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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SINCLAIR WYOMING REFINING COMPANY, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 22-9530

Petition for Review of an Order from the Environmental Protection Agency (EPA No. EPA-1)

Jeffrey R. Holmstead (Brittany M. Pemberton with him on the briefs), Bracewell LLP, Washington, D.C., for Petitioner.

Benjamin J. Grillot (Todd Kim, Assistant Attorney General with him on the brief), United States Department of Justice, Washington, D.C., for Respondent.

Before **HARTZ**, **MATHESON**, and **McHUGH**, Circuit Judges.

MATHESON, Circuit Judge.

Sinclair Wyoming Refining Company petitions this court under the Clean Air Act and the Administrative Procedure Act to challenge an email from an Environmental Protection Agency ("EPA") official denying the return of its Renewable Identification

Numbers ("RINs") that it had deposited with EPA when it was not exempted from the Renewable Fuel Standard program for the year 2018. Because the email was not a final agency action, we dismiss the petition for lack of jurisdiction.

I. BACKGROUND

A. *Legal Background*

The Renewable Fuel Standard Program ("RFS" or "Program") requires most domestic oil refineries to blend ethanol and other renewable fuels into the transportation fuels they produce. *See* 42 U.S.C. §§ 7545(o)(1)(J), (o)(1)(L), (o)(2)(A)(i).

As part of the Program, renewable fuel producers and importers "generate" RINs for each gallon of renewable fuel they introduce into the market. 40 C.F.R. § 80.1426 (2023).[1] The RINs, once created, may be bought and sold. *Id*. § 80.1428(b)(3). Refineries that cannot meet the RFS blending requirements and are not exempt from doing so can deposit or "retire" with EPA the RINs they have purchased to comply with the Program. *See id.* §§ 80.1427, 80.1434(a)(1). They can seek return of the RINs for a given year if EPA determines retroactively that they were exempt for that year.

[1] A renewable fuel is (1) "produced either from renewable biomass or from a biointermediate produced from renewable biomass;" (2) "used to replace or reduce the quantity of fossil fuel present in a transportation fuel, heating oil, or jet fuel;" and (3) "[h]as lifecycle greenhouse gas emissions that are at least 20 percent less than baseline lifecycle greenhouse gas emissions, unless the fuel is exempt from this requirement . . . ." 40 C.F.R. § 80.1401 (2023).

We cite the current regulations. Any changes since the original regulations are not material to our analysis.

When Congress created the RFS in 2005, it exempted small refineries from Program obligations until 2011. 42 U.S.C. §§ 7545(o)(1)(K), (o)(9)(A)(i). Congress directed EPA to "extend the [small refinery] exemption" for at least two additional years after 2011 if the Department of Energy ("DOE") determined RFS obligations would impose "a disproportionate economic hardship" on a small refinery. *Id.* § 7545(o)(9)(A)(ii). Under this ongoing exemption, EPA determined, in conjunction with DOE, whether to extend an exemption on a case-by-case basis. From 2011 until 2022, EPA and DOE made this determination based in part on a scoring matrix that assessed the impact of the RFS on a small refinery.

B. *Factual and Procedural History*

1. **Sinclair's 2018 Exemption Application**

Sinclair and 35 other small refineries applied for the hardship exemption for compliance year 2018. EPA did not act on their request within the RFS statutory deadline of 90 days, so the refineries deposited their RINs with EPA to ensure compliance.

In August 2019, EPA granted exemptions to 31 refineries and returned the RINs they had deposited for 2018, but it denied Sinclair's and four others' applications. When Sinclair challenged this decision in this court, the administrative record revealed that EPA had failed to transmit a critical document to DOE for matrix scoring. EPA stipulated to the voluntary dismissal of Sinclair's challenge so the agency could conduct further administrative proceedings.

2. ***Renewable Fuels Association v. EPA***

In January 2020, this court decided *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020) ("*RFA*"). We held that to receive a hardship exemption after 2011, a small refinery "must show that it is seeking an extension of an exemption, as opposed to a free-standing exemption." *Id*. at 1250 (quotations omitted). Thus, a refinery could receive an RFS exemption only if it had a continuous, unbroken line of exemptions following the initial blanket exemption. *See id.* The small refineries in *RFA* successfully petitioned the Supreme Court for certiorari. *See HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 974 (Mem.) (Jan. 8, 2021).

