MISSOURI DEPARTMENT OF NATURAL RESOURCES

Legal Session for 2025 WQS Workshop: An Overview of *San Francisco v. EPA* and Other Relevant Cases

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Recent U.S. Supreme Court cases to be discussed

- *San Francisco v. EPA* (2025)
  - Establishes a new interpretation of Clean Water Act § 301(b)(1)(C)
- *County of Maui v. Hawaii Wildlife Fund* (2020) (not so recent)
  - Upholds Clean Water Act permitting requirements for indirect discharges that are the "functional equivalent" of direct discharges
- *Loper Bright Enterprises v. Raimondo* (2024)
  - Overturns the *Chevron* deference doctrine
- *Securities and Exchange Commission v. Jarkesy* (2024)
  - Applies the U.S. Constitution's 7th Amendment right to a jury trial to federal agency adjudication

ATTACHMENT B – FACILITY AND RECEIVING WATER MAPS

Figure B-1. Facility Overview Map

Source: epa.gov, NPDES Permit No. CA0037681

City and County of San Francisco v. EPA
→Background on the NPDES permit

- EPA included two sets of WQBELs:
  - A numeric limitation applicable during dry weather, and
  - Comprehensive management requirements for operation of CSOs during wet weather.
- But EPA determined that these limits alone would not necessarily achieve water quality, so it also included two "generic" prohibitions:
  - "Discharge shall not cause or contribute to a violation of any applicable [WQS] …."
  - "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance …."

San Francisco v. EPA:
→Background on the statutory text

- Clean Water Act § 301(b)(1):
  - (A) requires "effluent limitations for point sources, other than [POTWs], which shall require the application of [BPT] …"
  - (B) requires "effluent limitations based on secondary treatment" for POTWs
  - (C) requires "any more stringent limitation, including those necessary to meet [WQS], treatment standards, or [SOCs], established pursuant to any State law or regulations … or any other Federal law or regulation, or required to implement any applicable WQS …."

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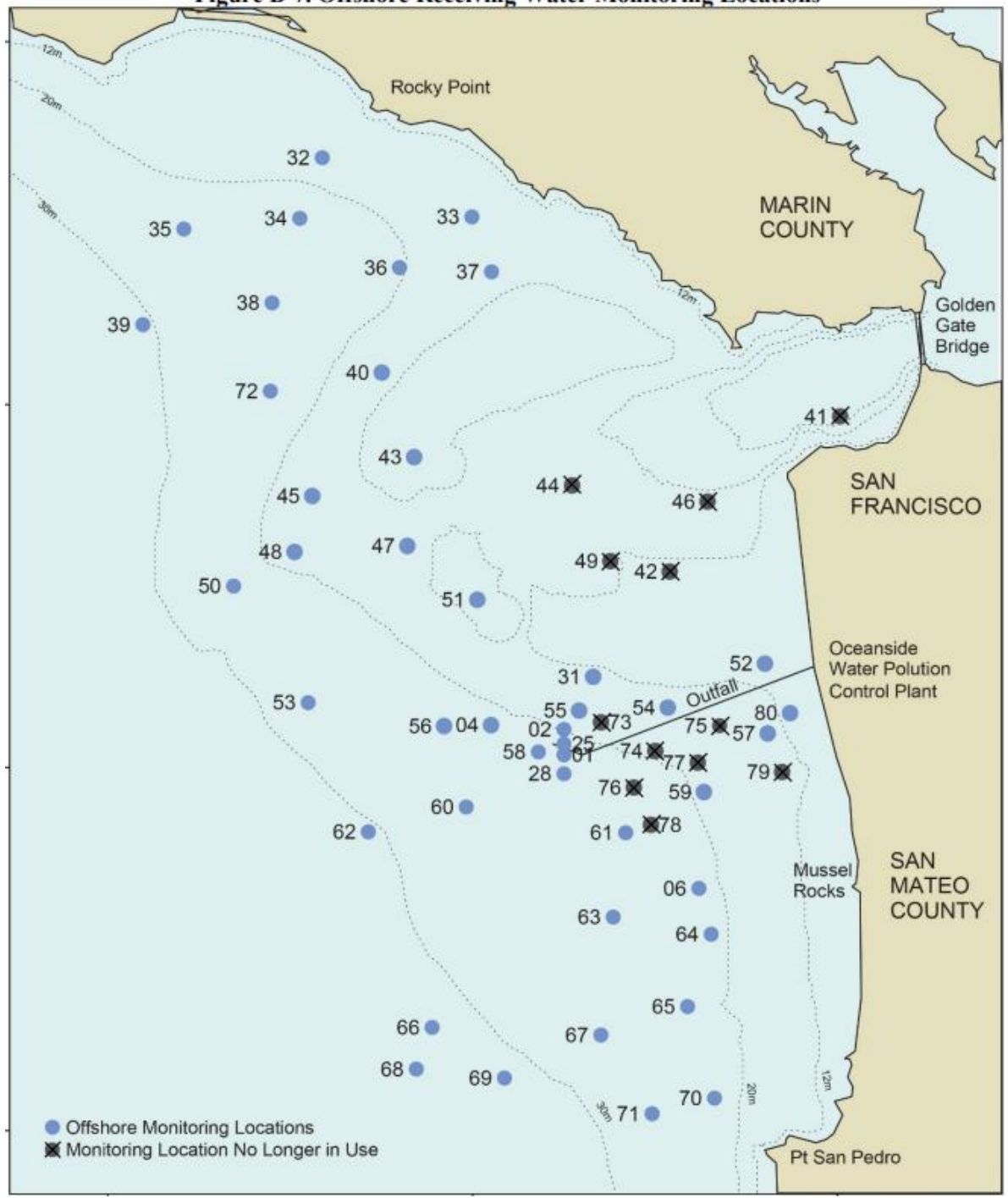
San Francisco v. EPA: →Procedural history

