

United States Court of Appeals for the D.C. Circuit

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
and AMERICAN PETROLEUM INSTITUTE,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATIONAL BIODIESEL BOARD and GROWTH ENERGY,

Intervenors

On Petitions for Review of a Final Action
of the Environmental Protection Agency

**INTERVENORS' PROPOSED JOINT RESPONSE
TO THE PETITION FOR REHEARING EN BANC**

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INTRODUCTION

Whether an agency may regulate with retroactive effect depends on whether “the relevant statute shows the Congress clearly so intended.” *Boniface v. Dep’t of Homeland Sec.*, 613 F.3d 282, 288 (D.C. Cir. 2010), *cert. denied*, 2011 WL 55611 (U.S. Jan. 10, 2011). The panel here interpreted the relevant statute, 42 U.S.C. § 7545(o), to provide “clear,” though “implicit,” authority for such rulemaking. Op. 34. The panel therefore upheld the challenged regulation—assuming, rather than deciding, that it had retroactive effect.

Petitioners seek reconsideration of this decision, arguing that a court must refuse to enforce a clear authorization of retroactive rulemaking if Congress did not choose language that is sufficiently “express.” Pet. 1. They also argue that the rule must be remanded for further proceedings, despite the panel’s conclusion that a remand “would serve no purpose.” Op. 39. Neither ground justifies rehearing.

As to the first ground, petitioners have not identified a single case that holds that clear statutory language may be ignored because of a failure to use particular words. There is likewise no conflict of authority on whether § 7545(o)’s language is clear. The panel also noted a possible exception to the presumption against retroactivity where, as here, an agency remedies its own delay in implementing Congress’s mandate. This Court recognized that possibility in *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002), and no decision of any court has

rejected it. In any case, the Court need not reach any of these issues on rehearing, because (among other things) the regulation is not in fact retroactive.

As to the second ground, petitioners claim only that the panel misapplied settled law by not ordering a remand. Because the decision rested on a fact-bound assessment of the record, that claim raises no question worthy of reconsideration.

The petition for rehearing en banc should be denied.

STATEMENT

1. Congress amended the Clean Air Act's renewable fuel provisions in 2007. Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110–140, §§ 201–203, 121 Stat. 1492, 1519–29 (codified at 42 U.S.C. § 7545(*o*)). The amendments required respondent Environmental Protection Agency ("EPA" or "Agency") "to ensure that transportation fuel * * * contains at least [a certain] volume of renewable fuel" of various kinds during specific calendar years. § 7545(*o*)(2)(A)(i), (B). The amended statute also provides that, "[r]egardless of the date of promulgation, the regulations * * * shall contain compliance provisions * * * to ensure that the [volume] requirements * * * are met." § 7545(*o*)(2)(A)(iii).

Congress instructed EPA to begin the new regulatory regime in 2009, with regulations promulgated by December 19, 2008. § 7545(*o*)(2)(A)(i), (B)(i). Regulated parties would not need to deal in renewable fuels themselves, but could purchase credits from those who did. § 7545(*o*)(5). The required number of

credits for a given year would be measured by each party's production or import of transportation fuel from January 1 through December 31 of that year. § 7545(o)(3)(B). Under the Congressional Review Act ("CRA"), however, the revised regulations (as "major rule[s]") would not take effect for 60 days after promulgation—*i.e.*, before February 18, 2009. 5 U.S.C. § 801(a)(3).

Due to the extensive analyses required by Congress, EPA was unable to revise its regulations by December 19, 2008. The Agency proposed new regulations on May 26, 2009. 74 Fed. Reg. 24,904 (JA 389). It published the final rule in March 2010, with an effective date of July 1, 2010. "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program" ("RFS2 Rule" or "Rule"), 75 Fed. Reg. 14,670 (Mar. 26, 2010) (JA 2045). To ensure that the fuel volumes specified by Congress would actually be used, the RFS2 Rule required that certain legislatively mandated 2009 fuel amounts be used in either 2009 or 2010. *Id.* at 14,675. The Rule also adhered to the statute's approach of measuring each year's credit obligations based on production from January 1 to December 31, giving regulated parties until February 28 of the following year to accumulate the necessary credits. *Id.* at 14,675–76. EPA concluded that the Rule did not operate retroactively; that regulated parties had adequate notice of their obligations; and that no other approach could achieve Congress's goals concerning fuel usage. *Id.* at 14,676.