3. **2021 Retroactive Exemption; Challenges in the D.C. and Tenth Circuits; Sinclair's Request for Return of the RINs**

On January 14, 2021, while the Supreme Court case was pending, EPA granted Sinclair a retroactive exemption for 2018. A renewable fuels industry group immediately petitioned the D.C. Circuit to block Sinclair's retroactive exemption. On January 21, 2021, the D.C. Circuit granted an administrative stay of the retroactive exemption. On February 20, 2021, the D.C. Circuit dissolved the administrative stay and held the case in abeyance.

The same industry group also petitioned the Tenth Circuit seeking a stay of Sinclair's exemption. On February 10, 2021, we issued a temporary stay. On March 5, 2021, we vacated the temporary stay and held the case in abeyance pending the outcome of the Supreme Court's decision in *HollyFrontier.*

On March 6, 2021, a day after we vacated the temporary stay, a Sinclair employee emailed EPA seeking return of Sinclair's RINs:

> I've been made aware that the temporary stay preventing Sinclair from receiving un-retired RINs tied to our 2018 . . . compliance retirement has been vacated. That being the case I would like to receive Sinclair's RINs . . . as soon as possible.

A.R., Vol. II at 13.

4. **Sinclair's 2021 Petition Seeking Return of the RINs; Vacatur of 2021 Retroactive Exemption**

On March 15, 2021, during the abeyance of the industry group's challenge, Sinclair filed a petition for review in this court challenging EPA's failure to return its RINs. In response, EPA filed a Motion for Vacatur and Voluntary Remand of the 2021 retroactive exemption, arguing that "[v]acatur is appropriate because EPA is now uncertain that the Sinclair Action can be sustained once the questions regarding whether Sinclair's refineries qualified to receive extensions of the small refinery exemption under [*RFA*] are analyzed." *Sinclair Wyo. Refin. Co. v. EPA*, No. 21-9528 (10th Cir.), Doc. 10826687 at 16. Sinclair did not oppose EPA's motion. On May 19, 2021, we vacated the 2021 retroactive exemption and remanded the issue to EPA.

5. ***HollyFrontier*; Remand of All 2018 Exemption Decisions**

In June 2021, the Supreme Court rejected *RFA*'s conclusion that a refinery may qualify for an exemption only if it received continuous, uninterrupted exemptions after 2011. *See HollyFrontier Cheyenne Refin, LLC v. Renewable Fuels Ass'n*, 141 S. Ct.

2172, 2177-79 (2021). The Court said small refineries that had previously received an exemption could continue to receive exemptions following a lapse. *See id.*

In response to *HollyFrontier*, EPA moved in the D.C. Circuit for voluntary remand without vacatur of all 2018 small refinery exemptions, including the initial denial of an exemption to Sinclair. The D.C. Circuit granted the motion and remanded to EPA.

6. **April 2022 Actions; Sinclair's Request for Return of the RINs**

On remand, EPA issued two actions (the "April 2022 Actions") adjudicating all small refinery exemption applications submitted for compliance year 2018.

First, the April 7, 2022 Denial Action denied all exemption applications. EPA determined that none of the 36 refineries that had applied for exemptions in 2018, including Sinclair, had demonstrated sufficient disproportionate economic hardship under the agency's latest interpretation of the Clean Air Act. *See* 87 Fed. Reg. 24300-01 (April 25, 2022) (notice of availability), "April 2022 Denial of Petitions for RFS Small Refinery Exemptions," EPA-420-R-22-005 (April 2022), *available at* https://perma.cc/R8TB-6GDU, ("April 7, 2022 Denial Action").

Second, the April 7, 2022 Compliance Action said that the refineries previously granted 2018 exemptions could comply using an alternative approach to depositing RINs with EPA. *See* 87 Fed. Reg. 24294-01 (April 25, 2022) (notice of availability), "April 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries," EPA-420-R-22-006 (April 2022), *available at* https://perma.cc/3ZYW-

PG4W, ("April 7, 2022 Compliance Action").[2] This alternative was not offered to the refineries that were not granted exemptions in EPA's initial August 2019 decision—including Sinclair:

> We note that the [April 7, 2022 Denial Action] adjudicates five other 2018 [exemption] petitions. Because those [exemption] petitions were originally denied, the [April 7, 2022 Denial Action] does not reverse previous exemptions for those [exemption] petitions as it does for the 31 remanded [exemption] petitions covered by this action. *Accordingly, this Compliance Action does not apply to those five [exemption] petitions*.

See id. at 1, n.5 (emphasis added).

