United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1115 **September Term, 2019**

FILED ON: NOVEMBER 12, 2019

ADVANCED BIOFUELS ASSOCIATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

HOLLYFRONTIER REFINING & MARKETING LLC,
INTERVENOR

On Petition for Review of an Order of the
United States Environmental Protection Agency

Before: MILLETT and KATSAS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the Environmental Protection Agency, as well as on the briefs and oral arguments of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be dismissed for lack of jurisdiction, and that the motion to dismiss the petition for lack of jurisdiction be granted, due to the absence of an identified final agency action at the time the petition was filed. Advanced Biofuels Association's motion to compel production is denied as moot.

The Clean Air Act's Renewable Fuel Program, 42 U.S.C. § 7545(o), requires that a specific percentage of the fuel that refineries produce each year be renewable. At the same time, certain small refineries were initially exempted from complying with the Program's renewable-fuel requirements. They also were eligible for extensions of that exemption in subsequent years. Advanced Biofuels Association petitions this court for review of an apparent change in methodology used by the EPA to award those extensions. Because Advanced Biofuels Association's petition did not identify the final agency action being challenged in a manner that

would permit judicial review, we dismiss the petition.

I

The Renewable Fuel Program was enacted in 2005 "[t]o move the United States toward greater energy independence and security" and "to increase the production of clean renewable fuels." Energy Independence and Security Act of 2007, Pub. L. No. 110-140, preamble, 121 Stat. 1492, 1492; *see also id.* §§ 201–210 (amending the Program); Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067–1076 (enacting the Program). To achieve that goal, Congress set annual benchmarks for the applicable volume of renewable fuel to be included in transportation fuel sold or introduced into commerce in the United States. 42 U.S.C. § 7545(o)(2)(A)(i). Those benchmarks steadily increase each year. *See generally id.* § 7545(o)(2)(B)(i). The EPA Administrator is tasked with "ensur[ing]" that those annual targets are met. *Id.* § 7545(o)(2)(A)(i).

Both refineries and fuel importers are obligated to meet the benchmarks established under the Program. 42 U.S.C. § 7545(o)(3)(B)(ii)(I); *see also* 40 C.F.R. § 80.1406(a)(1). Congress provided for an initial blanket exemption from the renewable-fuel obligations for all small refineries for 2010, the first year that regulatory compliance with the Program was otherwise required. 42 U.S.C. § 7545(o)(9)(A)(i); *see also id*. § 7545(o)(1)(K) (defining "small refinery" as "a refinery for which the average aggregate daily crude throughput for a calendar year * * * does not exceed 75,000 barrels").

After that initial period, the statute established a framework for granting individual exemptions when compliance would impose a "disproportionate economic hardship" on a small refinery. 42 U.S.C. § 7545(o)(9)(A)(ii). Congress directed the Department of Energy ("Energy") to conduct "a study to determine whether compliance with the requirements * * * would impose a disproportionate economic hardship on small refineries." *Id.* § 7545(o)(9)(A)(ii)(I). For refineries that Energy determined would be subject to a disproportionate economic hardship, the EPA was required to "extend the [blanket] exemption * * * for a period of not less than 2 additional years." *Id.* § 7545(o)(9)(A)(ii)(II).

After soliciting information from small refineries for the study, Energy developed two scoring matrices, designed to assess (i) disproportionate structural and economic effects of statutory compliance, and (ii) the impact of compliance on a refinery's viability. Energy evaluated refineries' eligibility for the extended exemption by analyzing those two factors. Of the fifty-nine small refineries that received the initial blanket exemption, eighteen replied to Energy's survey. Energy recommended that thirteen of those refineries receive an extension of the initial blanket exemption. The EPA ultimately granted the two-year extension to twenty-four refineries.

After that two-year period ended in 2012, small refineries could petition only for "an extension" of their exemptions. 42 U.S.C. § 7545(o)(9)(B)(i); 40 C.F.R. § 80.1441(e)(2). Specifically,

> [a] small refinery may at any time petition the Administrator for an extension of the

> exemption under subparagraph (A) [referencing the initial blanket exemption and the subsequent two-year extension] for the reason of disproportionate economic hardship.

42 U.S.C. § 7545(o)(9)(B)(i). In evaluating such petitions, the EPA is required to consult with Energy and to consider "the findings of the [Energy] study * * * and other economic factors." *Id.* § 7545(o)(9)(B)(ii).

In recent years, the number of small refineries applying for and receiving those extended exemptions has significantly increased. For 2013 and 2014, only eight petitions were granted each year. That number decreased to seven petitions for 2015. *See* EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last visited Oct. 28, 2019). But starting with 2016's compliance obligations, the number of exemptions granted increased dramatically—nineteen for 2016, thirty-five for 2017, and thirty-one for 2018. *Id.*

Prior to the filing of this action, those extension decisions were neither published nor even publicly acknowledged. Instead, the EPA designated the decisions, in full, as confidential business information. As a result, the identities of the applicants, the decisions, and the decisions' rationales were kept completely confidential, unless the refinery itself chose to make the decision or conclusions public.

Because the EPA deemed the decisions to be completely confidential, entities like petitioner Advanced Biofuels Association ("Association") and its members that were adversely affected by the increased number of granted exemptions were unable to identify, let alone seek judicial review of, the relevant exemption decisions in individual refinery cases. Nor did the EPA issue any public document acknowledging or explaining the sudden uptick in exemptions.

In April 2018, the Association got wind of the spike in exemptions through media reports that disclosed the new statistics. The Association then filed suit in May 2018, challenging the EPA's "decision to modify the criteria or lower the threshold by which [it] determines whether to grant small refineries an exemption[.]" Petition for Review at 1, *Advanced Biofuels, Inc. v. EPA*, No. 18-1115. HollyFrontier Refining & Marketing LLC intervened in this case.

