United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1202 **September Term, 2018**

FILED ON: MAY 24, 2019

PRODUCERS OF RENEWABLES UNITED FOR INTEGRITY TRUTH AND TRANSPARENCY,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

HOLLYFRONTIER CHEYENNE REFINING LLC, ET AL.,
INTERVENORS

On Petition for Review of Final Agency Actions
of the United States Environmental Protection Agency

Before: GARLAND, *Chief Judge*, and GRIFFITH and PILLARD, *Circuit Judges*.

J U D G M E N T

This petition was considered on the record from the Environmental Protection Agency and on the briefs of the parties and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated in the memorandum accompanying this judgment, it is

ORDERED and **ADJUDGED** that the petition for review be **TRANSFERRED** in part and **DISMISSED** in part.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or hearing en banc. *See* FED. R. APP. P. 41(B); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Producers of Renewables United for Integrity Truth And Transparency v. EPA, No. 18-1202

MEMORANDUM

I. Background

The Clean Air Act requires the Environmental Protection Agency (EPA) to promulgate annual "renewable fuel obligation[s]" specifying volumes of renewable fuels to be introduced into the U.S. economy each year. 42 U.S.C. § 7545(o)(2)(B), (3)(B). The obligation to meet the renewable fuel standards (RFS) falls on petroleum refineries and fuel importers, *see* 40 C.F.R. § 80.1406(a), who must ensure that, for every gallon of nonrenewable fuel, an "applicable percentage" of renewable fuel is sold or introduced into the economy. *See* 42 U.S.C. § 7545(o)(3)(B)(ii)(I)-(III); 40 C.F.R. § 80.1407. Obligated parties meet their obligation in annual compliance demonstrations by submitting to EPA, or "retiring," unique Renewable Identification Numbers (RINs). *See* 42 U.S.C. § 7545(o)(5)(A)-(C); 40 C.F.R. §§ 80.1427, 80.1451. RINs are tradeable credits that represent batches of renewable fuel to be used, or blended into nonrenewable fuel to be used, as transportation fuel, heating oil, or jet fuel. 40 C.F.R. § 80.1429(b).

When Congress established the renewable fuel program in 2005, it temporarily exempted all small refineries from RFS compliance until 2011, 42 U.S.C. 7545(o)(9)(A)(i), and, after a congressionally directed study by the Department of Energy so warranted, prolonged the blanket exemption for a subset of those refineries through 2013, *see id.* § 7545(o)(9)(A)(ii). Thereafter, individual small refineries could petition "at any time" for an "extension," prolonging their exemption only upon a showing that RFS compliance would cause the petitioning refinery "disproportionate economic hardship." *Id.* § 7545(o)(9)(B)(i); *see also* 40 C.F.R. § 80.1441.

EPA denied petitions of three Wyoming refineries for extended exemption from 2014 and 2015 RFS obligations. The Tenth Circuit vacated two of the denial orders as based on an impermissibly stringent reading of "disproportionate economic hardship," *see Sinclair Wyoming Ref. Co. v. EPA*, 887 F.3d 986, 999 (10th Cir. 2017), and it granted EPA's voluntary request for remand and vacatur in an appeal involving the third refinery, *see* EPA Br. 7-8. On remand, EPA granted the exemptions. *See* EPA Br. 8. The three Wyoming refineries had by then demonstrated compliance with the 2014 and 2015 standards by retiring RINs for those years, and those RINs had since expired. The EPA thus decided that, in order to provide the refineries "meaningful relief" from their since-excused compliance, it would "replac[e]" the retired, expired RINs with an equal number of newly minted 2018 RINs. *See* EPA Br. 8-9, 19-20.

Petitioner, Producers of Renewables United for Integrity Truth and Transparency (Producers of Renewables or Petitioner), challenges EPA's authorization of replacements for the expired RINs. Petitioner also challenges EPA's timeframe for small-refinery exemptions—in particular, its recent practice of approving exemptions well after the agency has calculated the relevant year's RFS on the assumption that the exempted refineries would participate. Petitioner assails EPA's new approach, but disclaims challenge to any specific exemption. Based on those claims of error, Petitioner seeks, among other relief, an order requiring EPA to revisit the standards it set in recent years.

Because this is not the correct venue in which to challenge the RIN-replacement orders, which are applicable locally in Wyoming, we transfer that portion of the petition to the Tenth Circuit. As to the challenge to EPA's timeframe for extending small-refinery exemptions, we dismiss for lack of jurisdiction. Producers of Renewables did not file its petition for review within 60 days of any of the EPA announcements Petitioner characterizes as subject to challenge, nor within 60 days of any after-arising ground that might have created a new opportunity to timely petition.

