IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 10-1070
(consolidated with No. 10-1071)

# EPA'S RESPONSE TO PETITION FOR REHEARING *EN BANC*

Pursuant to the Court's February 10, 2011, Order, Respondent the United States Environmental Protection Agency ("EPA") files this response to the petition for rehearing *en banc*. In the agency action at issue, EPA published renewable fuel standards in February 2010, with an effective date of July 2010, and applied those standards to transportation fuel sold in or imported into the United States throughout all of 2010. The Panel correctly held that EPA's decision did not exceed EPA's authority under the Energy Independence and Security Act of 2007 ("EISA"). Slip op. at 24-25. As explained below, the Panel's decision does not meet this Court's standard for rehearing *en banc* because it neither conflicts with a decision of the Supreme Court or with another decision of this Circuit nor involves a question of exceptional importance.

## BACKGROUND

Renewable fuel standards are one of the means by which Congress seeks "[t]o move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government." Slip op. at 2 (quoting Pub. L. No. 110-140, 121 Stat. 1492 (2007)). To those ends, Congress in 2005 established the Renewable Fuel Standard program under section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), which directed EPA to promulgate by August 2006 regulations "to ensure that gasoline sold or introduced into commerce in the United States . . . on an average annual basis, contains the applicable volume of renewable fuel determined in accordance with" a table listing minimum volumes of renewable fuel to be used for each year from 2006 through 2012. Slip op. at 3. By November 30 of each year, EPA must divide the volume of renewable fuel listed for the upcoming year by the total volume of gasoline estimated to be used in the United States during that year, and publish the resulting ratio. *Id*. at 5. Obligated parties (*i.e.*, refiners, importers, and certain blenders of gasoline) apply that ratio, or percentage standard, to their actual annual production to determine the number of gallons of renewable fuel for which they are each responsible. *Id*.

Rather than blending renewable fuel into gasoline or diesel themselves, obligated parties such as refiners instead accumulate Renewable Identification Numbers ("RINs"), which represent renewable fuel produced or imported. Slip op. at 6. EPA determined that accumulating a RIN ensures that the renewable fuel represented by that RIN will be consumed as motor vehicle fuel. Obligated parties may choose to accumulate RINs throughout the year or at the end of the year, after their total annual production is known, and with certain restrictions may either sell or retain and carry over into another year credits for excess RINs they acquire. *Id.* at 3-4. Obligated parties may also carry over a deficit if they fail to acquire sufficient RINs by the compliance deadline. *Id.* at 4.

The first set of regulations under the Renewable Fuel Standard program was due by August 8, 2006, but Congress provided that if that date was not met, then a default standard of 2.78 percent would apply for 2006. Slip op. at 4. Congress further instructed that EPA was to ensure the volume requirements were met "[r]egardless of the date" the regulations were promulgated. *Id.*

EPA published the regulations in May 2007, and they took effect in September. Slip op. at 5. In December of that year, Congress passed the EISA, which directs EPA to expand the Renewable Fuel Standard program and "increase the production of clean renewable fuels." Pub. L. No. 110-140, 121 Stat. 1492, 1492 (2007); *see generally* slip op. at 6. This revised program, known as RFS2,

increases the applicable volumes for 2008 and on, and expands beyond gasoline the universe of fuels subject to the program. Slip op. at 6. RFS2 also separates what was one category of renewable fuel into four types, each with its own annual volume requirement (and thus its own percentage standard), and specifies that each type of fuel must achieve minimum reductions in lifecycle greenhouse gas emissions. *Id*. at 6-7.

As Congress had done in 2005, the EISA requires EPA to establish implementing regulations to ensure that transportation fuel contains at least the applicable volume of each type of fuel. Slip op. at 8 n.15; *see also* 42 U.S.C. § 7545(o)(2)(A)(i). The EISA directed EPA to issue RFS2 regulations by December 19, 2008, but did not specify a default standard for 2009 in the event EPA missed that deadline. Slip op. at 8, 17. The EISA does, however, retain the provision directing EPA to ensure that the specified applicable volumes are used regardless of the date the implementing regulations are promulgated. *Id*. at 35; *see also* 42 U.S.C. § 7545(o)(2)(A)(iii).

EPA was not able to issue RFS2 regulations by December 2008, and in their place continued the earlier program for another year. Slip op. at 8. EPA proposed RFS2 regulations in May 2009, and on February 3, 2010 signed the final rule, which contained the percentage standard for 2010 for each of the four types of fuel. *Id*. at 9, 11. EPA determined that obligated parties must apply those standards to

all of the obligated party's 2010 calendar year production or importation of transportation fuel in order to determine how many RINs are needed to comply with their specific obligation. *Id*. at 12. EPA established July 1, 2010, as the effective date of the rule, because that date was the start of the first quarter "following completion of the statutorily required 60-day Congressional Review period" under the Congressional Review Act. *Id*. at 13.

