

**NATURAL RESOURCES DEFENSE
COUNCIL
v.
REILLY**

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

983 F.2d 259

January 22, 1993, Decided

PRIOR HISTORY: Petition for Review of an Order of the Environmental Protection Agency

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner environmental group sought review of final agency action by respondent Environmental Protection Agency, which declined to promulgate onboard refueling vapor recovery systems standards under § 202(a)(6) of the Clean Air Act, 42 U.S.C.S. § 7521(a)(6).

OVERVIEW: Section § 202(a)(6) of the Clean Air Act (CAA), 42 U.S.C.S. § 7521(a)(6), was amended to provide for the promulgation of standards for onboard refueling vapor recovery (ORVR) by the Environmental Protection Agency (EPA) after consultation with the Department of Transportation. The EPA took the consultation provision to mean that it retained discretion to decline to issue regulations at all. In reversing the final agency action and ordering the EPA to promulgate ORVR standards, the court held that § 202(a)(6) was clear and unambiguous and left no room for agency interpretation. The court held that the duty to promulgate standards was plainly mandatory and left the EPA no discretion to decline to do so, and noted that in general a direction to consult did not render

nugatory a plain mandate. The court also dismissed the EPA's safety concerns, noting that the safety of ORVR systems was addressed in another section of the CAA.

OUTCOME: The court set aside the final agency action of the Environmental Protection Agency and ordered the agency to promulgate onboard refueling vapor recovery standards as mandated by the Clean Air Act.

JUDGES: Before: EDWARDS, RUTH B. GINSBURG and WILLIAMS, Circuit Judges. Opinion for the Court filed by Circuit Judges EDWARDS. Concurring opinion filed by Circuit Judge WILLIAMS.

OPINION BY: EDWARDS

OPINION

[*261] EDWARDS, *Circuit Judge*: The 1990 amendments to the Clean Air Act ("CAA") altered section 202(a)(6) to require the Environmental Protection Agency ("EPA"), after "consultation" with the Department of Transportation ("DOT"), to promulgate standards by November 15, 1991, that would require new "light-duty" vehicles¹ to be equipped with onboard refueling vapor recovery ("ORVR") systems over a specified phase-in period. After consulting with DOT, EPA concluded that the safety risks of ORVR systems were unreasonable given the availability of alternative mechanisms for controlling refueling vapor emissions and declined to promulgate ORVR standards by the statutory deadline. This decision was Noticed as a Final Agency Action in April, 1992. * * * In explaining its decision, EPA contended that amended section 202(a)(6) contained residual authority for EPA to exercise discretion in deciding whether to promulgate ORVR stan-

¹ Light-duty vehicles include passenger cars and light trucks capable of seating 12 or fewer passengers. * * *

dards if the Agency determined that ORVR was unreasonably unsafe. The Natural Resources Defense Council ("NRDC") initiated this suit, alleging that EPA lacked discretion under the statute and that its failure to promulgate ORVR standards was therefore unlawful.

Because the language of section 202(a)(6) plainly imposes a mandatory duty, we agree that EPA's decision not to promulgate ORVR standards was beyond the pale of its statutory authority. There is nothing in the statute to substantiate EPA's claim for residual discretionary authority, nor is there ambiguity that would warrant deference by this court to EPA's construction. Furthermore, EPA's findings regarding ORVR safety do not establish that all such systems present inherent and unreasonable safety risks. We are thus not faced with a situation in which a literal reading of the section produces nonsensical results. Whatever doubts EPA may have about the wisdom of choices implicit in the statute must be raised with Congress. This court is not the proper forum in which to argue the relative merits of those choices. Therefore, the Final Agency Action is set aside and EPA is ordered to promulgate ORVR standards in compliance with the CAA.

I. BACKGROUND

A. The "Refueling Vapor Recovery" Problem

During the normal operation of gasoline fueled vehicles, hydrocarbon vapors build up in the fuel tank. When the fill cap is removed during refueling, most of these vapors are forced out of the tank and into the environment by the influx of liquid gasoline. This release of vapors poses significant health and environmental hazards. Of primary concern is the effect these vapors have on the production of ozone, which is formed when hydrocarbons

and nitrogen oxides react in sunlight.² Excessive ozone pollution is a persistent environmental hazard in major metropolitan areas. * * * In addition, escaping gasoline vapors contain known carcinogens.³ Thus, the control and containment of these vapors has been an environmental concern for many years.