II. This Circuit is Not the Venue for Petitioner's Challenges to EPA's RIN-Replacement Orders

Producers of Renewables contends that EPA unlawfully replaced the Wyoming refineries' RINs without notice and comment, that the replacement orders contravene EPA's regulations and the Clean Air Act, and that the orders are arbitrary and capricious. Whatever the merits of those claims, our court is not the correct circuit to consider them. Venue lies in this court only if (1) the final action taken by EPA is "nationally applicable," or (2) EPA publishes a finding that an otherwise locally or regionally applicable action is "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1). Venue for a challenge to agency action that is locally or regionally applicable lies in the corresponding regional circuit—unless EPA acquiesces to a petitioner's choice of venue, which it has not done here. *Id.*; *see Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879-80 (D.C. Cir. 2015).

The final actions challenged here are five orders authorizing new RINs in place of three Wyoming refineries' retired and expired RINs. For purposes of determining whether an action is nationally or locally applicable, our court looks "only to the face of the [challenged action], rather than to its practical effects." *Dalton*, 808 F.3d at 881 (quoting *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013)). Those orders on their face are regionally applicable. On remand from the Tenth Circuit, EPA developed the RIN-replacement orders as a discrete remedy for the Wyoming refineries whose petitions it unlawfully denied. The orders apply only to those refineries. Petitioner and EPA agree that the agency has not replaced expired RINs in any other circumstance, before or since. *See* Oral Argument at 12:50-13:25 (counsel for Petitioner); *id.* at 29:25-33 (counsel for EPA). The asserted national impact of EPA's otherwise regionally-applicable remedial orders—such as the "chaos in a nationwide trading program" that Petitioner anticipates, Pet'r Br. 35—could only conceivably be relevant if EPA had published a finding deeming the orders to have "nationwide scope or effect," *Dalton*, 808 F.3d at 882, which EPA has not done.

EPA suggests that we dismiss the petition, but transfer is the appropriate course where the time for original filing in the correct venue may have passed. *See Alexander v. Comm'r of Internal Revenue*, 825 F.2d 499, 502 (D.C. Cir. 1987) (per curiam). Our decision to transfer expresses no determination on any of the potential jurisdictional defects the Respondent-Intervenors, Wyoming refineries, raise. As far as we are aware, neither the Supreme Court nor this court has decided whether a court may transfer a case without first satisfying itself of its Article III and subject matter jurisdiction. But "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)); *see Goldlawr, Inc. v. Heiman*, 369

U.S. 463, 466 (1962) (court may transfer a case to its appropriate venue without first determining that it has personal jurisdiction over the defendant). We are confident that our order transferring the RIN-remedy challenge does not assume the "law-declaring power" that would require us to first assert jurisdiction. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999); *see also Pac. Mar. Ass'n v. NLRB*, 905 F. Supp. 2d 55, 58-59 (D.D.C. 2012). Accordingly, we elect to transfer this portion of Petitioner's challenge to the Tenth Circuit.

III. Petitioner's Challenge to EPA's Timeframe for Extending Exemptions Comes Too Late

Producers of Renewables also takes aim at EPA's reading of the statutory and regulatory invitation to small refiners to petition for extensions of hardship exemptions "at any time," 42 U.S.C. § 7545(o)(9)(B)(i); 40 C.F.R. § 80.1441(e)(2), which EPA treats as authorization to grant extensions even after annual RFS have been set. Petitioner contends that granting "retroactive" exemptions, Pet'r Br. 49, violates EPA's statutory duty to calculate those standards annually and "ensure" they are met, 42 U.S.C. § 7545(o)(2)(A), (o)(3). However, Petitioner does not challenge any specific exemptions. Instead, it seeks to directly challenge EPA's "promulgation" of 40 C.F.R. § 80.1441 in 2010 together with EPA's statements in subsequent annual rulemakings that it may grant extensions under section 80.1441 after setting the upcoming year's standards. *See* Pet'r Br. C-3, 37 & n.37; Pet'n for Review 2.

The Clean Air Act precludes judicial review of petitions filed more than 60 days after the challenged agency action appeared in the Federal Register, unless "such petition is based solely on grounds arising after such sixtieth day" and is "filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). The filing deadline is jurisdictional: "[I]f the petitioners have failed to comply with it, we are powerless to address their claim." *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011); *see also Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 26 (D.C. Cir. 2016). Because Producers of Renewables' petition comes years after the agency policy it seeks to challenge, we lack jurisdiction to consider it.