- City and County of San Francisco brought suit directly in the 9th Circuit Court of Appeals to challenge the permit:
  - Alleged that EPA was required to derive effluent limitations rather than rely on narrative conditions prohibiting violations of WQS;
  - Argued that generic prohibitions are neither "necessary to meet" nor "required to implement" WQS; and
  - Argued that generic conditions do not actually prevent pollution, only impose liability after violations have occurred.

San Francisco v. EPA:
→9th Circuit decision

- Held that EPA had authority under § 301(b)(1)(C) to impose "any" limitations ensuring applicable WQSs are met in the receiving waterbody.
- "EPA … was not required to follow the procedures set forth in 40 C.F.R. § 122.44(d)(1) for deriving pollutant-specific effluent limitations in imposing the general narrative provisions."
- Also agreed with EPA's decision to impose the general narrative provisions as a "backstop" to the more specific provisions, because it could help protect beneficial uses.

Figure B-7. Offshore Receiving Water Monitoring Locations



Source: epa.gov, NPDES Permit No. CA0037681

San Francisco v. EPA:
→San Francisco's appeal to the U.S. Supreme Court

- Question Presented: Does the CWA allow EPA or an authorized state to impose generic prohibitions against exceeding WQS without identifying specific effluent limits?
  - In other words, does CWA § 301(b)(1)(C)'s reference to "any more stringent limitation" necessarily refer to effluent limitations?
- San Francisco also argued that the permit had to identify exactly how it had to control its discharges, in words or numbers, without compliance being determined based on conditions in the receiving stream.

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San Francisco v. EPA, 145 S.Ct. 704 (2025)
→Majority opinion: takeaways and holding

- Eight Justices reject San Francisco's primary argument that § 301(b)(1)(C) only authorizes effluent limitations.
  - (This part of the opinion is joined by the four dissenting justices, but not by Justice Gorsuch, who otherwise joined the rest of the majority opinion.)
- But a five Justice majority still concludes that "the two challenged provisions exceed the EPA's authority," and the Court holds that "**§ 301(b)(1)(C) does not authorize the EPA to include 'end-result' provisions in NPDES permits.**"

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San Francisco v. EPA (2025)
→Majority's new term: "'end-result' requirements"

- "For convenience," the Court invents a term that does not appear in the CWA to categorize the types of challenged permit provisions at issue: **"'end-result' requirements."**
  - Remarkably, the Court uses this non-statutory term in its holding, even though this issue was not briefed by the parties or included within the Question Presented.
- The majority opinion describes these as "provisions that do not spell out what a permittee must do or refrain from doing; rather, they make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants."

