

Environmental Update

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Article One

The Final Rule Promulgated By Environmental Protection Agency Did Not Violate The Energy Independence And Security Act And Was Not Impermissibly Retroactive
National Petrochemical & Refiners Association v. Environmental Protection Agency
Consolidated Case Nos. 10-1070 and 10-1071 (D.C. Ct. App., Dec. 21, 2010)

Petitioners, the National Petrochemical and Refiners Association and the American Petroleum Institute (collectively “Petitioners”) petitioned for review of the Environmental Protection Agency (“EPA”) final rule on the grounds that it (1) violated statutory requirements setting separate biomass-based diesel volume requirements; (2) was impermissible retroactive; and (3) violated statutory lead time and compliance provisions. The U.S. Court of Appeals for the District of Columbia held that the EPA’s final rule did not violate any statute or was impermissibly retroactive, and, accordingly, denied the petition for review.

Background

In 2007, Congress enacted the Energy Independence and Security Act (“EISA”), which expanded the renewable fuel program under the Energy Policy Act of 2005 (“2005 Act”) by establishing required volumes of renewable fuel to be incorporated into gasoline sold in the United States annually. The EISA specifically increased the required volumes for renewable fuel and added new requirements for advanced biofuel, biomass-based diesel, and cellulosic biofuel. EPA posted notice of the final revisions and published the regulations in the Federal Register, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program* (“Final Rule”).

In 2005, Congress amended section 211 of the Clean Air Act that authorizes EPA to regulate fuel and fuel additives to establish a renewable fuel program. Congress established increasing minimum volumes of renewable fuel to be used annually from 2006 through 2012. Additionally, Congress directed EPA to promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States contained the requisite volumes of renewable fuel. The regulations were also to include a credit trading program.

Regardless of the date of promulgation, the regulations were to contain provisions to ensure that the requirements were satisfied. Under the regulations, the obligated parties, including, refiners, importers, and certain blenders of gasoline, were required to demonstrate that they introduced the required volume of renewable fuel into the domestic gasoline pool on an annual basis. Each obligated party was responsible for ensuring its share of overall renewable fuel volume was blended into gasoline sold or introduced into commerce.

The Final Rule applied to gasoline produced or imported on or after September 1, 2007. The obligated parties were required to be registered and record-keeping responsibilities commenced. As enforcement, EPA adopted a system of Renewable Identification Numbers (“RINs”), whereby obligated parties would demonstrate their compliance by acquiring RINs for each gallon of renewable fuel, which was assigned to batches of renewable fuel produced or imported into the United States.

The Final Rule significantly increased the applicable volumes of renewable fuel required to be used annually beginning 2008 through 2012. The scope of renewable fuel subject to the standards was also expanded to include diesel and some non-road fuels. The EISA authorized the waiver of volume requirement only in limited circumstances. The modified regulations were to be promulgated within one (1) year, by December 19, 2008. The Final Rule, however, was not published until November 21, 2008. EPA therefore published notice that it was unable to meet the previously set deadline for promulgating modified regulations therefore it ordered that the previously established volumes would apply.

On May 26, 2009, EPA published a notice of a modified regulatory scheme to incorporate the EISA’s changes to the renewable fuel program as well as implementing existing regulations. EPA promulgated the final revised regulations on February 3, 2010 and published the Final Rule in the Federal Register on March 26, 2010. Under the Final Rule, the obligated parties were required to use 1.15 billion gallons of biomass-based diesel based on combined volume requirements for 2009/2010 with a deferred compliance date. The parties were further required to apply the applicable percentage standards to their 2010 production or importation of gasoline and diesel fuel to calculate their renewable volume obligation for 2010. The compliance date for the 2009/2010 volume requirement was February 28, 2011. And the effective date of the Final Rule was July 1, 2010.