[*262] Two basic approaches have emerged for controlling the emission of hydrocarbon vapors during refueling: "Stage II" controls⁴ and ORVR systems. Stage II controls--typically a rubber boot on the fuel nozzle that creates a tight seal with the fuel filler spout so that escaping vapors are recaptured and funneled to underground tanks--are relatively simple mechanisms that have been used since 1976 in many counties in California as well as certain cities in the United States. * * * Under the current CAA, Stage II controls are required in most nonattainment areas of moderate or worse severity. * * *

² EPA has established National Ambient Air Quality Standards ("NAAQS") for six pollutants, including ozone. * * * Those areas in which ozone NAAQS have not been attained ("nonattainment" areas) are classified either as "Marginal," "Moderate," "Serious," "Severe," or "Extreme" depending on the severity of the ozone pollution in those areas. * * *

³ EPA has concluded that benzene, a normal constituent of gasoline and gasoline vapors, is a human carcinogen. * * * Epidemiological and animal studies indicate that exposure to benzene results in an increase in leukemia. Moreover, animal studies with fuel vapors have demonstrated a significant increase in kidney cancer among male rats and liver cancer in female mice. * * * Therefore, EPA has concluded that gasoline vapors are a probable human carcinogen under EPA's Cancer Risk Assessment Guidelines. * * *

⁴ Refueling operations at service stations involve two steps: the filling of underground storage tanks, commonly called stage I; and vehicle refueling, commonly called stage II. * * *

ORVR systems, on the other hand, are more sophisticated and have not yet been used in production vehicles. As the name implies, on-board refueling vapor recovery systems are built into the vehicle itself to contain the vapors before they reach the fuel filler spout. There are presently two types of technology that have been seriously considered for operational ORVR systems. The first is the ORVR "canister," which collects vapors as they are forced through a regulating orifice and stores them in a charcoal-filled canister. * * * As the engine operates, ambient air is drawn through the canister to purge the hydrocarbons from the charcoal and meter the vapors back into the engine for combustion ("purging").⁵ * * * Canister systems are more fully evolved than other ORVR systems because virtually all of the necessary technology for canister systems is currently available. Indeed, most passenger cars on the road today already carry a small charcoal filled canister (so called "evaporative canisters") to collect the relatively modest quantities of vapor that accumulate in fuel tanks during operations other than refueling. * * *

An alternative to ORVR canisters is the flexible fuel bladder, which contracts as gasoline is burned, retarding the evaporation of liquid fuel and thus the accumulation of hydrocarbon vapors. Because of potential safety benefits from such a system, aside from the environmental protection it would provide, the possibility of using flexible fuel bladders has been explored for many years. * * * Nonetheless, no bladder prototypes were available at the time NHTSA conducted its study. * * *

B. Legislative and Regulatory Responses to the "Refueling Vapor Recovery" Problem

⁵ Under normal operating conditions, nearly all of the vapors should be purged from a saturated ORVR canister within the first eleven to twenty-eight miles of travel after refueling. * * *

Under the 1977 amendments to the CAA, EPA was required to promulgate ORVR regulations if it found ORVR to be a feasible and desirable means of controlling vapor emissions during refueling. * * *⁶ Upon review of the information available to it in the late 1970's, EPA initially concluded that ORVR was "technically feasible." *See* 52 Fed. Reg. at 31,163 (describing conclusions reached in 1980). However, in order to avoid placing additional regulatory burdens on the ailing American automotive industry, EPA decided not to require ORVR systems at that time. *See* 46 FR 21,628, 21,629 (1981).