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San Francisco v. EPA (2025)
→Majority opinion, definition of "limitation"

- Looks to a single dictionary to define the word "limitation" in § 301(b)(1)(C). With no analysis and in a single sentence, the Court declares:
  - "As used in the relevant context, **a limitation is a 'restriction or restraint imposed *from without* (as by law[])**. Webster's Third New International Dictionary 1312 (1976) (emphasis added)."
- "A provision that tells a permittee that it must do certain specific things plainly qualifies as a limitation. Such a provision imposes a restriction 'from without.' But when a provision simply tells a permittee that a particular end result must be achieved and that it is up to the permittee to figure out what it should do, the direct source of restriction or restraint is the plan that the permittee imposes on itself for the purpose of avoiding future liability. In other words, the direct source of the restriction comes from within, not 'from without.'"

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San Francisco v. EPA (2025)
→Majority opinion, more definitions

- Looks to one dictionary each to define the words "implement" and "meet" in § 301(b)(1)(C) (i.e., "any more stringent limitation, including those necessary to meet [WQS] … or required to implement any applicable WQS."
- "The implementation of an objective generally refers to the taking of actions that are designed 'to give practical effect to and ensure of actual fulfillment by concrete measures.' Webster's Third New International Dictionary, at 1134."
  - Then interprets "required to 'implement' [WQS]" as directing EPA to "'ensure' 'by concrete measures' that they are 'actual[ly]' 'fulfill[ed].'"
- "The verb to 'meet,' in the sense operative here, means 'to comply with; fulfill; satisfy' or 'to come into conformity with.' Random House Unabridged Dictionary 1195 (2d ed. 1987)." But then uses none of those terms to conclude:
  - "Thus, a limitation that is 'necessary to meet' an objective is most naturally understood to mean a provision that sets out actions that must be taken to achieve the objective."

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San Francisco v. EPA (2025)
→Majority opinion's response to EPA's concerns

- Addresses EPA's concern about general permits by saying that its opinion "allows" requirements that are "narrative limitations other than end-result requirements," including "provisions demanding compliance with [BMPs] and 'operational requirements and prohibitions.'"
- Dismisses EPA's concern regarding the information disparity between it and the permittee, noting that "EPA possess the expertise … and the resources necessary to determine what a permittee should do. It is also armed with ample tools to deal with situations in which a permittee is slow to provide needed information or is otherwise uncooperative."

San Francisco v. EPA (2025)
→Majority opinion: what about states?

- The majority opinion mentions state-issued NPDES permits only twice, both in passing:
  - Footnote 1: "The provision at issue in this case, §1311(b)(1)(C), applies equally to federal and state permits, but for convenience, we refer only to the EPA when referring to the scope of permitting authority under that provision."
  - When responding to the information-disparity argument: "For one thing, it appears that the EPA and state permitting authorities have used end-result requirements routinely, not just when a permit holder has failed to provide necessary information."

San Francisco v. EPA, 145 S.Ct. 704 (2025)
→Majority's holding

"In sum, we hold that § 301(b)(1)(C) does not authorize the EPA to include 'end-result' provisions in NPDES permits. **Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility**, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer." (emphasis added)

San Francisco v. EPA (2025)
→Dissenting opinion by Justice Barrett

- Argues that the Court's analysis is contrary to the text of the CWA.
- Says the Court's rejection of San Francisco's argument "should have ended this case."
- Criticizes the majority's conclusion:

"Whatever 'any more stringent limitation' may mean, the Court says, it does not authorize EPA to direct permittees to comply with the water quality standards.

