window to bring a facial challenge to a regulation.
- **The *Corner Post* decision in combination with the *Loper* decision creates significant new opportunities for plaintiffs to bring facial challenges to regulatory action where they believe the statutory authority is ambiguous and the plaintiff has suffered an injury in the last six years**.

New York Energy Forum
Fostering understanding of energy since 1982

Will We See Less Regulatory Flip-Flopping?

- No, not in the short term.
- Agencies are committed to their regulatory agendas.
- We are late in the regulatory cycle for this presidential term.
  - Proposed rules yet to be finalized could still be adjusted.
  - But it's probably too late to rethink the premises for major actions.
- Agencies rarely rely on *Chevron* alone as the basis for their rulemakings.

New York Energy Forum
Fostering understanding of energy since 1982

What if We Have a Change in Administrations?

- Don't assume *Loper Bright* is a one-way street.
- Longstanding, consistent agency interpretations—whoever first promulgated them—will continue to garner respect. There is a first-mover advantage to the Administration in place at the time a statute is first enacted.
- Remember, *Chevron*'s virtue (or vice) wasn't protecting agency rules *per se*; it was protecting agency *flexibility*.

New York Energy Forum
Fostering understanding of energy since 1982

How Will *Loper* Affect Future Legislation?

- The *Loper* decision will fundamentally change how legislation is drafted going forward.
- Typically, Congress reaches a bipartisan compromise that achieves most of what they intend to accomplish and leave the rest to the Executive Branch Agencies to "fill in the gaps."
- Under *Loper*, federal courts will no longer rely on reasonable interpretations where the statutory authority is ambiguous.
- This puts a lot more pressure on Congress to:
  - Write new legislation that is a lot more specific regarding the authorities granted – or not granted; and
  - To respond to court decisions striking down popular regulations that lack adequate statutory authority.
- **The legislative drafting changes required by *Loper* will particularly impact the energy and infrastructure stakeholders in highly regulated industries where the regulatory framework relies on organic statutes – which are often quite old.**

New York Energy Forum
Fostering understanding of energy since 1982

How Will *Loper* Affect Future Legislation?

THE HILL

With Chevron's end, Congress urgently needs a boost in technical expertise

BY MAYA KORNBERG, OPINION CONTRIBUTOR - 07/15/24 11:00 AM ET

- Congress will require dozens (hundreds?) of new technical experts to help draft legislation with the level of specificity needed to comply with the *Loper* decision.
- Congress will not have the resources to hire this level of new experts.
- This creates opportunities and risks for transportation stakeholders.

New York Energy Forum
Fostering understanding of energy since 1982

State-Level Impact and Dynamics

New York Energy Forum
Fostering understanding of energy since 1982

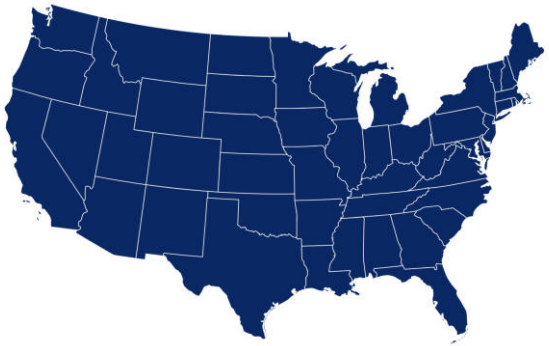
State-Level Impact and Dynamics

- Impact on state court activity
  - Federal jurisprudential principle, so no direct effect on state decisions
  - Some states have modeled their review doctrines on *Chevron*, whether those courts will reconsider in light of *Loper Bright* remains to be seen
  - Other state's courts already follow a doctrine closer to *Skidmore* which *Loper Bright* reinvigorates
- Impact on state regulatory frameworks
  - To the extent a state regulatory program exists independent of federal agency oversight, little or no impact
  - Where state programs are subject to federal oversight or approvals, like State Implementation Plans under the Clean Air Act, we may see impacts as federal agency implementation is challenged and adjudicated
- Future interplay between federal and state regulations

