SNAP! D.C. Circuit Greenhouse Gas Decision a Win for Industry

09.27.2017

Industries that manufacture products containing hydrofluorocarbons (HFCs), such as aerosol cans, refrigerators, automobile air conditioners, building insulation and fire extinguisher foams, can breathe easier this month thanks to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). It recently struck down part of a 2015 regulation (the HFC Alternatives Rule) issued by the United States Environmental Protection Agency (EPA) banning the use of HFCs in certain products and requiring an EPA-approved alternative.

In 1987, the United States joined the Montreal Protocol which required signatory nations to regulate the production and use of ozone-depleting substances, including chlorofluorocarbons (CFCs). To comply with the Protocol, Congress added Title VI to the 1990 Amendments to the Clean Air Act (CAA) to address stratospheric ozone protection. Around this same time, HFCs were introduced in the United States as a substitute for ozone-depleting refrigerant gases. Therefore, HFCs were viewed as a win for the environment.

Fast-forward almost thirty years. In 2015 and 2016, EPA determined that certain HFCs must be banned because of their disproportionately large contribution to climate change compared to other greenhouse gases (GHGs) due to their high global warming potential (GWP). In fact, a reduction in the use of HFCs was a primary focus under the Obama Administration's policy of curbing GHGs. This focus was both global and domestic. In 2016, the United States reached a global agreement with participating countries to cap and reduce the use of HFCs beginning in 2019. To do its part, the United States amended its Significant New Alternatives Policy (SNAP) under Section 612 of the CAA, including requiring federal agencies to avoid purchasing products containing high GWP HFCs beginning in 2016. Under SNAP, federal agencies are required to prefer products that use alternatives to HFCs in their purchasing decisions.

As part of the Obama Administration's domestic focus on GHG reductions, EPA also targeted manufacturers that used HFCs. Specifically, in 2015 EPA issued the HFC Alternatives Rule. Like SNAP, the HFC Alternatives Rule required certain manufacturers to use alternative substances in their products with EPA approval. Like SNAP, the authority cited by EPA for issuing the HFC Alternatives Rule is Title VI, and specifically Section 612 of the CAA. Section 612, entitled "Safe Alternatives Policy", requires certain listed substances "to the maximum extent practicable…be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment."

Industry challenged EPA's authority to issue the HFC Alternatives Rule. The D.C. Circuit sided with industry and held that EPA had no authority to regulate HFCs under Section 612 of the CAA for the

simple reason that HFCs are not ozone-depleting substances (a fact not disputed by EPA). Specifically, the Court focused on the fact that HFCs were previously approved by EPA as a replacement for ozone-depleting substances. The Court went on to point out that in 1994, EPA published comments on the SNAP rule specifically stating that once a manufacturer has replaced its ozone-depleting substance with an EPA approved non-ozone depleting substitute, Section 612 does not give it authority to require the manufacturer to later replace that substitute with a different substitute. Noting EPA's previous position, the Court held that allowing EPA to require a reduction of HFCs previously approved to replace actual ozone-depleting substances is inconsistent with the plain language of the CAA. Therefore, the Court vacated the 2015 rule "to the extent it requires manufacturers to replace HFCs" and sent the rule back to EPA for further proceedings. The opinion is a message to EPA that it cannot issue regulations for which it does not have statutory authority in order to push a particular environmental agenda.

Mexichem Fluor, Inc. v. EPA et al. (CA No: 15-1328 (D.C. Cir. Aug. 8, 2017).

42 USC §§ 7671, 7671a & 7671k

80 Fed. Reg. 42,870 (July 20, 2015)

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