2. Petitioners challenged the Rule on multiple grounds, and the panel unanimously rejected all of them. In portions of the opinion that are not challenged here, the panel found that EPA, by missing the 2008 deadline, had not lost authority to require subsequent use of the fuel volumes originally designated for 2009 and that parties had been given adequate lead time to comply with the Rule. Op. 14–25, 39–40. In the portion of the opinion that *is* challenged here, the panel found that the Rule was not impermissibly retroactive. Op. 25–39.

Assuming, without deciding, that the Rule had “primary retroactive effects” (Op. 33), the panel concluded that such effects were permitted by a “clear albeit implicit” statutory authorization (Op. 34). The panel noted this Court’s recognition of a possible exception to the presumption against retroactivity for situations involving a missed statutory deadline. Op. 33. The panel observed that the EISA calculates fuel obligations beginning with production on January 1, 2009, even though, under the CRA, the implementing rule could not take effect until February 18 of that year. Op. 34. And the panel read the Agency’s obligation to act “[r]egardless of the date of promulgation” to “indicate[] * * * Congress’s focus on ensuring [that] the annual volume requirement was met regardless of EPA delay” (Op. 35). Although the preamble to the Rule had not relied on this statutory authorization, the panel found that no remand was warranted, because EPA’s deliberations showed that it “would serve no purpose.” Op. 39.

REASONS FOR DENYING THE PETITION

There is no reason to reconsider the panel’s holding that EPA had statutory authority to promulgate the RFS2 Rule. While many cases have stated the general presumption against retroactive rulemaking, none has forbidden Congress from “clear[ly] albeit implicit[ly]” authorizing such rulemaking in a particular statute. Nor has any case foreclosed an exception to the general rule when the agency must remedy a missed deadline, an issue this Court treated as open in *Sierra Club* and never addressed since. To reach these questions, moreover, the Court would have to resolve two preliminary issues: whether Congress *explicitly* authorized the Agency’s action; and whether the RFS2 Rule is retroactive in the first place. Both of these issues would be resolved in favor of the parties defending the Rule.

There is also no reason to reconsider the panel’s decision not to order a remand. Petitioners’ objections mischaracterize the panel’s reasoning, which simply applied settled legal standards to the evidence in the record.

A. En Banc Rehearing Is Not Warranted On Whether Congress May Impliedly Authorize Retroactive Rulemaking

1. The panel’s decision is correct

The panel correctly concluded that EPA had “clear albeit implicit authority” to calculate renewable fuel obligations based on 2010 production. Op. 34.

a. When Congress delegates “general rulemaking power” to an agency—*e.g.*, the power to “prescribe such regulations as may be necessary” to administer a

statute—the delegation does not normally include the power to make retroactive rules. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 & n.3 (1988) (internal quotation marks omitted). Such a grant “will not, *as a general matter*, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Id.* at 208 (emphasis added). This Court has similarly stated, as a “general legal principle[],” that “[a]n agency may not promulgate retroactive rules absent express congressional authority” (*Nat’l Mining Ass’n v. Dep’t of Labor (NMA)*, 292 F.3d 849, 859 (D.C. Cir. 2002) (per curiam)) and that there is a “presumption against retroactive rulemaking” (*Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)).

This presumption is consistent with “the narrower (and unexceptional) proposition” that Justice Scalia noted in his concurrence in *Bowen*—namely, “that a *particular statute* may in some circumstances implicitly authorize retroactive rulemaking.” 488 U.S. at 223 (emphasis added). “If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule * * *.” *Id.* at 224–25. This Court has treated Justice Scalia’s concurrence as “substantially authoritative” (*Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (citing *Bergerco Canada v. U.S. Treasury Dep’t*, 129 F.3d 189, 192–93 (D.C. Cir. 1997))) and has agreed that “[t]here may be an

exception” to the presumption “for situations in which the statute prescribes a deadline by which particular rules must be in effect and the agency misses that deadline” (*Sierra Club*, 285 F.3d at 68 (internal quotation marks omitted)).

