How Corner Post Affects Enviro Laws' Statutes Of Limitations

By **Chris Leason and Liam Martin** (August 16, 2024)

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The U.S. Supreme Court recently decided Loper Bright Enterprises v. Raimondo,[1] overruling the Chevron doctrine established in its 1984 decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council.[2]

Shortly thereafter, the court issued its decision in Corner Post Inc. v. Board of Governors of the Federal Reserve System, which held that a plaintiff can raise a facial challenge to an agency rule under the catchall federal statute of limitations within six years of being injured by a final rule.[3]

The Corner Post decision overturned a relatively well-established consensus among the circuit courts of appeal that the six-year period ran from the publication of the final rule, regardless of when a plaintiff was injured.

Corner Post, in combination with Loper Bright, has altered the fundamental underpinnings of administrative law by reducing the power of agencies to say what statutes mean, while simultaneously increasing the ability of plaintiffs to challenge agency interpretations — including agency rules previously validated under Chevron deference.

Further, Corner Post's plaintiff-centric approach to the federal catchall limitation may prove to have indirect implications for some specific environmental statutes of limitations periods.

The Court's Decision

The provision directly at issue in Corner Post was Title 28 of the U.S. Code, Section 2401(a), the default statute of limitations for suits against the U.S. — including suits under the Administrative Procedure Act — which provides that, generally, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[4]

Of course, the time at which the six-year period begins under the statute depends on when a claim first accrues. Prior to Corner Post, virtually every circuit court of appeals to consider the issue had held that, at least for facial challenges to a regulation — i.e., for broad challenges to the validity of a rule rather than to its application to a particular plaintiff[5] — the six-year period runs from the publication of the regulation rather than the date the plaintiff is allegedly injured by it.[6]

In Corner Post, the Supreme Court upset this circuit court consensus, holding that an APA claim does not accrue under Section 2401 until a final agency action causes injury to the plaintiff.[7] Relying on dictionary definitions and Supreme Court precedents to determine the meaning of the word "accrue," the majority reasoned that there was no evidence that Congress had intended to depart from "strong background presumption" that a right cannot accrue, i.e., come into existence, before a plaintiff has been damaged.[8]

The majority devoted roughly equal time to rebutting arguments urged by the dissent. The majority and dissent sparred, for example, over whether "finality-focused" as opposed to plaintiff-centric limitations provisions were the accepted practice for administrative statutes prior to enactment of Section 2401(a), and whether relevant precedents supported the majority's background presumption or showed, as the dissent contended, a flexible and claim-specific definition of "accrual."[9]

Although the majority did engage with the dissent's policy concerns, the majority rested most strongly on its textual analysis, writing, for example, that the dissent's "argument hits the immutable obstacle of Section 2401(a)'s text."[10]

Similarly, while the dissent confronted the majority on its own turf, arguing that Section 2401(a)'s direction to consider when "the right of action first accrues" is an instruction "to start the clock at the earliest possible opportunity," the dissent is at its most persuasive in pointing out practical concerns with the Corner Post ruling that appear to have underpinned the erstwhile lower court consensus.[11]

Impact of the Court's Decision

The dissent's principal concern was that, in its view, the majority's rule "means that ... administrative agencies can be sued in perpetuity over every final decision they make."[12] As the dissent explained, this is because Section 2401(a) "now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities," or "by old entities that can find or create new entities to graft onto their complaint."[13]

As the dissent pointed out,[14] this potential consequence is amplified by the court's overruling of Chevron deference in Loper Bright Enterprises v. Raimondo.[15] Considered together, these decisions act as a sort of one-two punch against the administrative state: As long as the challenge is brought by a newly formed entity, "[a]ny new objection to any old rule must be entertained and determined de novo by judges who can now apply their own unfettered judgment as to whether the rule should be voided."[16]

It seems likely that this effect will also produce increased forum shopping, with litigants choosing to file in jurisdictions whose judges may be viewed as more likely to exercise their "unfettered judgment" to overturn established agency rules.[17]

Whether the "tsunami of lawsuits" and attendant "chaos" the dissent predicted will truly come to pass remains to be seen.[18] The dissent asserted that Corner Post "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."[19] But this is something of a simplification.

To get around the limitations period, existing entities that have already been affected by a regulation will need to either recruit plaintiffs to participate in their facial challenges, or create new subsidiaries. And genuinely new entities will generally need to have the wherewithal to identify harmful regulations and challenge them within six years of entity formation.

Further, as the majority noted, late challenges to agency regulations are already possible, including through as-applied challenges, or by petitioning an agency to reconsider an existing rule and then appealing the petition's denial.[20] So whether an avalanche of litigation will materialize depends not only on how widespread the willingness and ability to take those necessary measures really is, but also on the number of instances in which the Corner Post route offers a comparative advantage over existing options.

