***Loper Bright* and the National Historic Preservation Act: A case study**
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In *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court famously overruled the *Chevron* doctrine, under which courts were required to defer to "permissible" interpretations of an ambiguous statute by the federal agency charged with administering it—even if the court read the statute differently. The Court concluded that "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."

Litigants post-*Loper Bright* have since taken up the mantle, challenging regulations and other agency pronouncements they believe are not the best interpretation of a statute, including interpretations of environmental statutes. One area that seems ripe for challenges involves the government's interpretation of the National Historic Preservation Act's (NHPA) consultation requirement (section 106)—in particular, its scope with respect to federally licensed actions. Section 106, 54 U.S.C. § 306108, instructs federal agencies to "take into account" the effects of federally funded or federally licensed actions on historic properties. The NHPA charges the

The Advisory Council on Historic Preservation (ACHP), an independent agency, with issuing regulations to "govern the implementation" of section 106, 54 U.S.C. § 304108(a), and courts have generally deferred to its interpretation of the statute. After *Loper Bright*, however, that deference is no longer guaranteed; the Supreme Court reiterated there that not all agencies, and not all agency pronouncements, receive deference.

In an online post issued shortly after the *Loper Bright* decision, the ACHP opined that its regulations remain valid because when the regulations were challenged by industry groups in 2001, they were mostly upheld under *Chevron*. But *Chevron's* deferential standard of review is no longer operative, and the ACHP's interpretation of section 106 may not represent the "best" reading of the statute and its scope. Under the ACHP's interpretation of the statutory trigger for consultation (an "undertaking"), federal agencies must consider and consult on *all* impacts to historic properties caused by linear infrastructure projects, even for projects with only a *de minimis* connection to the permitting agency's actions or jurisdiction.

Under section 106, federal agencies with "direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking," or "authority to license any undertaking," must "take into account the effect of [a] [proposed Federal or federally assisted] undertaking on any historic property." The statute at 54 U.S.C. § 300320 defines the term "undertaking" as

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> a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; . . . [and] (3) those requiring a Federal permit, license, or approval.

The first clause of the definition, to which all others are subordinate, requires funding. Federal financing was top of mind for Congress when enacting the NHPA; the statute's statement of policy at 54 U.S.C. § 300101(1) emphasizes federal "financial and technical assistance."

The ACHP has taken an expansive view of the meaning of "undertaking," asserting jurisdiction over an entire project even where a federal license is required for only a small segment of it. *Nat'l Mining Ass'n, Appellant, v. John M. Fowler, et al., Appellees*, 2002 WL 34244379 (brief filed on behalf of Advisory Committee on Historic Preservation) ("The use of the phrase 'indirect jurisdiction' shows that Congress intended to extend the ambit of section 106 beyond matters within the 'direct' jurisdiction of federal agencies."). Federal licenses often apply to only a comparatively small section of a larger linear infrastructure project, as when work implicating wetlands requires a Clean Water Act permit or when an applicant requires a right-of-way to allow a project to cross lands administered by a federal land management agency. In such cases, the ACHP's interpretation of the term "undertaking" results in federalizing the entire project regardless of whether any federal funding is involved and regardless of the relative size of the permitted segment or component to the overall project. Thus, for a 100-mile long electricity transmission line or road corridor that must cross federal lands or jurisdictional wetlands, the scope of the "undertaking" includes the entire length of the project and the area radiating out from that corridor. ACHP's rationale for this capacious interpretation is that the areas adjacent to the lands or waters where work is federally permitted, licensed, or approved fall within the agency's "indirect jurisdiction."

This broad view of the term "undertaking" has produced the anomalous result that federal agencies, under the auspices of the NHPA, can significantly control and delay development on nonfederal lands. Project proponents must undertake expensive and time-consuming efforts to identify historic properties within the area of potential effects for the entire project—of which the federal hook may be a trifling component—and then support the agency's consultation regarding impacts to those properties and how to resolve them. This interpretation of the scope of an "undertaking" creates significant burdens, especially for transportation or transmission needs that require regional solutions.

The ACHP's interpretation is also in tension with the plain text of the NHPA, which, by its terms, applies only to any undertaking the agency has "authority to license" and does not purport to expand that authority. The traditional tools of statutory interpretation courts use, and which are once again paramount after *Loper Bright*, argue against this broad interpretation. The statute does refer to an agency's "indirect jurisdiction," but only in a clause relating to federally *financed* projects, not the separate clause referring to federally licensed ones. *See* 54 U.S.C. § 306108. An interpretation that relies on the reference to "indirect jurisdiction" to justify

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requiring permitting agencies to consult about impacts to areas outside their *licensing* authority thus is not the "best" reading of a statute. Indeed, at least one court has pointed out that the definition of "undertaking," because its first clause refers to funding, applies by its terms only to federally funded projects. With *Loper Bright's* renewed emphasis on the judiciary's interpretive toolkit, the ACHP's definition of "undertaking" seems likely to be litigated and ultimately, replaced.

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