EPA expressly stated that it adopted the 2009-2010 volume because “it more closely represented what would have occurred if the EPA had been able to implement the 0.5 billion gallon requirement in 2009.” EPA stated the volume requirement was a reasonable exercise of its authority to issue regulations that ensure that the volumes for 2009 are ultimately used, even though the EPA was unable to issue final regulations prior to the 2009 compliance year. The EPA regulations allowed for obligated parties to defer compliance with any or all of the 2009 standards until the 2010 calendar year.

Court’s Rationale

Petitioners contend that the Final Rule violated the statutory mandate under 42 U.S.C. § 7545(o)(2)(B) that the biomass-based diesel requirement for 2010 “shall” be 0.65 billion gallons by imposing a combined 2009/2010 requirement of 1.15 billion gallons. Petitioners asserted that the statutory mandate is binding. Additionally, Petitioners contend that EPA lacked authority to establish the 2009/2010 volume because it failed to issue the directive before the statutory deadline. On review, the court analyzed Congress’ intent under 42

U.S.C. § 7545(o)(2)(B) and the Final Rule to determine which volume requirement was binding and enforceable.

The court determined that Congress delegated authority to EPA to make certain that the 2009 applicable volume of each type of renewable fuel is sold or introduced into commerce. The express language under 42 U.S.C. § 7545(o)(2)(A)(i) provides that EPA “shall promulgate regulations to *ensure* that transportation fuel sold or introduced into commerce in the United States...on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, and biomass-based diesel....”

Contrary to Petitioner’s assertions, the court determined that courts should not assume that Congress intended for an agency to divest its power to act upon the agency’s failure to meet a statutory deadline. Congress did not expressly state in the EISA what would occur if the EPA failed to meet the statutory deadline for issuing revised renewable fuel regulations on the increased 2009 volume requirements. Precedent from The Supreme Court has established that congressional silence in the EISA does not presume that Congress intended EPA to lose authority to act upon missing statutory deadlines. The court further determined that the EISA deadlines mandating that EPA issue revised regulations were unrealistic because final revised regulations were due in one year yet the EISA included several “new, complex provisions” to be considered.

The entire case is largely premised on EPA’s scope of authority when it fails to meet statutory deadlines for promulgating the implementing provisions in accordance with the EISA. The court determined that under the circumstances Congress’ objective to expand the renewable fuel program under the EISA is better facilitated by upholding EPA’s approach in the Final Rule instead of merely foregoing the 2009 volume requirements as proposed by Petitioners. Accordingly, the court held that the EISA authorized EPA to apply in 2010 the volume requirement for biomass-based diesel established by Congress for 2009, and EPA did not lose authority to establish volume requirements despite missing the statutory deadline.

Petitioners also asserted that the Final Rule is impermissively retroactive by imposing renewable fuel standards that became effective in July 2010 but apply to the entire 2010 calendar year. Petitioners asserted that the regulation had a retroactive effect because they were subjected to new duties or disabilities regarding past transactions when they were required to obtain RINs to demonstrate their compliance with the renewable fuel standards.

In the preamble, EPA expressly stated that the Final Rule was not retroactive. Additionally, EPA asserted that Congress expressly and impliedly authorized the retroactive effect, if any, by directing EPA to ensure that specified renewable fuel volume requirements “regardless of the date of promulgation.”

EPA had clear implied authority under the EISA to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve statutory objectives. EPA fulfilled its obligation to consider relative benefits and burdens in concluding that applying second retroactive fuel standard to the entire calendar year was consistent with the EISA. A review of the structure of the EISA demonstrates that Congress anticipated retroactive impact in the first year of the expanded renewable fuel program. Congress set volume requirements sometime in November of the first year yet applying the requirement to the entire calendar year.

Additionally, it can be inferred that Congress was aware that EPA could miss a statutory deadline for promulgating regulations. The 2005 Act set an August 8, 2006 deadline but directed that applicable regulations be applied to the entire calendar year. Moreover, the Final Rule's retroactivity does not make the situation worse because the obligated parties had adequate notice of their need to accumulate RINs to satisfy 2010 standards. Accordingly, the court determined that the Final Rule was not impermissibly retroactive.