In the part of the opinion relevant to the petition for rehearing *en banc*, the Panel concluded that the EISA implicitly authorizes any retroactive effects of EPA's decision to require obligated parties to apply the standards to the obligated parties' full calendar year of fuel production, and that EPA reasonably balanced the detriments of any retroactive effects against the benefits of its action. Slip op. at 33. Petitioners assert two grounds for rehearing *en banc*. First, they argue that the retroactive impact of EPA's action must be authorized explicitly, rather than implicitly. Pet. at 4. Second, they argue that a remand is necessary for EPA to consider in the first instance the rule's retroactive effects. *Id*. at 12-13.

STANDARD FOR REHEARING *EN BANC*

Under Fed. R. App. P. 35, a case may be suitable for rehearing *en banc* if (1) it is in conflict with a decision of the Supreme Court or with another decision of this Circuit and consideration by the full Court is necessary to secure and maintain

uniformity of the Court's decisions, or (2) it involves a question of exceptional importance.

## ARGUMENT

### A. EPA's Authority Under The EISA Presents Neither A Conflict With Prior Decisions Nor A Question Of Exceptional Importance.

In his concurring opinion in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Justice Scalia identified two types of retroactive impacts that might flow from an agency action. An agency action has primary retroactive effects if it alters "the *past* legal consequences of past actions," *id*. at 219, and secondary retroactive effects if it "makes worthless substantial past investment incurred in reliance upon the prior rule." *Id*. at 220. As Petitioners note, Pet. at 7, in *Bergerco Canada v. U.S. Treasury Department*, 129 F.3d 189, 192 (D.C. Cir. 1997), this Court has adopted Justice Scalia's distinction between primary and secondary retroactivity.

The Panel assumed without deciding that the agency action at issue here has primary retroactive effects. Slip op. at 33. According to Petitioners, absent express congressional authority there is a "categorical limit" on agency actions with primary retroactive effect. Pet. at 7, quoting *Bergerco*. Petitioners' argument has two flaws.

First, Petitioners wrongly equate a "categorical limit" with a restriction that does not permit any exceptions. *See* Pet. at 8 (by recognizing an exception to the

"categorical rule" that retroactive rules require express authorization, "the panel held that *Bergerco's* 'categorical' limit on primary retroactivity is not categorical after all"). Although categorical can mean "absolute" or "unqualified," *see, e.g.*, *Webster's New Collegiate Dictionary* 175 (1977), the *Bergerco* court used the term "categorical" to distinguish primary retroactivity from secondary retroactivity. Secondary retroactivity involves "the sort of balancing of competing values, both legal and economic, that often features in 'arbitrary and capricious' analysis and that has historically governed retroactivity considerations in the agency context." *Bergerco*, 129 F.3d at 192. In contrast, absent congressional authorization, primary retroactivity is impermissible regardless of any claimed benefits of retroactive application of the agency action. *Id*. Thus, in this context categorical does not mean "without exception," it simply refers to the type of retroactivity the permissibility of which does not depend on a balancing of benefits and detriments. *See id*. at 193 ("Even in its categorical (*i.e.*, non-balancing) aspect, retroactivity law is concerned with the protection of reasonable reliance.")

Second, neither *Bergerco* nor any other case of which Respondents are aware forecloses implicit rather than explicit congressional authorization. None of the three D.C. Circuit cases cited by Petitioners (Pet. at 7-9) -- *Bergerco*, *National Mining Ass'n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002), and *Arkema, Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010) -- involved a claim of implicit

authorization. In fact, as noted above, *Bergerco* treats Justice Scalia's concurrence in *Bowen* as authoritative, and it is Justice Scalia's *Bowen* concurrence that suggests the "unexceptional [] proposition that a particular statute may in some circumstances implicitly authorize retroactive rulemaking." 488 U.S. at 223 (Scalia, J., concurring); *see also Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) (recognizing that despite the lack of statutory language suggesting that Congress intended to allow a rule with retroactive effects, there may be an "exception" where an agency misses a prescribed deadline). The Panel's decision fits squarely within Justice Scalia's concurrence and the dicta in *Whitman*, and does not conflict with any decisions of either this Court or the Supreme Court.

Nor is the question presented one of exceptional importance. Petitioners do not claim that it is, asserting only that *en banc* review is "warranted to harmonize the Court's decisions on an important issue of administrative law." Pet. at 5. This merely repackages Petitioners' attempt to manufacture an intra-Circuit split. Petitioners do not argue that clear, albeit implicit, congressional authorization would upend the well-settled presumption against retroactive rulemaking, which of course it would not. Instead, Petitioners argue, Pet. at 9-10, that the Panel erred in finding any implicit authorization at all. Such a narrow question of statutory construction does not generally rise to the level of a question of exceptional importance, and does not do so here. *See, e.g., Bartlett ex rel. Neuman v. Bowen*,

824 F.2d 1240, 1242-44 (D.C. Cir. 1987) (Edwards, J., concurring in the denials of rehearing *en banc*) (questions of exceptional importance are those which present "real significance to the legal process as well as to the litigants") (citation omitted).

