



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/LITIGATION

APA/Chevron

On June 28, the U.S. Supreme Court handed down a long-awaited decision in *Loper Bright Enterprises v. Raimondo* (#22-451) related to deference to agencies' interpretation of statutes, in this case related to regulation of commercial fishing and fisheries management. The Court's conservative majority held: "The Administrative Procedure Act [APA] requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled." (See <https://www.supremecourt.gov/opinions/23pdf/22-4517m58.pdf>)

The decision read: "The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.... Neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *Chevron* defies the command of the APA that 'the reviewing court' – not the agency whose action it reviews – is to 'decide all relevant questions of law' and 'interpret...statutory provisions.'"

In 1984, the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U. S. 837, "...triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning. The question in the case was whether an Environmental Protection Agency (EPA) regulation was consistent with the term 'stationary source' as used in the Clean Air Act."

In *Chevron*, "...the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action. The first step was to discern 'whether Congress had directly spoken to the precise question at issue....' But in a case in which 'the statute [was] silent or ambiguous with respect to the specific issue' at hand, a reviewing court could not 'simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.' Instead, at *Chevron*'s second step, a court

had to defer to the agency if it had offered 'a permissible construction of the statute.'"

The Opinion read: "Although the Court did not at first treat *Chevron* as the watershed decision it was fated to become, the Court and the courts of appeal were soon routinely invoking its framework as the governing standard in cases involving statutory questions of agency authority. The Court eventually decided that *Chevron* rested on 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"

The decision to overturn *Chevron* is expected to have a significant impact on the interpretation and implementation of a broad range of statutes, limiting agency discretion and precluding agency actions, rules and regulations not clearly authorized by the Congress. Justices Kagan, Jackson and Sotomayor joined a lengthy dissent.

ADMINISTRATION/WATER QUALITY

Human Health Criteria

On June 6, the EPA announced its determination that Alaska must update its water quality standards and human health criteria (HHC) to more accurately reflect the amount of fish Alaskans consume. EPA is requiring Alaska to revise its limits on toxic pollutants in the State's waters. If the State does not submit revised water quality standards, EPA plans to propose new and revised standards for Alaska that will account for its estimated Alaska Native and rural subsistence fish consumption rate of 7-14 ounces per day, rather than the current 2003 national default fish consumption rate of approximately 7 ounces per month.

In a letter to Alaska Department of Environmental Conservation (DEC) Commissioner Emma Pokon, EPA said that "new and revised water quality standards," specifically revised human health criteria, are required for Alaska to "meet the requirements of the Clean Water Act (CWA)." EPA wrote: "New and revised HHC that

more accurately represent actual fish consumption will better protect the health of Alaska's residents... The EPA is committed to working closely and collaboratively with Alaska to ensure that the HHC are protective of applicable designated uses, based on sound scientific rationale, and responsive to the needs of Alaska's residents."

In January, Alaska DEC's Division of Water issued a Triennial Review (TR) identifying the adoption of amended HHC as a high priority issue for rulemaking. It said: "DEC has been actively pursuing rulemaking during the existing TR cycle and will continue this effort during the 2024-2026 TR cycle."

Wild & Scenic Rivers

On June 20, the Interagency Wild and Scenic Rivers Coordinating Council made its new Water Quality Management and Protection for Wild and Scenic Rivers document available on its website. Several WSWC Members reviewed the paper before publication and provided comments and suggestions. See www.rivers.gov/sites/rivers/files/2024-06/water-quality-protection.pdf and WSW #2499, #2600.

The technical paper is designed to provide tools and strategies to a range of professionals in addressing water quality issues on federally designated wild and scenic rivers (WSR). It offers guidance to river managers on incorporating water quality protection into the statutorily required comprehensive river management plan and into other management and planning activities. It covers topics such as state and federal water quality regulations, water quality monitoring program design considerations, and water quality protection strategies.

The final remarks read: "River managers should work closely with state and tribal agencies to ensure that impaired segments of WSRs receive high priority in a state's water quality restoration program, and that the pollution of a WSR is eliminated or diminished."

ADMINISTRATION/WATER RESOURCES **NIDIS/Drought**

On June 24, the National Oceanic and Atmospheric Administration (NOAA) announced \$4.9M in funding for the agency's labs and research partners to improve drought monitoring and prediction in the West. The research combines \$3.1M in funding from NOAA's National Integrated Drought Information System (NIDIS) program and \$1.8M from the Inflation Reduction Act (IRA). NOAA's Climate Program Office's Modeling, Analysis, Predictions and Projections (MAPP) program, in collaboration with the NIDIS program, will support seven research projects collaborating with universities in

California, Colorado, and Texas. The 3-year projects cover drought issues across the southwestern U.S.

The selected projects include: (1) investigating local/remote moisture anomalies as monitors/predictors of Southwest U.S. droughts; (2) predicting drought and subsequent water resource challenges at landscape-resolving scales across the western U.S.; (3) understanding and resolving a global discrepancy in near surface water vapor trends between models and observations; (4) advancing forecast-informed reservoir operations and planning for Texas and New Mexico through integration of climate forecasts and reservoir water balance predictions; (5) understanding heatwave-snow drought relationships across the western United States; (6) advancing understanding of plant-drought interactions for landscape to regional scale drought prediction; and (7) improving hydroclimate forecasts by multi-model combination approaches for enhanced reservoir operations on the Colorado River.

CONGRESS **Colorado River**

On June 18, Senators Mitt Romney (R-UT), John Hickenlooper (D-CO), John Barrasso (R-WY), Michael Bennet (D-CO), and Cynthia Lummis (R-WY) introduced the Colorado River Basin System Conservation Extension Act, bipartisan legislation to extend the System Conservation Pilot Program through 2026 to help the Upper Basin examine water management strategies to help water users manage a drier, more uncertain water supply future.

Romney said: "Over the last several years, the System Conservation Pilot Program has proven successful in increasing water efficiency and mitigating the impacts of historic drought. Reauthorizing this important program will encourage water conservation in Lake Powell and other bodies of water in the Upper Colorado River Basin."

Hickenlooper said: "We need to work together to address the Colorado River crisis, and conservation is one part of the puzzle. Let's finish the pilot program and figure out what works best for Colorado's communities and our farmers."

Senator Lummis said: "The west continues to lead the nation in our cutting-edge water conservation and management practices. Our ability to maintain that reputation hinges on preserving proven policies that mitigate drought threats, and I am excited to partner with my colleagues to protect Wyoming communities and ranchers from droughts by continuing this successful program."

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.