This exception has a simple rationale. When Congress requires an agency to implement a statute by a date certain, allowing the agency’s inaction to “postpone the [statute’s] operation * * * beyond the date fixed by Congress” could “fly in the face of Congressional purpose” and “do violence to the law as Congress wrote it.” *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619–20 (1944). In such circumstances, “[s]omething ha[s] to yield.” *Bowen*, 488 U.S. at 223 (Scalia, J., concurring). Which principle it will be—the presumption against retroactive rulemaking or the command to have the regulation in place by a certain date—depends on the statute’s text. As the Supreme Court has explained, the sum and substance of *Bowen* is that, “where the congressional intent is clear, it governs.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

b. The EISA “prescribes a deadline by which [a] particular rule[] must be in effect[,] and the [A]gency misse[d] that deadline.” *Sierra Club*, 285 F.3d at 68 (internal quotation marks omitted). But this is hardly the only evidence that Congress intended to authorize retroactive rulemaking. For one thing, Congress insisted that the Agency adopt provisions “to ensure that the [annual] requirements * * * are met,” and to do so “[r]egardless of the date of promulgation.” 42 U.S.C.

§ 7545(o)(2)(A)(iii) (emphasis added). The panel correctly read this language as demonstrating “Congress’ focus on ensuring [that] the annual volume requirement was met regardless of EPA delay,” and the Agency properly “put[] the 2009/2010 volume requirements in place at the earliest date notwithstanding agency delay.” Op. 35. For another, as a consequence of the CRA’s 60-day waiting period, even a rule “promulgated by December 19, 2008”—the statutory deadline—would have been effective “at the earliest February 18, 2009, one and one-half months into the calendar year.” Op. 34. As the panel correctly concluded, this “demonstrates that Congress anticipated the possibility of some retroactive impacts.” *Id.*

The panel thus followed the Supreme Court’s instruction in *Kaiser* and gave effect to a “clear albeit implicit” statutory command. *Id.*; *cf. Boniface*, 613 F.3d at 288 (retroactive effect “is permissible only if the relevant statute shows the Congress clearly so intended”). Petitioners read the statute differently. *See* Pet. 9–10. But any disagreement on that score concerns only the proper interpretation of § 7545(o)(2)(A)(iii), a narrow question unworthy of en banc review.

2. There is no intra- or inter-circuit conflict

The panel’s decision does not conflict with any decision of this or any other court of appeals. This Court recognized the possibility of a missed-deadline exception in *Sierra Club* (*see* 285 F.3d at 68), and a decision recognizing a particular issue as an open question cannot conflict with a subsequent decision that

answers the question in a particular way. Petitioners claim that *Sierra Club*'s exception was foreclosed when *NMA* recited the general requirement of “express congressional authority” a few months later. Pet. 8 (quoting 292 F.3d at 859). But that argument misreads a statement of a general rule as a specific rejection of any exceptions to that rule. *NMA* did not address *Sierra Club* or its reasoning, and had no occasion to; the case did not involve missed deadlines, or indeed *any* claim to implicit authorization. As the Court noted, it was “undisputed” that the agency “was not authorized to promulgate retroactive rules,” and so the Court merely stated the general rule en route to applying it. *NMA*, 292 F.3d at 859.

None of the six decisions on which petitioners rely held that Congress may not impliedly authorize retroactive rulemaking. Indeed, not one of the decisions so much as *addressed* that question—much less the specific circumstance of a missed deadline. In four of the cases (including *NMA*), the parties *agreed* that Congress had not conferred retroactive rulemaking authority. *See Arkema Inc. v. EPA*, 618 F.3d 1, 7 (2010); *Combs v. Comm’r of Soc. Sec.*, 459 F.3d 640, 645 (6th Cir. 2006) (en banc); *NMA*, 292 F.3d at 859; *compare* Appellees’ Brief at 24–29, *Durable Mfg. Co. v. Dep’t of Labor*, 578 F.3d 497 (7th Cir. 2009) (No. 08–4122) (arguing only that the rule was not retroactive), *with Durable Mfg.*, 578 F.3d at 503–04 (accepting that argument). In *Bergerco*, this Court found that the challenged rule “[did] not run afoul of *Bowen*”—*i.e.*, that it was not retroactive in the relevant

sense—and so the Court “[did] not consider” the government’s claim to implicit authorization under the applicable statute. 129 F.3d at 192; *see* Brief for Appellant at 24–27, *Bergerco*, 129 F.3d 189 (No. 96–5225), 1997 WL 34649247. Likewise, in *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), *aff’d*, 488 U.S. 204 (1988), this Court explicitly noted that any “exceptions [that] might exist to [the] general rule were not implicated in the case before us” and that the opinion therefore “[did] not purport to address” them. 821 F.2d at 760 (order on denial of rehearing).

