D.C. Court of Appeals Rejects EPA Attempt to Regulate Greenhouse Gases Through Restrictions on Hydrofluorocarbons

By Christopher G. Foster / Sep 27, 2017

In 1987, the United States signed the Montreal Protocol (Protocol). The Protocol is an international agreement that has been ratified by every nation that is a member of the United Nations. The Protocol requires nations to regulate the production and use of certain ozone-depleting substances. In 1990, in part to implement U.S. obligations under the Protocol and to regulate the production and use of ozone-depleting substances, Congress added a new Title to the Clean Air Act: Title VI. Among Title VI's provisions is Section 612.

Section 612 requires manufacturers to replace ozone-depleting substances with safe substitutes. The Environmental Protection Agency (EPA) maintains lists of both safe substitutes and prohibited substitutes for ozone-depleting substances. In the years since 1990, many manufacturers of products such as aerosols, motor vehicle air conditioners, commercial refrigerators, and foams have stopped using ozone-depleting substances in those products. Manufacturers have often replaced those ozone-depleting substances with hydrofluorocarbons (HFCs) that have long been on the list of safe substitutes.

However, in 2015 as part of the Obama administration's climate change strategy, the EPA, acting under the authority of Section 612, moved some HFCs from the list of safe substitutes to the list of prohibited substances. (When HFCs are emitted, they trap heat in the atmosphere. They are therefore greenhouse gases. But HFCs do not deplete the ozone layer.) As a result, manufacturers replacing ozone-depleting substances could no longer use those HFCs as a safe substitute. More importantly, under the Rule, manufacturers who had already replaced ozone-depleting substances with those HFCs could no longer use them in their products.

In *Mexichem Fluor, Inc. v. EPA*, (Case No. 15-1328; U.S. Court of Appeals for the D.C. Circuit), plaintiff manufacturer of an HFC prohibited under the Rule petitioned for review. Plaintiff argued first that the Rule exceeded the EPA's statutory authority under Section 612. In particular, it contended that the EPA does not have statutory authority to require manufacturers to replace HFCs, which are non-ozone-depleting substances, with alternative substances. Second, plaintiff alleged that the EPA's decision in the Rule to remove HFCs from the list of safe substitutes was arbitrary and capricious because the EPA failed to explain its decision and failed to consider several important aspects of the problem. The court stated the "key dispute" in the case was "whether EPA has authority under Section 612(c) to prohibit manufacturers from making products that contain HFCs *if those manufacturers already replaced ozone-depleting substances with HFCs at a time when HFCs were listed as safe substitutes."* (Emphasis original.)

The EPA's admittedly new interpretation of Section 612 was dependent on its definition of the word "replace". The EPA argued that the initial substitution is not the only time when manufacturers "replace" an ozone-depleting substance. The EPA claimed that a manufacturer continues to "replace" the ozone-depleting substance every time the manufacturer uses the substitute substance, indefinitely into the future. The court rejected the EPA's attempted linguistic sleight of hand noting that manufacturers "replace" an ozone-depleting substance when they transition to making the same product with a substitute substance. "After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance. * * * Put simply EPA's strained reading of the term 'replace' contravenes the statute."

Although the court suggested alternative statutory authorities, including the Toxic Substances Control Act, were available to the EPA to directly regulate non-ozone-depleting substances that are causing harm to the environment, it concluded with a sharp rebuke of the EPA's attempt to use Section 612 for that purpose: "However, EPA's authority to regulate ozone-depleting substances under Section 612 and other statutes does not give EPA authority to order the replacement of substances that are not ozone depleting but that contribute to climate change. Congress has not yet enacted general climate change legislation. Although we understand and respect EPA's overarching effort to fill that legislative void and regulate HFCs, EPA may act only as authorized by Congress. Here, 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)."

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