Loper Bright and *Corner Post* May Create a "Tsunami" of Litigation

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"At the end of a momentous term, this much is clear," declared Justice Ketanji Brown Jackson: "The tsunami of lawsuits . . . that the Court's holdings in [*Corner Post*] and *Loper Bright* have authorized has the potential to devastate the functioning of the federal government."

Much ink has been spilled on the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* which overruled *Chevron v. NRDC*—a 40-year-old precedent that required courts to defer to an agency's reasonable interpretation of ambiguous statutory provisions. From this point forward, the Roberts decision reads, courts "must exercise their independent judgment" and "may not defer to an agency interpretation of the law simply because the statute is ambiguous."

More significant, however, may be the combined effect of *Loper Bright* with the Court's ruling three days later in *Corner Post v. Board of Governors of the Federal Reserve System.* This opinion creates a potentially expansive exception to the six-year statute of limitations for Administrative Procedure Act cases. Some stakeholders believe that, read together, the two decisions will allow parties to revisit lower court precedents and reopen old regulations and agency actions. Earthjustice, for example, warned that the "one-two punch" of these rulings "will sow chaos and undermine predictability and legal certainty."

The two decisions have major ramifications for practitioners

Will this pair of opinions spark a flood of environmental litigation? Consider first the potential for revisiting past court decisions upholding agency regulations and actions. Chief Justice Roberts, downplaying this concern, attested that "we do not call into question prior cases that relied on the *Chevron* framework. The[ir] holdings . . . that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." On the other hand, there are key exceptions to respect for precedent that parties will surely invoke.

It is unclear how many older cases will be perceived as worth targeting by motivated litigants. Even for cases decided under *Chevron*'s "step two"—where the statute is deemed ambiguous—it may be difficult to tell whether the court would have reached a different result absent the deference requirement. Indeed, in many cases, a court's defense of an agency's interpretation as "reasonable" signals that the court found the agency's rationale persuasive. And the *Loper Bright* Court left intact so-called "*Skidmore* deference," where the courts may give due weight to the well-considered views of an expert agency that the court finds persuasive.

Next consider the potential for challenging older agency regulations and actions. This is where *Corner Post* kicks in. In that case, the Court held that an APA claim does not "accrue" until a plaintiff is injured by final agency action, even when the government action being challenged occurred much earlier. Corner Post, a North Dakota truck stop operator that opened in 2018, joined a suit against the Federal Reserve Board under the APA in 2021, alleging that a regulation promulgated a decade earlier violated the Dodd-Frank Act.

The district court dismissed the case as barred by the six-year statute of limitations, and the Eighth Circuit affirmed. In a 6-3 decision, the Supreme Court reversed, reasoning that the truck stop operator could not have been injured by the regulation before it even opened for business.

This decision carries major ramifications for environmental practitioners. Regulations and other agency actions once thought to be safe from challenge because they "survived" the six-year statute of limitations—counting from the date the action was published or announced—may now be subject to challenge by newly created entities, or perhaps even existing companies opening new lines of business. And why would *Corner Post* be limited to businesses? A similar argument for reopening older regulations and agency actions could be made, for example, by newly created environmental NGOs.

The effect of *Corner Post* may be limited when it comes to some environmental statutes that contain express time limitations for seeking judicial review predicated on a date certain—e.g., publication in the Federal Register—as opposed to the date the cause of action "accrued." The Court made clear that its holding did not affect such provisions. On the other hand, some of these statutes have exceptions that could be affected by *Corner Post*'s reasoning. For example, the Clean Air Act imposes a 60-day period for judicial review, but provides an exception for cases based on "grounds arising" after the 60th day.

These are only a few of the issues that will have to be sorted as parties test the limits of these new doctrines. Tsunami or not, a wave of litigation is sure to follow.