Conclusion

The United States Court of Appeals for the District of Columbia upheld the Final Rule promulgated by EPA which established increasing volume requirements of fuels and fuel additives in accordance with the renewable fuel standard program. Despite missing the statutory deadline established by Congress under the EISA, the EPA did not divest any authority to establish and enforce volume requirements for 2009 and 2010 during the 2010 calendar year. This case supports that an agency does not divest the authority to promulgate regulations when statutory deadlines lapse to the extent that no statutory language states otherwise and the agency's continued authority is consistent with legislative objectives.

Article Two

Settlement of an Action for the Impairment of Property Values Cannot Bar Arrow's Subsequent CERCLA Section 113(b) Contribution Claim *Arrow Gear Company v. Downers Grove Sanitation District* (Case No. 09-4030, 7th Cir., Dec. 10, 2010)

Arrow Gear Company and Precision (collectively "Arrow") appealed an order granting the defendants in Arrow's contribution action summary judgment based on *res judicata*. In 2008, Arrow and Precision brought separate lawsuits under CERCLA's section 113(b), seeking contribution against other polluters ("Defendants"), arising from Arrow having been found liable for groundwater contamination. The Defendants filed summary judgment alleging that Arrow's and Precision's suits were barred by *res judicata*-that the prior settlement of the 2004 *Muniz v. Rexnord Corp.* ("Muniz") class action already resolved the rights of these parties arising from the groundwater contamination at issue. After addressing issues of appellate and trial-court jurisdiction, *res judicata* and the interpretation of settlement agreements, the 7th Circuit reversed with instructions to reinstate the suits. The Court only addressed Arrow's suit as Precision's did not offer any additional issues.

Background

Arrow, along with other companies, operated commercial facilities in the Ellsworth Industrial Park, in Downers Grove, Illinois. These commercial facilities used industrial solvents that leaked into groundwater and contaminated adjacent residential areas. EPA began investigating this site in 2002, and later filed an enforcement action. EPA had not concluded its investigation at the time of Arrow's suit and appeal, but was already seeking \$1 million from Arrow to reimburse it for its investigation costs. EPA had not determined remediation costs and was reserving its right to impose additional costs against Arrow.

The Muniz class action was filed in federal court on behalf of residents of the contaminated area against several polluters—Arrow included. The Muniz action alleged several causes of action seeking damages mainly for the impairment of property values. In 2006, the parties settled this class action for \$16 million, followed by a series of agreements under which the defendants allocated the settlement proceeds among themselves. Each agreement “...releases in the broadest possible terms any claims for contribution by any defendant against any other defendant that had or could have been made ‘from the beginning of time.’” *Id.* This broad release was qualified such that “...the agreement does ‘not release any claims other than the specified claims and do[es] not release claims that may arise in other litigation or in other contexts related to the alleged contamination at the Ellsworth Industrial Park.’” *Id.*

After the settlement agreements were signed, the district court dismissed the Muniz suit with prejudice. The court did not, however, reserve jurisdiction to resolve disputes arising out of these settlement agreements. Defendants allege that the dismissal with prejudice is *res judicata* in Arrow’s suit because the suit arises out of the same facts as Muniz—the groundwater contamination caused by the leakage of solvents at the Ellsworth Industrial Park.

Court’s Rationale

The Court initially addressed the issue of appellate jurisdiction as the district court did not dismiss Arrow’s suit against all the polluters it sued; Arrow accepted a voluntary dismissal, without prejudice, of its pending claims against two remaining defendants. These defendants, who were parties to Arrow’s appeal, argued that the suit was pending against them so the dismissal was not a final, appealable judgment. These defendants pointed out that should Arrow be allowed to proceed with its appeal while leaving contribution claims open against them, the result would “...prevent the entirety of the contested issues, involving all the parties, from being resolved in a single appeal...[resulting in] piecemeal appealing, which is disfavored in the federal court system.”