Furthermore, the Panel correctly interpreted the EISA. At a minimum, the EISA does implicitly authorize some retroactive effects because Congress knew that even timely RFS2 regulations could not take effect until after the beginning of the first year of the program. Slip op. at 34. Under the EISA, the first set of RFS2 standards were to be in place by November 30, 2008, and the RFS2 regulations were to be promulgated by December 19, 2008, but because those regulations are considered a "major rule" under the Congressional Review Act, they would not take effect for 60 days, *i.e.*, until February 18, 2009. *Id.* Even if EPA had timely acted, the 2009 standard and regulations would apply to an obligated party's production throughout *all* of 2009, just as the 2010 standard did, even though the 2009 standards could not be finalized until mid-February of 2009. The Panel correctly found that Congress "knew that in the first year of the expanded renewable fuel standard there could be one and one-half months of retroactive effect from the effective date of the revised regulations." *Id.* Petitioners complain that the Panel upheld a period of retroactivity longer than one and one-half months, Pet. at 10, but cite no authority that Congress must precisely delineate the outer maximum limit of permissible retroactive effects.

The Panel also correctly held that Congress "was explicitly aware" EPA might miss a deadline, slip op. at 34, yet retained the statutory directive for EPA to ensure that the requirements setting forth the annual volumes of renewable fuels are met, regardless of the date of promulgation of the necessary implementing regulations. *Id*. at 34-35 (citing 42 U.S.C. § 7545(o)(2)(A)(iii)). Petitioners complain that these statutory provisions were enacted in the 2005 predecessor to the EISA, Pet. at 9-10, and not revised or repeated in 2007, but the tenet of statutory construction cited by Petitioners, that Congress "acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language, Pet. at 10, equally supports the Panel's conclusion that Congress intentionally *retained* this directive in 2007. Congress could certainly have struck the language in section 7545(o)(2)(A)(iii) if it no longer wished to authorize EPA to implement late RFS2 regulations retroactively, but Congress chose to retain that authorizing provision.

Finally, as Petitioners concede, the Panel did not actually hold that EPA's action has any primary retroactive impacts. Pet. at 5 n.2. Instead, the Panel assumed without deciding that EPA's action could have such impacts, based on a hypothetical situation suggested by Petitioners. Slip op. at 32-33. In that hypothetical, an entity imports diesel fuel in early 2010, and then ceases operations before EPA issues the 2010 standard and the revised regulations. Slip op. at 28 n.28. Yet, Petitioners never claim anyone, either a member of their trade

associations or otherwise, fits that hypothetical. In *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994), the Court rejected the proposition that "a rule which is effective retroactively as to any party is wholly invalid," noting that a court need only set aside the portion of the rule that is invalid. Therefore, even if the rule would have primary retroactive impacts on a "fleeting importer," Petitioners have failed to demonstrate any such impacts on themselves or their members.

B. The Panel's Decision Not to Remand To The Agency Presents Neither A Conflict With Prior Decisions Nor A Question Of Exceptional Importance.

EPA did not assert during the rulemaking that Congress implicitly authorized any primary retroactive impacts. Slip op. at 36. However, the Agency did receive and consider comments on whether EPA should apply the 2010 standard to all production and importation during 2010, or just to production and importation occurring after the effective date of the RFS2 program. Slip op. at 37-38. EPA found that obligated parties had adequate lead time and notice, and would be able to comply. *Id*. In contrast, EPA found that other alternatives, such as delaying the program until 2011, would further and unreasonably frustrate Congress' intent to mandate the production and use of annual volumes of renewable fuels. *Id*. at 38. The Panel held that EPA therefore considered the relative benefits and burdens of adopting a rule with retroactive impacts, and that a

remand for EPA to rehash these considerations "would serve no purpose." *Id*. at 39.

Petitioners claim the Panel erroneously found that the EISA "commands a particular outcome," so that any incorrect legal reasoning was confined to a discrete question of law. Pet. at 13-14. In fact, the Panel recognized that the permissibility of an agency action's retroactive impact is not merely a legal question but requires "a determination of policy or judgment." Slip op. at 36, *quoting SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Because this is an inquiry the Agency has already made, remand is unnecessary.

Petitioners do not question the balance that EPA struck, which in any event depends on the case-specific justifications in the administrative record and is unsuited to *en banc* review. Because the Panel's decision is not contrary to Circuit or Supreme Court precedent, and because it does not present a question of exceptional importance, it does not merit rehearing *en banc*.

Therefore, the petition for rehearing *en banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2011, the foregoing EPA'S RESPONSE TO PETITION FOR REHEARING EN BANC 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.

/s/ Daniel R. Dertke
DANIEL R. DERTKE