In 1984, EPA again took up the ORVR issue in a draft study entitled "Evaluation of Air Pollution Strategies for Gasoline Marketing Industry," * * * After thorough reconsideration, EPA concluded that ORVR was the preferred control technology and proceeded to detail proposed regulations for the implementation of mandatory ORVR. * * * In that same Federal Register Notice, EPA addressed the technical difficulties associated with a practical ORVR system. EPA concluded that ORVR was generally safe and that approximately two years of lead time would be sufficient for manufacturers to install ORVR in new models since most of the technology was already available. * * *

Researchers at NHTSA had a somewhat different view of the situation, for they had continuing concerns that ORVR would lead to an increase in crash and non-crash vehicle fires.⁷ * * * Thus, before promulgating a final rule, EPA initiated further dialogue with NHTSA in order to address these issues.

NHTSA's concerns stemmed primarily from its view that ORVR would increase the com-

⁶ Footnote omitted.

⁷ Footnote omitted.

plexity of fuel systems and concomitantly the risk of fire. EPA specifically responded to this concern in its 1988 draft report on the safety of ORVR. First, EPA challenged NHTSA's underlying assumption that there is a positive correlation between increased complexity and increased risk. * * * Second, even assuming that added complexity means added safety risk, EPA determined that ORVR systems need not be overly complex. * * * [*264] * *

In order to test this conclusion, EPA constructed a simple ORVR canister system and installed it in a test vehicle. * * * This vehicle adequately performed under limited testing conditions, leading EPA to summarize the experiment as follows:

* * *

In 1990, Congress again amended the CAA, this time establishing a comprehensive framework for controlling refueling emissions. . . ., Stage II controls are required in moderate, serious, severe, and extreme nonattainment areas. * * * Amended section 202(a)(6) of the CAA now mandates that EPA, after consultation with DOT regarding safety, *shall* promulgate standards for ORVR by November 15, 1991.⁸ Pursuant to this statutory [*265] mandate, EPA reinitiated consultation with DOT, through NHTSA. NHTSA then embarked upon a further review of ORVR canister safety. Since actual ORVR systems were proprietary and not available for independent testing, NHTSA used components of, and data pertaining to, current evaporative systems to reach its conclusions. * * * NHTSA acknowledged that, because of availability problems, it did not consider or reevaluate ORVR systems other than canisters. * * *

NHTSA's final report was submitted to EPA in July, 1991. The report identified potential failure points of an ORVR canister system during operation. * * *

After publication of the study, EPA requested public comment on NHTSA's findings and conclusions. *See* 56 FR 43,682 -83 (1991). In late September, a public hearing on the matter was held in which both EPA and NHTSA officials participated. *See* 57 Fed. Reg. at 13,221. EPA then asked NHTSA to review the presentations made at the hearing and to respond to public comments. NHTSA's technical evaluation, which followed on November 27, concluded:

On this issue, the record is clear and unambiguous. Implementation of ORVR, regardless of prototype development and technological evolution, will increase safety risks. ORVR systems will require additional components and must manage, store, and transport larger quantities of flammable fuel vapor. . . . Thus, further technology development and operational successes or failures of prototype vehicles will not eliminate the fundamental safety issues associated with ORVR systems.

. . . .

NHTSA considers these risks to be inherent. We [NHTSA] believe that no amount of product development or engineering and quality control measures would fully alleviate these risks, regardless of lead time.

DOT Review at 4-5.

While this evaluation process was being completed, the November 15, 1991 deadline for the promulgation of ORVR standards passed without EPA action. Alleging that EPA had failed to abide by the statutory [*266] mandate in section 202(a)(6), NRDC filed suit in

⁸ Footnote omitted.

the Eastern District of Virginia under section 304(a) of the CAA. * * * Before the case could be concluded, however, EPA issued a Notice of Final Agency Action in which it determined that the safety risks of onboard systems outweighed the environmental benefits of such devices and that it would not, therefore, promulgate standards pursuant to section 202(a)(6). * * *

II. DISCUSSION

The principal dispute in this case involves EPA's interpretation of section 202(a)(6) of the CAA. NRDC contends that the section contains an unambiguous requirement that EPA promulgate standards for ORVR systems. EPA, on the other hand, sees the "consultation" requirement contained in section 202(a)(6) as the last vestige of discretion permitted the Agency. In particular, the Agency argues that Congress did not intend that EPA promulgate ORVR standards if it found the systems to be inherently and unreasonably unsafe.