The 7th Circuit previously held that a decision is not final for purposes of appellate jurisdiction if an entered dismissal permits the plaintiff to refile one or more of its claims against one or more of the defendants. [Citations omitted.] A dismissal without prejudice does not always permit a suit to be refilled, resulting in a final, appealable resolution. For instance, when a statute of limitations has run, or when a dismissal for want of subject-matter jurisdiction is entered, it makes no difference whether a dismissal was voluntary or with prejudice as the result is the same—the claim is extinguished and is, therefore, appealable.

As Arrow could have refilled its case against the defendants who had voluntarily settled, the Court, on oral argument, gave Arrow’s attorney the choice to either stand by its voluntary dismissal resulting in the dismissal of the appeal, or to convert its dismissal of the other two defendants to a dismissal with prejudice. Arrow’s attorney selected the second option resulting in a final appealable judgment the merits of which the Court could consider.

The final jurisdictional issue concerned whether a district court, in dismissing a suit due to settlement and failing to reserve jurisdiction to resolve issues arising from the settlement, could still entertain a suit to enforce the settlement even if there is no federal jurisdictional basis separate from the basis of federal jurisdiction in the original suit. Precedent does not

allow a court to entertain the suit to enforce the settlement unless there is an independent basis of federal jurisdiction over such a suit. [Citation omitted.] This authority is not applicable in this matter because Arrow's suit is based on federal law-CERCLA, and not on any settlement governed by state law.

Concerning the merits of Defendants *res judicata* defense, the Court rejected the argument that the Muniz case adjudicated the issues raised in Arrow's suit. The Court stated: "[i]t would have been difficult to settle all possible claims by the cross-claiming defendants before their total liability was determined. So claim splitting—allocation of the \$16 million first, and of the additional \$5 million (which will doubtless grow) second—made sense, and the district court should not have forbidden it." *Id.* Moreover, there was no doubt that the settlements limited the release to claims by defendants against each other concerning the allocation of the \$16 million. The Defendants, therefore, would not have a defense of *res judicata* to Arrow's contribution action that concerns responsibility for remediation and investigatory costs arising from the leakage of solvents at the Ellsworth Industrial Park.

Conclusion

Claim-splitting is a common practice in many jurisdictions, the 7th included. The practice represents the pairing down of complex cases so they can be administered according to the settling parties' wishes. This is a vital tool used to administer large environmental cases.

Article Three

FERC's Refusal to Impose Conditions on PacifiCorp's Operation of the Klamath Hydroelectric Project Upheld

Hoopa Valley Tribe v. Federal Energy Regulatory Commission
(Case No. 09-1134, D.C., Dec. 28, 2010)

In 2007, the Tribe filed with the Commission a motion asking that interim environmental conditions be imposed in PacifiCorp's annual licenses. Specifically, the Tribe requested that the Commission immediately impose the conditions with respect to ramping rates and minimum flows. In 2008, the Commission issued an Order denying the Tribe's requests as the record did not demonstrate the need for imposing the requested conditions on PacifiCorp's annual licenses. The Tribe filed a request for rehearing of the Commission's Order, arguing that the Commission had erroneously rejected the proposed conditions on the ground that they were not necessary to prevent irreversible environmental damage to the trout fishery. In the second order for review, the Commission agreed with the Tribe that a showing of irreversible environmental impact was not necessary for the imposition of interim environmental conditions in an annual license. Rather, the Commission concluded absent such evidence, it would examine a request to impose interim conditions under the terms of the license essentially in the same manner as if it were being asked to reopen the license. Under this standard, the Commission concluded that the Tribe had not demonstrated that its proposed conditions were appropriate in PacifiCorp's annual license, even if it required that the project be relicensed. On appeal, the Court affirmed that the Commission applied the appropriate standard, and that it had properly exercised its discretion afforded to it under the regulations.