Petitioners thus cannot identify a single case from any court holding that a “clear albeit implicit” statutory authorization may be ignored. Op. 34. And there is of course no conflict over the proper interpretation of § 7545(o).

3. This case is not an appropriate vehicle for deciding the question

Even if there were a conflict of authority on whether Congress may impliedly authorize retroactive rulemaking, this case would be the wrong vehicle for resolving it. That is true for two independent reasons: EPA’s action was *expressly* authorized; and, in any event, no special authorization was needed, because the RFS2 Rule is not in fact primarily retroactive. The outcome would thus be the same regardless of how the question raised by petitioners was decided.

a. The EISA expressly authorizes the RFS2 Rule. As this Court has recognized in another context, the clearer the expression of congressional intent,

the murkier the distinction between implicit and explicit commands. *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (“The most traditional tool [of construction], of course, is to read the text; if it clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is ‘silent’ in the *Chevron* sense.”). Petitioners claim only that “clear evidence” of congressional intent is required (Pet. 9 (internal quotation marks omitted)), and that is what the panel said it found.

Congress required that EPA “ensure” that the volume requirements were met for calendar year 2010, “[r]egardless of the date of promulgation” of its regulations. Op. 15–16 n.23 (quoting 42 U.S.C. § 7545(o)(2)(A)(iii)). Congress “thus delegated authority to EPA to make certain that the * * * applicable volume of each type of renewable fuel is sold or introduced into commerce” each year. Op. 15. While the panel characterized this inference as “implicit” (Op. 34), it is at least as accurate to say that the statute *explicitly* permits EPA to address each entire year’s production, “[r]egardless of the date of [the Rule’s] promulgation.”

In addition, Congress unambiguously empowered the Agency to calculate fuel obligations for an entire calendar year through regulations that would not take effect until that year had already begun. The EISA required the Agency to issue the RFS2 Rule by December 19, 2008, and the CRA prohibited the Rule from taking effect until 60 days had passed. *See* Op. 34. That is express authorization.

Petitioners suggest that looking to “a *different* statute” is an improper means of construing the EISA. Pet. 10. But courts “assume that Congress is aware of existing law when it passes legislation,” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and only an absurd definition of “explicit” would forbid reference to the U.S. Code. Petitioners also argue that, having been granted authority to consider production beginning on January 1, the Agency somehow lost that authority by acting too late. Pet. 10. But as the panel held in a portion of the opinion that petitioners do not challenge, when an agency “fail[s] to meet a statutory deadline, courts should not assume Congress intended for the agency to lose its power to act.” Op. 17. This Court “has repeatedly concluded that missing a statutory deadline does not divest an agency of authority.” *Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994). So has the Supreme Court. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (statutory deadlines are meant to “spur” agency action, “not to limit the scope of [its] authority” (internal quotation marks omitted)); *Brock v. Pierce County*, 476 U.S. 253, 265 (1986) (same).

b. This case is also a poor vehicle because—as EPA correctly concluded in the preamble—the RFS2 Rule is not primarily retroactive. Petitioners say the Rule is retroactive because “it would apply even to a company that went out of business prior to the rule’s effective date.” Pet. 5 n.2. But on petitioners’ theory, as applied to companies that have *not* ceased producing fuel, there is nothing impermissible

about a rule that measures those companies' future obligations based on their production for all of 2010. The RFS2 Rule does not alter or affect regulated parties' transactions between January 1 and July 1; it merely calculates the number of credits they must later buy based on their production for the entire calendar year. As to these companies, the very authorities on which petitioners rely (*see id.*) demonstrate that there is no primary retroactivity, because the Rule does not "regulate past transactions," but merely "regulate[s] future rates" while "draw[ing] upon antecedent facts for its operation." *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (internal quotation marks omitted); *see also Neild v. Dist. of Columbia*, 110 F.2d 246, 315 (D.C. Cir. 1940).