This conclusion is puzzling. The entire function of §1311(b)(1)(C) is to ensure that permitted discharges do not violate state water quality standards."

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San Francisco v. EPA (2025)
→Dissenting opinion by Justice Barrett

- Most importantly, notes that § 301(b)(1)(C) "**is not optional**: EPA is required to issue the limitations necessary to ensure that the water quality standards are met. So taking a tool away from EPA may make it harder for the Agency to issue the permits that municipalities and businesses need in order for their discharges to be lawful." (emphasis added).
- "If the Agency must impose individualized conditions for each permittee under §1311(b)(1)(C), then it will be more difficult and more time consuming for the Agency to issue permits."
- Concludes: "Receiving water limitations are not categorically inconsistent with the Clean Water Act."

NPDES Permitting Post-*San Francisco v. EPA* →Impressions and brief analysis (my opinions)

- The Court's holding applies only to:
  - permits/permit conditions (i.e., no effect whatsoever on enforcement of violations by unpermitted facilities): specifically,
  - "limitations" established under § 301(b)(1)(C):
    - meaning the opinion does not apply to NPDES permit limitations established under other authorities; and
    - the opinion does not affect monitoring or reporting requirements, all of which can absolutely still be based solely on water quality.
- Increases the importance of:
  - proactive water quality monitoring;
  - permit writers evaluating water quality data, particularly during renewals; and
  - permit writers requesting facility information early and often.

San Francisco v. EPA (2025)
→EPA's response so far

- Last week, EPA announced final modifications to its Construction General Permit (CGP):
  - "Consistent with [the Court's] holding, this CGP modification removes the proposed generic narrative prohibition analogous to the permit text rejected by the Court in *San Francisco*, replacing it with final water quality-based limitations that tie compliance to the condition of the discharge (not the receiving water)." 90 Fed. Reg. 15,656.
  - Appears to have added turbidity benchmark monitoring, along with reporting and recordkeeping requirements.

NPDES Permitting Post-*San Francisco v. EPA*
→Questions and considerations for states

- Does your state have any state-specific authorities (or even obligations) to include permit terms that are based on the quality or condition of the receiving water?
- If not, how to reframe permit conditions from "end-result requirements" to concrete measures or a plan that ensures that WQSs will be met?
  - WQS staff may need to get more involved assisting permit writers.
- Is it still possible to draft permits that give permittees flexibility?