Since EPA is charged with administering the CAA, NRDC's challenge to its construction of this provision must be reviewed using the analysis provided by the Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council Inc.*, . . .

If, under the first prong of [the] *Chevron* analysis, we can determine congressional intent by using "traditional tools of statutory construction," then that interpretation must be given effect. * * * If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," then we will defer to a "permissible" agency construction of the statute. *Chevron*, . . .

* * * *

It is only legislative intent to delegate such authority that entitles an agency

to advance its own statutory construction for review under the deferential second prong of *Chevron*. * * *

Kansas City v. Department of Housing & Urban Dev., . . . 923 F.2d 188, 191-92 (D.C. Cir. 1991).

Given the plain and unmistakable language of section 202(a)(6), we need not proceed beyond the first step of the *Chevron* analysis. Section 202(a)(6) mandates that "within one year after November 15, 1990, the Administrator shall . . . promulgate standards under this section requiring that new light duty vehicles . . . shall be equipped with [ORVR] systems." 42 U.S.C. § 7521(a)(6) (Supp. 1990) (emphasis added). In this case, the language of the relevant section most manifestly obligates EPA to promulgate standards for ORVR systems. *See Hewitt v. Helms*, . . . ("shall" is "language of an unmistakably mandatory character"); *Her Majesty the Queen v. USEPA*, . . . ("shall" signals mandatory action).

Where the authors of the CAA intended to create a conditional duty, they used the familiar words of condition. *See, e.g.*, CAA [*267] § 112(d)(9)⁹ ("No standard for radionuclide emissions . . . is required . . . under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission . . . provides an ample margin of safety to protect the public health.") (emphasis added); CAA § 110(c)(1)¹⁰ ("The Administrator shall promulgate a Federal implementation plan at any time within the 2 years after the Administrator . . . disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency,

⁹ Footnote omitted.

¹⁰ Footnote omitted.

and the Administrator approves the plan or revision, before the Administrator promulgates such Federal implementation plan.") (emphasis added). No such words of condition are found in the consultation requirement of section 202(a)(6) that derogate from EPA's duty to promulgate ORVR standards. Therefore, EPA exceeded its statutory authority by declining to issue the standards.

Recognizing that its only hope of prevailing in this case is to reach the deferential second step of *Chevron*, EPA posits two facets of the legislation as evidence of ambiguity. However, neither argument undermines the congressional intention plainly evinced by the "shall promulgate" mandate of section 202(a)(6).

A. The Consultation Requirement

* * * 11 12 13 14 15 16 17 18 19 20 21

B. The Lapse of Stage II Requirements

* * * 22 23 24

¹¹ Footnote omitted.

¹² Footnote omitted.

¹³ Footnote omitted.

¹⁴ Footnote omitted.

¹⁵ Footnote omitted.

¹⁶ Footnote omitted.

¹⁷ Footnote omitted.

¹⁸ Footnote omitted.

¹⁹ Footnote omitted.

²⁰ Footnote omitted.

²¹ Footnote omitted.

²² Footnote omitted.

III. CONCLUSION

The text of section 202(a)(6) clearly manifests a congressional intent that EPA promulgate ORVR standards. The requirement that EPA consult with DOT prior to promulgating the standards does not derogate from that mandatory duty. In addition, the provisions in the CAA for Stage II controls provide for an interim solution to the problem of ozone accumulation until ORVR systems become commonplace. ORVR and Stage II controls are not two alternative approaches between which EPA has discretion to choose. Moreover, even if we were to allow that Congress did not intend for EPA to require ORVR systems if EPA found that ORVR presented inherent and unreasonable safety risks, the record would not support such a finding. At most, it appears that EPA performed a net weighing of the risks and benefits of ORVR *canisters* relative to Stage II controls. In the end, EPA concluded that it preferred Stage II controls. However, that is not the equivalent of a finding that all ORVR systems present inherent and unreasonable safety risks. Thus, EPA's final decision must be set aside and ORVR standards promulgated in compliance with the CAA.

So Ordered.

CONCUR BY: WILLIAMS [omitted]

²³ Footnote omitted.

²⁴ Footnote omitted.