On April 15, 2022, a Sinclair lawyer emailed EPA seeking return of its 2018 RINs under the April 7, 2022 Compliance Action's alternative compliance approach:

> With the recent decision to overturn these exemptions but still not require these companies to retire any RINs against their 2018 [compliance obligations] we are now requesting EPA to unretire [Sinclair's] RINs. Please consider this letter as our request to EPA to unretire [Sinclair's] RINs . . . .

A.R., Vol. II at 10.

7. **The Weihrauch Email and Petition for Review**

On April 19, 2022, John Weihrauch, the director of the EPA Fuel Compliance Center, emailed Sinclair as follows:

> The direct answer to your question is that the 2018 RINs will not be returned. As you may recall, EPA's January 2021

[2] "To comply using this alternative approach, [refineries previously granted 2018 exemptions were required to] resubmit their annual compliance reports for 2018 and report their actual gasoline and diesel fuel production, actual annual [renewable volume obligations], and zero RIN deficit carryforward into the following compliance year." April 7, 2022 Compliance Action at 17.

> action granting a small refinery exemption to [Sinclair] for 2018 and granting exemptions for [Sinclair] for 2019 was immediately challenged. EPA sought voluntary remand and vacatur of the action, which the U.S. Court of Appeals for the Tenth Circuit granted in May 2021. I have attached the court order for your reference. Thus, EPA's April 7, 2022, decision referred only to the original denial of the 2018 [Sinclair] petition. The 2018 [Sinclair] petition was again denied as part of the April 7 action. As such, the 2018 RINs will not be returned as those are being used to demonstrate compliance with this 2018 RFS obligation.

A.R., Vol. II at 13 ("Weihrauch email").

Sinclair characterizes the Weihrauch email as a response to its April 15, 2022 RIN-return request. *See* Pet. Br. at 29 ("Shortly after EPA announced the [April 2022 Actions], Sinclair again contacted EPA to request the return of its 2018 RINs. . . . On April 19, 2022, EPA denied this request . . . ."). EPA characterizes the email as a response to Sinclair's March 6, 2021 request. *See* Resp. Br. at 17 ("EPA's email on April 19, 2022, did not respond to [Sinclair's] April 15, 2022 email, but rather responded to the March 6, 2021 email from [Sinclair] seeking the return of [Sinclair's] RINs."). As explained below, the Weihrauch email is not a final agency action under either characterization.

8. **Petition for Review**

On May 4, 2022, Sinclair and other small refineries filed two cases in the D.C. Circuit challenging the April 2022 Actions.

On May 24, 2022, Sinclair filed a petition for review in this court under the Clean Air Act, 42 U.S.C. § 7607(b)(1), and the Administrative Procedure Act, 5 U.S.C. § 706(2). It asked for review of the Weihrauch email "denying Sinclair's request to

unretire credits used to demonstrate compliance with the Renewable Fuel Standard program." Pet. for Review at 1.

II. DISCUSSION

A. *Legal Standard*

The Clean Air Act provides that circuit courts have jurisdiction to review only "final action[s]" of EPA. 42 U.S.C. § 7607(b)(1). The Administrative Procedure Act likewise provides that circuit courts may review only "final agency action." 5 U.S.C. § 704.[3] "[A]gency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

An agency action is final if it meets two conditions. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and quotations omitted).

To be final, an agency action must "itself [be] the source of the parties' obligations, modifying the applicable legal landscape by interpreting the scope" of their statutory rights or duties. *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1034 (10th Cir. 2017) (quotations and alterations omitted).[4] Finality thus attaches when an

[3] "[F]inal action" in the Clean Air Act is synonymous with "final agency action" as used in the Administrative Procedure Act. *See Pub. Serv. Co. of Colo. v. EPA*, 225 F.3d 1144, 1147 (10th Cir. 2000).

[4] *See also Chem. Weapons Working Grp., Inc. (CWWG) v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) ("the implementation of" an already consummated

agency "has rendered its last word on the matter in question." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quotations omitted).

Although courts recognize a "presumption in favor of judicial review of administrative action," *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quotations omitted), a petitioner challenging agency action must show the action is final. *See Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).

B. ***Application***

As explained below, whether the Weihrauch email responded to (1) Sinclair's April 15, 2022 request or (2) its March 6, 2021 request, the email was not a final agency action. It did not (1) "consummat[e]" EPA's decision-making, (2) "determine[]" Sinclair's "rights or obligations," (3) impose "legal consequences," or (4) exercise adjudicatory discretion. *Bennett*, 520 U.S. at 178 (quotations omitted).

