By Alita J. Giuda, Esq., and Colin Wind[1]
Couch White, LLP

There Goes *Chevron*

How Does *Loper* Change the Court's Role in Interpreting Agency Action?

IN A RECENT United States Supreme Court case, *Loper Bright Enters., Inc. v. Raimondo*, the Court significantly changed the scope of review for statutory interpretation with respect to agency actions. ***Loper, Nos. 22-451 & 22-1219 (2024).*** Under previous Supreme Court precedent, courts were required, in the face of statutory "ambiguities," to grant deference to federal agencies like the EPA, MSHA, and DOT's interpretations of federal statutes. In practice, this resulted in a federal agency determining what an ambiguous statute meant, and a reviewing court would, by default, likely be forced to follow that agency's interpretation. This deference was known as *Chevron* deference, as it was created by the Supreme Court in 1984 in *Chevron, U.S.A., Inc. v. Natural Resources Deference, Inc.*, 467 U.S. 837.

The *Chevron* test had two steps: first a Court reviewed whether Congress spoke directly to the issue, and if they had, the Court could strike the portions of the agency's regulation that did not align with Congress's intent. The second step was only reached where Congress had not spoken about the issue, wherein the reviewing Court was bound to accept the agencies resolution of the ambiguity, if that resolution "was a permissible construction of the statute." This deference was based both on the presence of ambiguities, at all, which was often in dispute depending on the court, and where the statute dealt with technical knowledge in the wheelhouse of an agency, that agency was better suited to interpret that statute. Basically, if Congress didn't say what

ISTOCK.COM/DNY59

As new challenges to federal agency interpretations of law are brought, Federal Courts will engage in statutory interpretation as they would for any other issue, but agencies will not get any boost simply because they are the agency.

they meant, then the agency could decide what the statute meant, and courts were all but forced to agree. This deference has allowed agencies such as the EPA, FERC, the NLRB, etc. to determine the meaning of laws passed by Congress for the last four decades. This has had broad application in determination of the legality of regulations, adjudicatory hearings as well as enforcement by Federal agencies.

On June 28, 2024, the Supreme Court reviewed, and ultimately reversed, *Chevron* in *Loper Bright Enterprises*. In *Loper*, the Supreme Court thoroughly analyzed the role of the judicial branch and the *Chevron* standard, as well as how it was interpretated, deciding that the presumptions supporting *Chevron* deference were, among other problems, "misguided" and "fiction." The opinion of the *Loper* Court, delivered by Chief Justice Roberts, examined three factors to reach this conclusion. First, the history of judicial review. Under *Chevron*, courts were bound to agree with (defer to) an agency's interpretation of statutes. Since the earliest days of the Supreme Court, in *Marbury v. Madison*, the Court has held that it was "emphatically the province and duty of the judicial department" to determine what the law meant. ***Cranch 137 (1803).***

As a result, in *Loper*, the Supreme Court found that upholding *Chevron* meant abandoning the judiciary's fundamental duty and purpose. The second factor was the history of judicial deference to agency determinations prior to *Chevron*. During the New Deal era, Courts would frequently accept or defer to an agency's factual findings, particularly as those facts related to technical or specialized knowledge. However, even during that era, where agency power was rapidly expanded, Courts were never required to accept all agency determinations, including legal interpretations. Courts exclusively relied on their own interpretations of law.

The third rationale was the adoption of the Federal Administrative Procedure Act. This law codified administrative procedures and review requirements in 1946. The Court reviewed *Chevron* through this lens and found the deference standard directly contradicts the APA. The APA was enacted "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." ***U.S. v. Morton Salt Co., 338 U.S. 632 (1950).*** Critically here, the APA expressly provides that the judicial branch was to decide all questions of law. In contrast, the APA grants some deference to agencies in their factfinding and other executive actions, outside of statutory interpretation, pointing clearly to the demarcation in roles between the judicial branch and agency activities.