Attempting to avoid the Clean Air Act's unusually strict time bar, Producers of Renewables contends that new developments in EPA's administration of small refinery exemptions are "after-arising grounds" that enable a timely challenge. *See Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1016-17 (D.C. Cir. 2016). Petitioner points to EPA's recent activity granting many more exemptions than before, and apparently granting new exemptions (*i.e.* not "extensions") to refineries not previously exempted. It also contends that EPA's unretirements of belatedly-exempted small refineries' RINs have caused volatility and drops in RIN prices. All this, Petitioner asserts, "reopened" earlier EPA actions and newly ripened this challenge. Pet'r Br. 44.

Assuming without deciding that Producers of Renewables identifies final agency action, plus "after-arising grounds" that extended the time to challenge that action, we nevertheless hold the petition untimely. Petitioner filed on July 31, 2018, more than 60 days after the claimed after-arising grounds were apparent. *See Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1114 (D.C. Cir. 2009). Petitioner relies on a June 1, 2018, newspaper report that "EPA allows small refineries to generate RINs that represent previously expired or retired RINs, rather than production of biofuels by the refinery." Pet'r Br. 1 (citing Dan Macy, *EPA's Grant of 2018 RIN*

Credits to Two Refiners Riles Biofuels Industry, OPIS (June 1, 2018)). That article was itself based almost entirely on a Reuters article from May 31, 2018. *See* Jarrett Renshaw & Chris Prentice, *Exclusive: U.S. EPA grants refiners biofuel credits to remedy Obama-era waiver denials*, Reuters (May 31, 2018). Both the OPIS and Reuters articles cited a May 2, 2018, Securities and Exchange Commission (SEC) filing by HollyFrontier, which owns one of the Wyoming refineries. *See* HollyFrontier, *10-Q Quarterly Report*, at 20 (May 2, 2018). The SEC filing confirmed—well over 60 days before Producers of Renewables petitioned us—that EPA had authorized HollyFrontier to "generate new 2018 vintage RINs to replace the RINs previously submitted" as demonstration of its Wyoming refinery's 2015 RFS compliance. *Id.* In addition, EPA announced as early as November 2017 that it planned to "un-retire[]" RINs for small refineries who had received retroactive exemptions. *See* EPA, *Carryover RIN Bank Calculations for 2018 Final Rule*, Docket No. EPA-HQ-OAR-2017-0091, at 2 (Nov. 30, 2017). All this information was available to Petitioner more than 60 days before it sought our review.

Producers of Renewables claims that it could not have known until "July 2018" that EPA had "recently expanded the number of exemptions granted, indicating EPA was granting 'new' exemptions not simply granting extensions, and it was *receiving* and granting those exemptions even after the compliance year ended and the demonstration deadlines passed." Pet'r Br. 2. Not so. In April 2018, Reuters reported that EPA had approved 25 small refinery exemption requests for the 2017 compliance year, up from between six and eight waivers per year in past years, and that the agency was still accepting applications. Jarrett Renshaw & Chris Prentice, *U.S. ethanol groups bristle as EPA frees refiners from biofuels law*, Reuters (April 4, 2018). The Advanced Biofuels Association filed a petition for review based on that information on May 1, 2018—a filing that was itself more than 60 days before Producers of Renewables' petition. Pet'n for Review, *Advanced Biofuels Ass'n v. EPA*, No. 18-1115 (D.C. Cir. May 1, 2018). The Advanced Biofuels petition rests on the same facts that Petitioner here contends were not yet apparent: that EPA's "retroactive grant of a historically unparalleled number of exemptions has destabilized the national renewable fuels market," *id.* at 2, and that EPA "is unlawfully awarding 'extensions' of temporary exemptions to small refineries not previously exempt," Pet'r Br. at 47-54, *Advanced Biofuels Ass'n*, No. 18-1115 (Mar. 6, 2019) (capitalization adjusted).

The upshot is that, even assuming Petitioner has identified agency action subject to challenge, and identified developments amounting to "after-arising grounds," these grounds arose more than 60 days before Producers of Renewables filed its petition for review and hence cannot render the current challenge timely. In so holding, we do not pass on the validity, or the susceptibility to challenge through an appropriate vehicle, of EPA's decisions to grant "extensions" of exemptions to small refineries whose prior exemptions had lapsed or who had not previously been exempted. Nor do we weigh in on EPA's "practice" of unretiring RINs previously retired by those newly exempted refineries. *See* EPA Br. 26.

* * *

Accordingly, we transfer Producers of Renewables' RIN-replacement challenges to the Tenth Circuit, and we dismiss the balance of its petition as untimely. Our decision also moots Petitioner's motion to supplement the record and take judicial notice.