Admittedly, these considerations will offer little comfort to observers who view Loper Bright and Corner Post merely as component parts of a greater scheme on the part of the conservative legal movement to hobble or dismantle the regulatory apparatus of the federal government.[21]

Aside from possibly resulting in more lawsuits and, consequently, more vacated agency rules, Corner Post could also have the indirect effect of encouraging greater agency use of interpretive rules, opinion letters and policy statements — which did not receive deference prior to Chevron, and are generally less susceptible to legal challenge because they are less likely to be found sufficiently binding to establish plaintiffs' standing to sue.[22]

Impact on Federal Environmental Statutes

The impact Corner Post will have specifically on plaintiffs seeking to bring challenges to rules promulgated under federal environmental statutes likewise remains to be seen, although it is certain that any effect will be, for the most part, indirect.

The notable exception here is the Endangered Species Act — to which Section 2401 and Corner Post squarely apply, because the ESA lacks its own statute of limitations provision.[23]

Corner Post's relaxation of the time period to bring suit under Section 2401 is not directly relevant to challenges under most environmental statutes, which typically have their own specific, and shorter, statutes of limitations.[24]

Further, federal environmental statutes do not use the "accrual" language that was critical to the outcome of Corner Post. Rather, they are among the "many specific statutory review provisions that start the clock at finality," i.e., when a final agency action occurs, rather than when a plaintiff is injured.[25]

Because the majority opinion explicitly distinguished Section 2401's language from the language in most environmental statutes, if anything, Corner Post only confirms that the latter set of limitations runs from finality rather than injury. This is especially true for environmental statutes of limitations that are completely unqualified — reading, for example, that "[n]ot later than 60 days after ... publication ... any person may commence a civil action."[26]

But Corner Post's implications for a second set of provisions is less certain. The Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act all provide limitations periods that run for a certain number of days after a final agency action, unless the challenge "is based solely on grounds" that arose after that period.[27] New injuries, including injuries to new entities, would facially appear to fit within the rubric of "grounds arising after."

However, the U.S. Court of Appeals for the D.C. Circuit has long held — in decisions such as Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency, handed down in 2013 — that, unless the agency has implicitly reopened the proceedings,[28] such language only permits "a substantive attack on a regulation as originally promulgated" to be filed after the limitations period to the extent "post-rulemaking events ... have fatally undermined the original justification of the rule," but not when a challenger seeks review of "defects extant at the time of the original rulemaking."[29]

On the other hand, the D.C. Circuit has also suggested that a claim "arises after" the limitations period (and causes the period to run anew) where a newly formed company was not "in existence at the time the regulation was promulgated."[30] And claimants have also been permitted to sue where a new agency action extends an original rule to previously unregulated parties, providing them with newly ripened claims.[31]

Even these exceptions, however, have been carefully guarded and narrowed by circuit panels apparently wary of the consequences of allowing unlimited facial challenges to long-established agency rules.[32]

Further, at least in the context of the Clean Air Act, the Supreme Court has held — as in Union Electric Co. v. EPA, in 1976 — that the limitations exception only applies where the new grounds are "such that, had they been known at the time," the agency action "would have been an abuse of discretion," suggesting that injury to a particular plaintiff would not be relevant.[33]

While existing law thus seems generally unfavorable to the proposition that fresh injuries from old regulations would necessarily constitute "grounds arising after" under this second set of limitations periods, it remains to be seen whether Corner Post's plaintiff-centric approach and relative disregard for practical consequences will encourage litigants to urge and courts to accept such an argument.

Conclusion

Although it is certain that Corner Post tilts the playing field, at least to some degree, in favor of regulated entities and against regulators, it is unclear whether the wave of litigation the dissent predicts will materialize.

In any case, because most federal environmental statutes provide their own statute of limitations, any effects will be felt most strongly in other areas of the law.

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[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[3] Corner Post Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

[4] 28 U.S.C. § 2401(a).

[5] See, e.g., Corner Post, 144 S. Ct. at 2454.

[6] N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 55 F.4th 634, 639–42 (8th

Cir. 2022), rev'd sub nom. Corner Post, 144 S. Ct. 2440; Harris v. FAA, 353 F.3d 1006, 1012–13 (D.C. Cir. 2004); Odyssey Logistics & Tech. Corp. v. Iancu, 959 F.3d 1104, 1111–12 (Fed. Cir. 2020); Hire Order Ltd. v. Marianos, 698 F.3d 168, 170–71 (4th Cir. 2012); Dunn-McCampbell Royalty Interest Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997); Wind River Mining Corp. v. U.S., 946 F.2d 710, 713–716 (9th Cir. 1991).

[7] Corner Post, 144 S. Ct. at 2460. All Republican-appointed justices joined Justice Amy Coney Barrett in the majority, while all Democratic-appointed justices joined Justice Ketanji Brown Jackson's dissent. See id. at 2446, 2470 (Jackson, J., dissenting).

[8] See id. at 2449–2453.

[9] Compare id. at 2454, 2456–57, with id. at 2474–75, 2477 (Jackson, J., dissenting).

[10] Id. at 2453.

[11] See id. at 2474, 2479–83.

[12] Id. at 2480 (Jackson, J., dissenting).