The Association next filed a motion to compel the EPA to produce the full administrative record underlying its apparently new approach to evaluating and granting exemptions. The EPA responded by providing copies of decision documents, issued in 2017 and 2018, under a protective order.

Approximately three months after the petition was filed, the EPA developed what it refers to as a "dashboard," in which it revealed on its website only the total number of petitions received, granted, denied, and withdrawn for each compliance year. The dashboard does not identify the refineries that received extensions, the date of decisions, the regulatory standards being applied to evaluate applications, or the reasons for granting or denying the exemptions.

Developments since the petition was filed have cast a brighter light on the EPA's now-acknowledged change in the legal standards it applies when reviewing extension applications. In one case, the EPA's new rule of decision was disclosed because a small refinery that was denied an extension filed suit to challenge that decision. As the EPA explained its new rule:

> In prior decisions, EPA considered that a small refinery could not show disproportionate economic hardship without showing an effect on "viability," but we are changing our approach. While a showing of a significant impairment of refinery operations may help establish disproportionate economic hardship, compliance with [renewable fuel] obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its [renewable fuel] obligations—even if the refinery's operations are not significantly impaired.

Ergon-West Virginia, Inc. v. EPA, 896 F.3d 600, 614 (4th Cir. 2018) (quoting the EPA's denial of the small refinery's request for an extension).

More recently, the EPA publicly released a formal memorandum documenting its new test for and ultimate rulings addressing forty-two small refinery exemptions for compliance year 2018. *See* Anne Idsal, Acting Assistant Administrator, Office of Air & Radiation, Decision on 2018 Small Refinery Exemption Petitions (Aug. 9, 2019) ("2019 Memorandum"). Forty-two refineries petitioned for extensions of exemptions for that year, of which thirty-one were granted, six were denied, three were declared ineligible or withdrawn, and two remain pending. *See* EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last visited Oct. 28, 2019). In the 2019 Memorandum, EPA explained that, while it "[p]reviously * * * considered that [disproportionate economic hardship] exist[ed] only when a small refinery experience[d] *both* disproportionate impacts *and* viability impairment," the agency had now changed its approach and only requires a refinery to meet one of those prongs. *See* 2019 Memorandum at 1 (italics in original). The EPA also announced that it was adopting a new practice of granting full waivers in cases where Energy had recommended partial waivers because "Congress intended the extension to be a full, and not partial, exemption." *Id.* at 2.

II

Under the Clean Air Act, this court can only review "final action" taken by the EPA. *See* 42 U.S.C. § 7607(b)(1). That limitation is jurisdictional. *Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019). The "final action" requirement under the Clean Air Act has the same meaning as the "final agency action" requirement of the Administrative Procedure Act, 5 U.S.C. § 704. *See Valero Energy*, 927 F.3d at 536. The jurisdictional predicate of final agency action must exist at the time the petition is filed. *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998) (per curiam). And the petitioner bears the burden of establishing jurisdiction. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012).

Final agency action subject to judicial review can take a variety of forms. The most common are notice and comment rulemaking and case-by-case formal or informal adjudications. 5 U.S.C. §§ 553, 554. Agencies may use informal adjudications "when they are not statutorily required 'to engage in the notice and comment process' or to 'hold proceedings on the record.'" *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007)). Within those adjudications, agencies may announce decisional principles that affect similarly situated non-parties in future adjudications. *Conference Group, LLC v. FCC*, 720 F.3d 957, 965–966 (D.C. Cir. 2013).

Informal adjudication is the course the EPA chose here. The rules of decision governing the grant or denial of exemption extensions were manifested through rulings on individual refineries' applications. The Association does not dispute that, under the Clean Air Act and its Renewable Fuel Program, the EPA has the statutory authority to rule on exemption extensions through the informal adjudication process.

The jurisdictional problem for the Association is that its petition for review did not identify any final agency action for this court to review. The petition does not challenge any notice and comment rulemaking or other agency action announcing the adoption of a new methodological basis for decision. *Cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (judicially reviewable final action existed where EPA issued a guidance document that reflected "the agency's settled position," and that "EPA officials in the field [were] bound to apply"). Nor did the petition seek judicial review of any of the EPA's informal adjudications. Quite the opposite, the Association has eschewed seeking review of individual exemption grants. *See* Advanced Biofuels Opening Br. 35.

Instead, the petition asserts that the increased "number of exemptions granted," Pet. 2, could "only be attributable to a decision by EPA to modify the criteria or lower the threshold by which it evaluates and grants exemptions," and challenges that perceived trend in agency decisionmaking as itself unlawful, Pet. 3. While the petition's identification of a pattern across myriad circumstances may be *evidence* of a final agency action, it is not itself a final agency action that, without more, can support a petition for review. Yet that pattern is all that the petition points to as the object for this court's review. *See* Pet. 2–3.

To be sure, the EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review. But we need not decide in this case whether or how an ongoing pattern of genuinely secret law might be challenged because the EPA's changed rules of decision have been disclosed both through the numerous informal adjudication decisions recently released to the Association and, of particular import, the August 2019 formal and public memorandum announcing the EPA's new decisional framework and applying it to forty-two refineries. During oral argument, the EPA acknowledged that the August 2019 Memorandum is "final agency action" to which a challenge could be brought if filed within the required limitations period. *See* Transcript of Oral Argument at 40:23-25, 62:2-6, 62:13-15 (statement by the EPA that the 2019 Memorandum "was not published in the Federal Register, so the 60-day [judicial review]

period has not been triggered yet").

For those reasons, we dismiss the Association's petition for review.

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 rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk