

The Burger Court Opinion Writing Database

Harrison v. PPG Industries, Inc.

446 U.S. 578 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 10, 1980

RE: 78-1918 - Harrison v. PPG

Dear Potter:

I join..

Regards,

WJB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

February 22, 1980

RE: No. 78-1918 Harrison v. PPG Industries, Inc.

Dear Potter:

I agree.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart
 Circulated: 21 FEB 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
 Petitioners, } On Writ of Certiorari to the
 v. } United States Court of Ap-
 PPG Industries, Inc. } peals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court. Section 307 (b)(1) of the Clean Air Act (Act), provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator of the Environmental Protection Agency (EPA) under specifically enumerated provisions of the Act, and of "any other final action of the Administrator under [the] Act . . . which is locally or regionally applicable." (Emphasis added.)¹ The issue in this case is whether the Court of Ap-

¹ Section 307 (b)(1) provides in full:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under sections 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d), any order under section 111 (j), under section 112 (c), under section 113 (d), under section 119, or under section 120, or his action under section 119 (c) (2) (A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations

1,41,15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Thurgood Marshall
Mr. Justice Powell
Mr. Justice Blackmun
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT

Recirculated: 20 MAY 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
Petitioners,
v.
PPG Industries, Inc., et al. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 307 (b)(1) of the Clean Air Act (Act) provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator of the Environmental Protection Agency (EPA) under specifically enumerated provisions of the Act, and of "any other final action of the Administrator under [the] Act . . . which is locally or regionally applicable." (Emphasis added.)¹ The issue in this case is whether the Court of Ap-

¹ Section 307 (b)(1) provides in full:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under sections 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d), any order under section 111 (j), under section 112 (c), under section 113 (d), under section 119, or under section 120, or his action under section 119 (c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 25, 1980

Re: No. 78-1918 - Harrison v. PPG Industries

Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

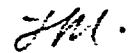
February 28, 1980

Re: No. 78-1918 - Harrison v. PPG Industries, Inc.

Dear Potter:

Please join me.

Sincerely,



T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

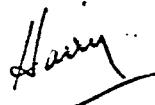
February 29, 1980

Re: No. 78-1918 - Harrison v. PPG Industries

Dear Potter:

I shall wait to see what John has to say about finality.

Sincerely,



Mr. Justice Stewart

cc: The Conference

To: The Chief Justice ✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 19 1980

Recirculated: _____

No. 78-1918, Harrison v. PPG Industries

MR. JUSTICE BLACKMUN, concurring in the result.

For the reasons stated in my Brother STEVENS' dissent, I accept the Court's conclusion that the Agency's determination in this case constituted "final" action. The opaque language of § 307(b)(1) and the scant attention it received by Congress, however, leave me in doubt concerning Congress' true intentions with respect to the scope of direct appellate review. Like my dissenting Brethren, I find it difficult to believe that Congress would undertake such a massive expansion in the number of Agency actions directly reviewable by the Courts of Appeals without some palpable indication that it had given thought to the consequences. Nonetheless, I agree with the

To: The Chief Justice
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice O'Connor
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated:

MAY 20 1980

1st PRINTED DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
 Petitioners,
 v.
 PPG Industries, Inc., et al. } On Writ of Certiorari to the
 } United States Court of Appeals for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE BLACKMUN, concurring in the result.

For the reasons stated in my Brother STEVENS' dissent, I accept the Court's conclusion that the Agency's determination in this case constituted "final" action. The opaque language of § 307 (b)(1) and the scant attention it received by Congress, however, leave me in doubt concerning Congress' true intention with respect to the scope of direct appellate review. Like my dissenting Brethren, I find it difficult to believe that Congress would undertake such a massive expansion in the number of Agency actions directly reviewable by the courts of appeals without some palpable indication that it had given thought to the consequences. Nonetheless, I agree with the Court that the dearth of evidence to the contrary makes its broad interpretation of the statute inescapable. On this legislative record, we must leave to Congress, should it be so inclined, the task of introducing some clear limitation on appellate jurisdiction over review of informal Agency determinations like the one now before us.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 26, 1980

78-1918 Harrison v. PPG Industries, Inc.

Dear Potter:

Please join me in your opinion for the Court.

I may add a brief concurrence reiterating the due process reservation as to §307(b) that I expressed in a concurring opinion in Adamo Wrecking Co. v. U.S.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

TO: Mr. Justice Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

3-4-80

From: Mr. Justice Powell.

Circulated. MAR 5 1980

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
 Petitioners,
 v.
 PPG Industries, Inc. } On Writ of Certiorari to the
 } United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. JUSTICE POWELL, concurring.

I continue to have reservations about the constitutionality of the notice and review preclusion provisions of § 307 (b). *Adamo Wrecking Co. v. United States*, 424 U. S. 275, 289 (1978) (POWELL, J., concurring); see *ante*, at 14, n. 9. Congress has extended to 60 days the period within which a petition for review may be filed under § 307 (b)(1). But publication in the Federal Register still is unlikely to provide constitutionally adequate notice that a failure to seek immediate review will bar affected parties from challenging the noticed action in a subsequent criminal prosecution. An informal exchange of letters, like those involved in this case, often will provide no greater protection. Although these constitutional difficulties well may counsel a narrow construction of § 307 (b)(1), cf. *Chrysler Corporation v. EPA*, — U. S. App. D. C. —, 600 F. 2d 904, 912-914 (1979) (parallel provisions of Noise Control Act), no such construction is possible in this case. As the Court demonstrates, the intention of Congress is clear. Accordingly, I join the opinion of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 25, 1980

Re: No. 78-1918 Harrison v. PPG Industries, Inc.

Dear Potter:

I shall both await John's dissent on the issue of finality and circulate as soon as possible a dissent on the merits.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

PP 2-5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 13 MAR 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
Petitioners,
v.
PPG Industries, Inc. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

The effort to determine congressional intent here might better be entrusted to a detective than to a judge. The court rejects the application of the traditional canon of *ejusdem generis* to the phrase "any other final action" on the grounds that (1) there is no uncertainty as to the meaning of that phrase, *supra*, at 10, and (2) at least one of the provisions now included in § 307 (b)(1), 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II)—*i. e.*, § 112 (c), 42 U. S. C. § 7412 (c) (1976 ed., Supp. II)—does not require the Administrator to act after notice and opportunity for comment or hearing, *supra*, at 9. While I agree with the court that the phrase "any other final action" may not by itself be "ambiguous," I think that what we know of the matter makes Congress' additions to § 307 (b)(1) in the Clean Air Act Technical & Conforming Amendments of 1977 no less curious than was the incident in the *Silver Blaze* of the dog that did nothing in the nighttime. If I am correct in this, we must look beyond the language of the phrase "any other final action" in ascertaining congressional intention. The Court did just that in *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U. S. 395 (1975).

Before 1977, § 307 (b)(1) granted exclusive jurisdiction to courts of appeals to review only a limited class of actions

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1980

Re: 78-1918 - Harrison v. PPG Industries

Dear Potter:

Although I believe I agree with everything in your opinion except the first full paragraph on page 8, as of the present I remain unconvinced that any of the letters written by EPA representatives in response to the inquiries from PPG constituted "final action" within the meaning of the statute. I therefore presently intend to prepare a short dissent.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAY 19 '80

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1918

Adlene Harrison, etc., et al.,
 Petitioners,
 v.
 PPG Industries, Inc. } On Writ of Certiorari to the
 } United States Court of Appeals for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS, dissenting.

From May 1976 through June 1977, respondent PPG Industries, Inc. ("PPG") exchanged a series of letters with various officials of the Environmental Protection Agency concerning the applicability of certain federal performance standards to PPG's waste-heat boilers at its Lake Charles, La., plant. PPG took the position that its boilers were not required to meet these standards, first, because construction had begun on them prior to the effective date of the standards and, second, because waste-heat boilers are not within the category of sources to which the standards in question apply.¹

In April 1977 PPG submitted a formal request, pursuant to 40 CFR § 60.5 (a), for a definitive determination on these issues. Although § 60.5 (a) provides for such determinations only with respect to the first issue raised by PPG,² EPA's Regional Administrator apparently rejected both arguments

¹ PPG also had questions about compliance in the event that the standards were found to apply.

² 40 CFR § 260.5 (a) provides:

"When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part."