Before the panel, petitioners raised the "fleeting diesel importer" hypothetical "without claiming that either they or their members include such a company." Op. 28 n.28, 32. Nor do they make such a representation here. Yet parties cannot bring retroactivity challenges to rules that "had only prospective effect as applied to" them. *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994) (internal quotation marks omitted). If the Agency had promulgated "two entirely separate rules"—one for fleeting importers and another for companies that continued to produce fuel after the effective date—"it is beyond dispute that the latter rule would survive despite the former's [allegedly] retroactive nature." *Id.* at 1128. Because a court should not "set aside an entire

rule where only a part is invalid” (*id.*), petitioners’ arguments do not entitle them to relief.

B. En Banc Rehearing Is Not Warranted On Whether A Remand To The Agency Was Required

In the preamble to the RFS2 Rule, EPA concluded that the Rule was only secondarily retroactive, not that it was primarily retroactive but authorized. 75 Fed. Reg. at 14,676. Petitioners’ alternative ground for rehearing is that the panel upheld the Rule on a basis not adopted by the Agency, in violation of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *See* Pet. 11–14. But the panel cited and applied *Chenery*, concluding that, while a remand would ordinarily be required, it “would serve no purpose” in this case. Op. 36–37, 39. Petitioners thus allege, at most, a misapplication of settled law. That cannot justify rehearing en banc.

In any case, their argument rests on a mistaken premise. Based on its citation (*see* Op. 39) to *National Mining Association v. Department of Interior*, 251 F.3d 1007 (D.C. Cir. 2001), petitioners read the panel opinion as holding that EISA “commands a particular outcome” with regard to retroactivity. Pet. 13 (quoting *Nat’l Mining Ass’n*, 251 F.3d at 1014). But the panel obviously relied on the *next* two sentences of the cited decision, which state that, when “there is [no] significant chance that * * * the agency might have reached a different result,” a remand “would be pointless.” *Nat’l Mining Ass’n*, 251 F.3d at 1014 (internal quotation marks omitted). The other cases the panel cited—which petitioners ignore—

express the same harmless-error rule: if the Agency’s “determination would have in no way varied had it” followed the right procedures (*Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 247 (1964)), then “remand would be an idle and useless formality” (*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)).

Whether the record supports the view that “a remand would serve no purpose” is entirely fact-bound. And the panel’s conclusion that the record *does* support that view is correct. EPA understood perfectly well that it was calculating fuel obligations for all of 2010 in a rule with an effective date of July 1. The preamble therefore considered the same factors that would be involved in petitioners’ requested “balancing [of] the benefits and burdens of adopting a retroactive rule” (Pet. 12): whether regulated parties had adequate forewarning; whether they had enough time to comply; and whether other options would have ill-served the statutory purpose (*see* Op. 38–39). Petitioners do not identify any other factors that the Agency should have considered but did not. EPA has already done all of the “weighing” that petitioners would have it do; a remand here would “convert judicial review of agency action into a ping-pong game.” *Wyman-Gordon*, 394 U.S. at 766 n.6. The panel did not err by failing to order one.

CONCLUSION

The petition for rehearing en banc should be denied.

Dated: February 25, 2011

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, intervenors make the following disclosures:

National Biodiesel Board has no parent companies, and no publicly held company has a 10% or greater ownership interest therein. It has not issued shares or debt securities to the public. National Biodiesel Board is a trade association as defined in D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel industry growth.

Growth Energy has no parent companies, and no publicly held company has a 10% or greater ownership interest therein. It has not issued shares or debt securities to the public. Growth Energy is a trade association as defined in D.C. Circuit Rule 26.1(b). Growth Energy is a non-profit corporation committed to the promise of agriculture and growing America's economy through cleaner, greener energy. Growth Energy was formed in 2009 and its members include firms that produce ethanol, as well as other companies that provide equipment and technology used to produce ethanol from corn.

Dated: February 25, 2011

/s/ Dan Himmelfarb
Dan Himmelfarb

/s/ Stuart A.C. Drake (*with permission*)
Stuart A.C. Drake

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d), that, on February 25, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

I also certify that, on February 25, 2011, the foregoing was served by U.S. Mail, first-class delivery, on:

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Dated: February 25, 2011

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