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Environmental Law

D.C. Circuit Court of Appeals nullifies part of the Obama administration's 2013 Climate Action Plan regarding HFC ban

The Obama administration adopted a Climate Action Plan in 2013, which addressed climate change issues. Pursuant to the Climate Action Plan, the past administration indicated that "the [EPA] will use its authority through the Significant New Alternatives Policy Program of Section 612 to reduce HFC emissions."

Asserting authority under the Clean Air Act (CAA) in 2015, the United States Environmental Protection Agency (EPA) issued regulations that required manufacturers of hydrofluorocarbons (HFC) used in aerosol spray cans, auto air conditioners, refrigerators and foams, to replace them with non-ozone depleting substances. Under its 2015 rule, EPA moved some HFCs from the list of safe substitutes to the list of prohibited substitutes. EPA cited its authority under Section 612 of the CAA to require continuous replacement of HFCs even after manufacturers replaced ozone depleting substances with non-ozone depleting substances.

In *Mexichem Fluor Inc. v. EPA*, (D.C. Circuit 8/8/17), two manufacturers of HFC 134-a challenged EPA's rule. The challenge asserted that: EPA's 2015 rule exceeded its statutory authority under the CAA because the statute did not require replacement of non-ozone depleting HFCs with other substances, and EPA's 2015 decision to remove HFCs from the list of safe alternatives was arbitrary and capricious.

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The D.C. Circuit granted the petitions and vacated the 2015 rule to the extent that it required manufacturers to replace HFCs with alternate substances, and remanded the rule to EPA for further proceedings consistent with the opinion. The court wrote that since HFCs are not ozone-depleting substances, Section 612 does not grant EPA authority to regulate replacement of HFCs. Notably, prior to the 2015 rule, EPA acknowledged that Section 612 of the CAA did not grant EPA authority to require replacement of non-ozone depleting substances like HFCs. Thus, the 2015 rule was a major departure from Section 612 and the first time since it was enacted that EPA required replacement of previously acceptable non-ozone depleting substances.

The D.C. Circuit's two-to-one majority decision was rather direct in concluding that EPA lacked the authority to regulate HFCs. Initially, the court determined that the agency's authority to regulate ozone-depleting substances under Section 612 does not grant EPA power to order the replacement of substances that are not ozone depleting, but that contribute to climate change. The court wrote that "Congress has not enacted general climate change legislation" and "[al]though we understand and respect EPA's overarching effort to fill that legislative void and regulate HFCs, EPA may act only as authorized by Congress." Further, "EPA has tried to jam a square peg (regulating non-ozone depleting substances that may contribute to climate change) into a round hole (the existing statutory landscape)."

Additionally, the court rejected EPA's position that replacement is an ongoing process. The court determined that once manufacturers replace a non-ozone depleting substance when they change to an alternate substance, the replacement has been made and the "manufacturer no longer makes a product that uses an ozone-depleting substance."

While apparently sympathetic to EPA's desire to try to regulate climate change, the court noted that recent climate change decisions from the U.S. Supreme Court reflected two key limitations on agency action. First, that however laudable EPA's policy might be in the area, it does not on its own authorize EPA to act. Utility *Air Regulatory Group v. EPA*, (U.S. S.Ct. 2014). Rather, "the agency must have statutory authority for the regulations it wants to issue." Second, congressional inaction on general climate change legislation does not authorize EPA action. Based

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on recent Supreme Court decisions, the court noted that "[u]nder the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change."

The court's decision did leave open a sliver of hope for EPA if it pursues an alternative theory of retroactive disapproval of substances. While referenced in its appellate brief in passing, EPA did not fully develop the theory that an agency may use its authority to revise prior administrative decisions based on new developments or considerations. However, the court made clear that EPA would have to satisfactorily prove that: 1) it had statutory or inherent authority to do so; 2) there was a basis for the position and changed interpretation of Section 612; and 3) it has satisfied due process requirements by giving manufacturers fair warning of prohibited substances or conduct. Hence, unless EPA satisfies these three requirements on remand, the court found that the agency may not apply the 2015 rule to require replacement of non-ozone depleting substances with another substance that was approved at the time of the replacement.

The D.C. Circuit decision, while focused on repealing a single key aspect of the past administration's Climate Action Plan, is notable for the limits it recognized on agency action. Despite broad statutory authority under the CAA, the court determined that agency regulations must have a specific statutory mandate. Based on the new Trump administration and leadership at EPA, it will require a bit of time to determine whether the agency scales back its attempt to regulate HFCs or instead asserts the ability to retroactively regulate substances on remand.

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