Since each of these factors weighs against granting deference to an agency's statutory interpretation, *Chevron* was overruled. Federal courts are advised to exercise "independent judgment" in determining whether an agency has acted within its statutory authority; however, "careful attention to the judgment" of a federal agency "may help inform that inquiry." The *Loper* decision makes clear that an ambiguity in a federal law does not require deference to a federal agency for that reason alone, but still allows for consideration of the agency's interpretation where appropriate.

Despite the considerable shift in the legal standard, it is unlikely there will be immediate sweeping changes in agency regulation. At the close of the opinion, the Court specified it does not call into question any prior cases determined in reliance on the *Chevron* test. While this does not guarantee lower courts won't overturn prior decisions in the face of new litigation, it does mean current agency regulations will remain in place until challenged in court in the future. As new challenges to federal agency interpretations of law are brought, Federal Courts will engage in statutory interpretation as they would for any other issue, but agencies will not get any boost simply because they are the agency.

There could be instances where deference is granted, however: an independent review of what the law means may also result in annulling federal regulations more frequently. It could result in more regulations being struck as beyond agency authority, it could result in Courts improperly second-guessing agencies, or it could result in the right balance of power between the branches of government. It will likely result in all of these outcomes. However, for the regulated community, it means a greater chance to argue that the agency got the regulation wrong, as deference is not required.

Crucially, however, this case affects federal agencies and federal laws: for state permitting and local zoning matters, New York's standard remains unchanged, and would be highly unlikely to change and adopt the rationale in *Loper*. New York's legal standard requires a court to defer to an agency's interpretation, "when technical expertise or specialized knowledge of operational practices is required to interpret statutory language." *Matter of New York Constr. Materials Assn., Inc. v. New York State Dept. of Envtl. Conservation*, 921 N.Y.S.2d 686, 688 (3d Dep't 2011).

Put plainly, where the New York Legislature leaves a gap in a newly enacted statute which must be enforced by an agency, and that gap requires specialized agency knowledge and technical know-how, a reviewing Court defers to the agency charged with enforcing that statute. Deference is granted for such

technical matters within the area of expertise of the agency, provided the agency's interpretation is not "irrational or unreasonable." *Saratoga Economic Development Corporation v. Authorities Budget Office*, 201 N.Y.S.3d 735, 738 (3d Dep't 2023). This standard was actually adopted in New York prior to *Chevron*, and it is very similar. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451 (1980).

It is noted, however, that the two tests are almost the same, but not quite. In fact, the key difference in the New York test would have defeated the main thrust of the Supreme Court's reasoning in overturning *Chevron*. Where the Supreme Court took issue with *Chevron's* requirement that courts defer to the agency interpretation in all matters, including bare statutory interpretation, under the New York test, courts need only defer to an agencies interpretation if that interpretation required the specialized knowledge and skill possessed by that agency. (As many may recall, this issue was key to winning the DERA litigation, as the Third Department found that DEC was not entitled to deference for its interpretation of the statutory phrase "on behalf of," with respect to which engines required the retrofit pursuant to DERA. *Matter of New York Constr. Materials Assn.*, 921 N.Y.S.2d at 688.)

This limits the impact of *Loper* to state and local permitting in New York. The standard that exists today remains – when a new statute is passed in New York, and an agency promulgates regulations based on that statute, the agency will still have the benefit of deference, with respect to areas within their expertise, that must be overcome in order to annul those regulations. Over the last four decades, this standard has had, and will continue to have, a huge impact on interactions with New York agencies, such as the DEC and the DOL, which will still receive significant deference in their interpretation of ambiguous legal provisions. However, as a result of *Loper*, the same cannot be said for the decisions of the Army Corps of Engineers, MSHA, or EPA. ○

[1] *Special thanks to Couch White's summer associate, Colin Wind, a rising 3L at Albany Law School for his assistance on this article.*