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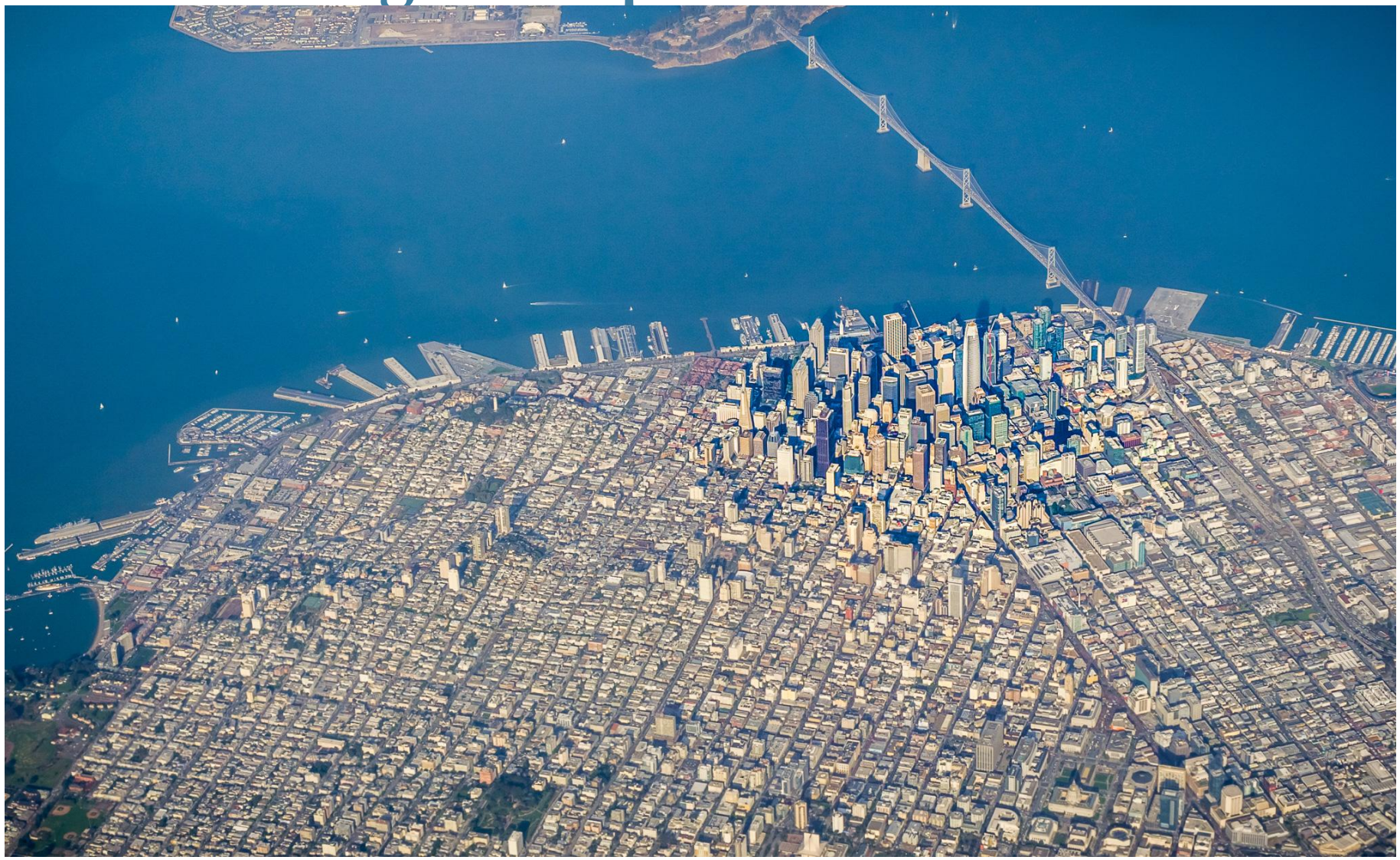
San Francisco v. EPA (2025)
→Final thoughts or questions?



Source: SF.gov

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County of Maui v. Hawaii Wildlife Fund, et al., 590 U.S. 165 (2020)

- Issue was the statutory definition of "discharge of any pollutant," which the CWA defines as "any addition of any pollutant to navigable waters from any point source."
- "The question presented here is whether the [Clean Water] Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, here, groundwater."
- "We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge."

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County of Maui v. Hawaii Wildlife Fund, et al. (2020)
→Factual background

- The County of Maui operates a wastewater reclamation facility serving about 40,000 people, previously had no NPDES permit.
- The facility collects sewage from the surrounding area, partially treats it, and pumps the partially treated wastewater through four injection wells approximately 200 feet deep.
- Amounts to about 4 MGD of effluent that travels approximately ½ mile through groundwater to the ocean.
- Die tracer study determined that at least 64% of the partially treated effluent emerged into the coastal ocean waters along a coral reef and near a beach.

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County of Maui v. Hawaii Wildlife Fund, et al. (2020)

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County of Maui v. Hawaii Wildlife Fund
→"Functional equivalent" factors

"(1) transit time, (2) distance traveled,
(3) the nature of the material through which the pollutant travels,
(4) the extent to which the pollutant is diluted or chemically changed as it travels,
(5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
(6) the manner by or area in which the pollutant enters the navigable waters,
(7) the degree to which the pollution (at that point) has maintained its specific identity."

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) →Majority opinion, Questions Presented and *Chevron*

- Questions Presented:
  - Whether the federal agency at issue had the statutory authority it claimed, under a proper application of the *Chevron* doctrine; and
  - Whether the Court should overrule *Chevron* or at least clarify that statutory silence does not constitute an ambiguity for which federal agencies are owed deference.
- *Chevron v. NRDC* (1984) established a two-part test (supplemented with additional "Step Zero" steps in later cases):
  - Step One: Has Congress directly spoken to the precise question at issue?
  - Step Two: If not, then courts must defer to a federal agency's interpretation of the law it administers, but only if it "is based on a permissible construction of the statute." (i.e., is reasonable).