New York Energy Forum
Fostering understanding of energy since 1982

States Taking Action

- *Loper Bright* may fuel increased Washington dysfunction
  - Greater Congressional clarity of delegation to agencies unlikely
  - In the absence of clear delegation, agencies may be reticent to act on the edges of their granted authority
- States fill the void when Washington does not act
- "Red State" vs "Blue State" regulatory divide will be magnified
  - This dynamic will continue to play out in litigation in federal court



New York Energy Forum
Fostering understanding of energy since 1982

States Taking Action – Climate Change

- Other than the 2022 Inflation Reduction Act (which contains more than $370 billion in incentives for clean energy technologies, including wind and solar power and electric vehicles), no federal statute directly empowers a federal agency to address climate change
  - EPA has relied on the Clean Air Act (CAA) to attempt to regulate in the climate change space, but those efforts are now on tenuous grounds
    - Climate change and greenhouse gases are not specifically included in CAA regulatory structure
    - EPA's early climate change efforts saw mixed results on judicial review
    - Additional EPA efforts will certainly face litigation and may be vulnerable
    - EPA's Standards and Guidelines for Fossil Fuel-Fired Power Plants finalized on May 9, 2024 – a rule that calls for aggressive action to reduce greenhouse gas (GHG) emissions from conventional power plants – has already been challenged on the ground that it exceeds EPA's authority
    - EPA motor vehicle emission standards limiting climate pollutants are also being litigated
  - SEC climate disclosure rule suspended due to several challenges filed immediately when it was finalized

New York Energy Forum
Fostering understanding of energy since 1982

Case Study: GHG and Fuel Economy Standards

- The Environmental Protection Agency (EPA) has the authority to set greenhouse gas (GHG) standards and the National Highway Traffic Safety Administration (NHTSA) has the authority to set fuel economy standards for surface vehicles – cars and trucks.
- The EPA and NHTSA standards have lurched back and forth from Republican to Democratic Administrations and courts have upheld the standards set by both as reasonable interpretations of their statutory authority.
- Two new cases challenge the latest regulations issued by the Biden Administration:
  - *Texas v. EPA*
  - *Natural Resources Defense Council v. National Highway Traffic Safety Administration*
- On July 30, the D.C. Circuit asked the parties in both cases to file briefs arguing how *Loper* impacts the arguments in the case.
- Decisions in these cases could lead to less dramatic swings in GHG and fuel economy standards or require Congress to address ambiguities in the existing statutory authority.

New York Energy Forum
Fostering understanding of energy since 1982

States Taking Action – Climate Change

- In light of Washington inaction, some states have stepped in to address the climate issue and those efforts will increase
  - California zero emission standards for motor vehicles and other engines, many of which have been adopted by about 1/3 of the states under CAA § 177
  - California climate disclosure requirements for businesses accessing California markets

- Red State vs Blue State regulatory divide will be magnified
  - Red State Attorneys General have led challenges to waivers granted by EPA for California vehicle emission standards to address climate pollutants
    - The judicial underpinnings for EPA's waiver practice may be vulnerable when examined by a court under *Loper Bright*
  - Red State Attorneys General immediately challenged EPA's Standards and Guidelines for Fossil Fuel-Fired Power Plants on the same day the rule was announced

Energy Policy in a Trump Administration

- Fossil fuel focus
- April Mar-A-Largo Dinner with Oil CEOs:
  - Raise me $1B and I'll reverse Biden's environmental rules
- September New York Economic Club:
  - Rescind all unspent IRA funds
  - "blast through every bureaucratic approval" to approve drilling, pipelines, refineries, power plants and reactors
  - "If I was president, oil production today would be four times higher than it is right now"
- Trade position: Protectionist
- Campaign website: "ensure the United States is never again at the mercy of a foreign supplier of energy."
- Project 2025: reform and relocate RFS in EPA; eliminate EERE entirely

New York Energy Forum
Fostering understanding of energy since 1982

Energy Policy in a Harris Administration

- Progressive advisors (Rep. Huffman, Ike Irby, Camilla Thorndike)
- Positioning against “Big Oil”
- Maintaining Biden Administration and IRA pillars:
  - Climate action
  - Environmental justice
  - Public lands
  - Public health
  - Job creation
  - Internationalism
- Return to center: abandoned fracking ban
- Limited discussion of biofuels

New York Energy Forum
Fostering understanding of energy since 1982

Questions?