[13] Id.

[14] Id. at 2482 (citations omitted).

[15] 144 S. Ct. 2244.

[16] See Corner Post, 144 S. Ct. at 2482 (Jackson, J., dissenting).

[17] Cf. Nate Raymond, Texas Federal Court Will Not Adopt Policy Against 'Judge Shopping,' Reuters (April 1, 2024), https://www.reuters.com/legal/texas-federal-court-will-not-adopt-policy-against-judge-shopping-2024-03-30/ (describing "a tactic used by conservative litigants of filing cases in small divisions in Texas' four federal districts whose one or two judges were appoint by Republican presidents and often rule in their favor").

[18] Corner Post, 144 S. Ct. at 2482 (Jackson, J., dissenting).

[19] Id. at 2470 (Jackson, J., dissenting).

[20] Id. at 2459–60.

[21] See, e.g., Harry Blain, SCOTUS Wants to Kill the Administrative State, Jacobin (July 11, 2024), https://jacobin.com/2024/07/scotus-administrative-state-conservative-federal.

[22] See Varu Chilakamarri, et al., Corner Post Magnifies Regulatory Uncertainty After Loper Bright, K&L Gates LLP (July 12, 2024), https://www.klgates.com/Corner-Post-Magnifies-Regulatory-Uncertainty-After-Loper-Bright-7-12-2024.

[23] See, e.g., Ctr. for Biological Diversity v. EPA, 2013 WL 1729573, at *22 (N.D. Cal. April 22, 2013) (citations omitted) ("The ESA does not contain its own statute of limitations. Thus, the six-year statute of limitations in 28 U.S.C. § 2401(a) applies.").

[24] See 33 U.S.C. § 1369(b)(1) (Clean Water Act); 42 U.S.C. § 7607(b)(1) (Clean Air Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act); 15 U.S.C. §

2618(a)(1)(C) (Toxic Substances Control Act); 7 U.S.C. § 136n(b) (Federal Insecticide, Fungicide, and Rodenticide Act); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act); but see Corner Post, 144 S. Ct. at 2473 (Jackson, J., dissenting) (noting that section 2401 applies to claims under the Endangered Species Act).

[25] Cf. Corner Post, 144 S. Ct. at 2453 (citing 28 U.S.C. §§ 2342, 2344; 29 U.S.C. § 655(f)) ("The Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations ... to petition for review 'within 60 days after [the] entry' of the final agency action.").

[26] 15 U.S.C. § 2618(a)(1)(C)(i) (Toxic Substances Control Act); see also 15 U.S.C. § 2618(a)(1)(A) (Toxic Substances Control Act) ("Except as otherwise provided in this subchapter, not later than 60 days after the date on which a rule is promulgated under this subchapter, subchapter II, or subchapter IV, or the date on which an order is issued under Section 2603, 2604(e), 2604(f), or 2605(i)(1) of this title, any person may file a petition for judicial review of such rule or order"); 7 U.S.C. § 136n(b) (Federal Insecticide, Fungicide, and Rodenticide Act) ("[A]ny person who will be adversely affected by [an administrative] order and who had been a party to the proceedings may obtain judicial review by filing ... within 60 days after the entry of such order"); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person ... . Any such application shall be made within ninety days from the date of promulgation of such regulations").

[27] 33 U.S.C. § 1369(b)(1) (Clean Water Act); 42 U.S.C. § 7607(b)(1) (Clean Air Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act).

[28] A proceeding is implicitly or constructively reopened where an agency action amounting to a "sea change" alters the stakes of judicial review in a way that could not have been anticipated. Nat'l Biodiesel Bd. v. EPA, 843 F.3d 1010, 1016 (D.C. Cir. 2016) (citations omitted).

[29] E.g., Pub. Emps. for Env't Resp. v. EPA, 77 F.4th 899, 910–11 (D.C. Cir. 2023).

[30] Coal River Energy LLC v. Jewell, 751 F.3d 659, 662–63 (D.C. Cir. 2014).

[31] See Nat'l Biodiesel, 843 F.3d at 1016 (discussing Coal. for Responsible Regulation Inc. v. EPA, 684 F.3d 102, 130 (D.C. Cir 2012)).

[32] See Sierra Club de Puerto Rico v. EPA, 815 F.3d 22, 27 (D.C. Cir. 2016) (discussing Coal River, 751 F.3d at 662–63); see also Am. Rd. & Transp. Builders Ass'n v. EPA, 705 F.3d 453, 458 (D.C. Cir. 2013) ("[I]f the mere application of a regulation ... were sufficient to constitute an after-arising ground and trigger a new 60-day statute of limitations period, ... concerns about preserving 'the consequences' of failing to bring a challenge within 60 days of a regulation's promulgation would be meaningless").

[33] Union Elec. Co. v. EPA, 427 U.S. 246, 255–56 (1976). This appears to be the only Supreme Court case to directly address this language or similar language in the Clean Water Act and Resource Conservation and Recovery Act — or any other statute.