Loper Bright v. Raimondo (2024)
→Background on *Skidmore* "respect"

- "[I]n *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court explained that the 'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions."
- "The weight of such a judgment in a particular case will depend 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 power to control.**" *Skidmore*, 323 U.S. at 140.

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Loper Bright v. Raimondo (2024)
→Background on the APA

- In 1946, Congress enacted the Administrative Procedure Act to establish a procedural framework for the activities of the rapidly burgeoning "administrative state" comprised of increasingly complex federal agencies established by Congress to regulate industries and protect public health and safety.
- The APA's provision for judicial review says: "To the extent necessary to decision and when presented, 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." 5 U.S.C. § 706.

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) →Majority's holding

"***Chevron* is overruled.** Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But **courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.**" (emphases added).

Loper Bright v. Raimondo (2024)
→Majority opinion, *Chevron* (1984) v. the APA (1946)

- "The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, through, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes." (citing *Skidmore*).
- "The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."
- "Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA."
  - The Court faults the *Chevron* majority, saying: "Without mentioning the APA, or acknowledging any doctrinal shift," it created Step Two.
    - But all of these points ignore the fact that *Chevron* itself was <u>not</u> an APA case!

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Loper Bright v. Raimondo (2024)
→Dissent by Justice Kagan

- Argues that *Chevron* "has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions."
- "This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that these statutes will inevitable contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court."

Loper Bright v. Raimondo (2024)
→Dissent by Justice Kagan

- Criticizes the majority for "giv[ing] itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. … It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice."
- "Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. … But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference."
  - Courts can still decide "all relevant questions of law" while using a deferential standard of review.

Loper Bright v. Raimondo (2024)
→Final thoughts (my opinions)

- Common misconception is that *Loper Bright* somehow affects the authority that agencies have, which is just plain false.
  - Agencies never derive their authority from courts: Agency authority comes from Congress and state legislatures, subject to oversight from the executive branches.
- *Loper Bright* will result in more lawsuits.
  - Increases the importance of effective coordination between litigation attorneys and technical staff to explain agency positions and interpretations persuasively.

SEC v. Jarkesy, 603 U.S. 109 (2024)
→Majority opinion, Question Presented and Context

- Question Presented is "whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud."
- Seventh Amendment: "**In Suits at common law,** where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved** …."
- Concludes that the Seventh Amendment is implicated because "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury."

SEC v. Jarkesy (2024)
→Majority opinion, "public rights" exception

- Then evaluates applicability of the "public rights" exception to courts' Article III jurisdiction.
  - "This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial."
  - "The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury."
- Repeatedly cites to *Tull v. U.S.*, a Clean Water Act case, but unclear how it distinguishes the results.

SEC v. Jarkesy (2024)
→Background on *Tull v. U.S.* (1987)

- Question Presented in *Tull* was "whether the Seventh Amendment guaranteed petitioner a right to a jury trial on both liability and amount of penalty" in a federal CWA enforcement case.
  - Court says no; concludes that the Seventh Amendment guarantees a right to a jury trial to determine liability, but not the amount of penalty, if any, which is the trial court's role.
- The Court looked to the relief sought rather than trying to find 18th-Century parallels based on causes of action.
- Finds that assessment of civil penalties is not a fundamental element of a jury trial. "Congress'[s] assignment of the determination of the amount of civil penalties to trial judges therefore does not infringe on the constitutional right to a jury trial."

SEC v. Jarkesy (2024)
→Majority's analysis of the remedy; dissent's concern

- "In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy."
  - The civil penalties here are "designed to punish and deter, not to compensate."
- Dissent says this is the first ever case in which the Court held that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right available to the government (i.e., a public right).

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Questions?

(keeping in mind that I can't provide legal advice)

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