1. **Response to the April 15, 2022 Request**

The April 15, 2022 request sought return of Sinclair's 2018 RINs under the April 2022 Actions' alternative compliance approach. The April 2022 Actions, however, had

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final agency action is not itself final agency action); *Cherry v. U.S. Dep't of Agric.*, 13 F. App'x 886, 890-91 (10th Cir. 2001) (unpublished) (a letter "which merely inform[ed] plaintiff" of his obligations under a statute did not "determine[] his legal rights" because it reflected previous decisions, and the letter "merely implemented the decisions") (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (a letter "*restating* EPA's established interpretation" of a regulation was not a final agency action because it "tread no new ground," "left the world just as it found it," and "thus cannot be fairly described as . . . prescribing law or policy").

already determined that Sinclair was ineligible for this alternative approach. Because the Actions were EPA's "last word" on the issue, the Weihrauch email was not a final agency action. *Whitman*, 531 U.S. at 478 (quotations omitted).

The April 7, 2022 Denial Action retroactively denied all exemption applications for 2018—including Sinclair's. *See* April 7, 2022 Denial Action at 1. The April 7, 2022 Compliance Action permitted refineries that were initially exempted to meet their new compliance obligations without retiring RINs, *see* April 7, 2022 Compliance Action at 1, but this alternative compliance approach "d[id] not apply to those five" refineries, including Sinclair, that "were originally denied" exemptions. *Id.* at 1 n.5.

Under the April 2022 Actions, Sinclair was thus not entitled to the return of the RINs it had deposited with EPA for 2018. These were final agency actions "from which legal consequences [for Sinclair] flow[ed]" because they "consummat[ed] . . . the agency's decisionmaking" regarding Sinclair's compliance obligations and established that Sinclair was not entitled to the return of its RINs. *Bennett*, 520 U.S. at 178 (quotations omitted).

The Weihrauch email simply "*restat[ed]* EPA's established" position. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). Mr. Weihrauch "merely inform[ed]" Sinclair that its RINs would not be returned because the April 2022 Actions mandated that result. *Cherry v. U.S. Dep't of Agric.*, 13 F. App'x 886, 890 (10th Cir. 2001) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1;

10th Cir. R. 32.1(A)).[5] The email "tread no new ground," "le[aving] the world just as it found it." *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428. It was not a final agency action because it neither determined Sinclair's "rights" to the return of its 2018 RINs nor "consummat[ed]" EPA's decision-making on the question. *Bennett*, 520 U.S. at 178 (citations omitted).[6]

2. **Response to the March 6, 2021 Request**

The March 6, 2021 request sought return of Sinclair's RINs one day after our vacatur of a temporary stay of Sinclair's retroactive exemption. *See* A.R., Vol. II at 13. On May 19, 2021, we vacated Sinclair's retroactive exemption. This eliminated any basis for the March 6 request because, after our vacatur of the retroactive exemption, Sinclair did not have an exemption for 2018 and was required to deposit RINs with EPA to meet its compliance obligations.

By the time Mr. Weihrauch sent his email on April 19, 2022, not only had our May 19, 2021 vacatur eliminated the predicate for the March 6, 2021 request, but the April 2022 Actions also had resolved that Sinclair was not entitled to a return of its RINs, as Mr. Weihrauch noted in his email. The email was therefore not a final agency action

[5] Sinclair argues that because Mr. Weihrauch exercised discretion on behalf of EPA, his email was final agency action. But the April 2022 Actions left Mr. Weihrauch with no discretion to return Sinclair's RINs.

[6] Sinclair argues the April 2022 Actions could not have determined the outcome of the Weihrauch email because they did not specifically pass on Sinclair's request to return its "2018 RINs." *See* Reply Br. at 20-22. But the April 2022 Actions determined that Sinclair was not exempt from 2018 compliance and was not permitted to demonstrate compliance without depositing its RINs.

because it was not "itself . . . the source of the parties' obligations." *Kansas ex rel. Schmidt*, 861 F.3d at 1034 (quotations and alterations omitted).[7]

III. CONCLUSION

Sinclair has not met its burden to show that we have jurisdiction to review the challenged EPA action. We dismiss the petition for lack of jurisdiction.[8]

[7] Another possible reading of the Weihrauch email is that it responded to Sinclair's series of requests, including its March 6, 2021 and April 15, 2022 emails, for return of its RINs. This reading again would not change our analysis or disposition.

[8] We grant Sinclair's motion to seal by redaction portions of its opening brief and EPA's motion to seal by redaction portions of the administrative record as those items were filed on June 8, 2023, and June 13, 2023, respectively.