Background

This case involves the Klamath Hydroelectric Project, located primarily on the Klamath River in Klamath County, Oregon, and Siskiyou County, California. The original 50-year license for the Klamath project issued by the Federal Power Commission (FERC's predecessor) expired on March 1, 2006. Since that time, PacifiCorp, the licensee of the project (and intervenor), has been operating the project under annual licenses.

The Tribe holds fishing rights in the Klamath River and subsists, in part, on the trout.

In 2004, PacifiCorp filed an application with the Commission for a new license for the project. In this relicensing proceeding, the Department of the Interior filed certain conditions required in the imposition in any new license for the Klamath project, including specific ramping rate (*i.e.*, rate of flow release) and minimum flow conditions intended to prevent damage to the local trout fishery.

On February 23, 2007, the Tribe filed with the Commission a motion asking that interim environmental conditions be imposed in PacifiCorp's annual licenses. Specifically, the Tribe requested that the Commission immediately impose the conditions with respect to ramping rates and minimum flows that Interior had required in the relicensing proceeding. *Id.* (Interior did not join the Tribe's request.)

In the first order on review, "Order Denying Motion for Interim License Conditions," the Commission concluded that the record did not demonstrate the need for imposing the requested conditions in PacifiCorp's annual licenses.

On December 19, 2008, the Tribe filed a request for rehearing of the Commission's Order, arguing that the agency had erroneously rejected the proposed conditions on the ground that they were not necessary to prevent irreversible environmental damage to the trout fishery. In the second order on review here, "Order Denying Rehearing," the Commission agreed with the Tribe that a showing of irreversible environmental impact was not necessary for the imposition of interim environmental conditions in an annual license. Rather, the Commission determined that, absent the prospect of irreversible impacts, "we examine a request to impose interim conditions under the terms of the license essentially in the same manner as if we were being asked to reopen the license." *Id.* Applying this standard, and exercising the discretion afforded the agency under its regulations, the Commission concluded that the Tribe had not demonstrated that its proposed conditions were appropriate in PacifiCorp's annual license, even if required in the event the project is relicensed.

Court's Rationale

The Court held that the Commission applied the appropriate legal standard in deciding whether the Tribe's proposed interim conditions should be included in the Klamath project's annual license. The Commission applied the same standard it has used to invoke its discretion to reopen a hydroelectric license, at which time it would deem whether new mitigation measures would be required if they were necessary to prevent a project's serious, unanticipated impacts on the environmental resources. The Commission had employed this same standard in the context of issuing annual licenses-*i.e.*, to review relevant environmental conditions and to take such conditional steps, if necessary. This review, however, did not require the Commission to impose the environmental conditions that may

be required for a new, long-term license.

In this context, the Commission explained that if, "...with the passage of time, a project is found to have unanticipated, serious impacts on...fishery resources, the Commission can reopen the license to determine that, if any, additional mitigation measures are required by the public interest, after notice and opportunity for hearing," *Id.*, quoting *Ohio Power Co.*, 71 FERC ¶ 61,092 at 61,314 n.43 (1995)). This standard being invoked here properly supported the Commission's conclusion that because the project was not having the unanticipated, serious impact on the trout fishery, the Commission appropriately exercised its discretion to deny the Tribe's request to reopen the licensing process to impose interim conditions.

The Commission's decision was also supported by substantial evidence in the record. This case presented "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Id.*, quoting from *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). The Commission properly acknowledged the conflicting evidence-regarding the project's effects on the trout population, and weighted the testimony of conflicting experts to hold that the fishery had sustained some adverse effects but was thriving, nevertheless. The Court held that the Commission's conclusions were supported by substantial evidence.

Conclusion

The Tribe dismissed much of the evidence the Commission relied upon, preferring to emphasize other expert testimony contained in the record, hoping to cast doubt on the Commission's decision. In the case of disputed expert testimony, the court "must defer to the informed discretion of the responsible administrative agenc[y]." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 746-47 (D.C. Cir. 2001).