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D.C. Circuit Vacates Key Element in HFC Rules under AIM Act

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A new D.C. Circuit opinion addressed the limits of non-delegation doctrine, upheld the U.S. Environmental Protection Agency's (EPA) authority to regulate HFC/HFO blends, and struck down the agency's authority to enact "complementary" implementation measures. On June 20, 2023, the U.S. Court of Appeals for the D.C. Circuit released an opinion in *Heating, Air Conditioning & Refrigeration Distributors International, et al. v. Environmental Protection Agency*, U.S.C.A. Case No. 21-1251. The order vacates the agency's rules requiring QR code labels and refillable containers for shipments of hydrofluorocarbon (HFCs). These rules were designed to assist with implementing the mandatory phasedown of HFCs under both the Kigali Amendment to the Montreal Protocol and the American Innovation and Manufacturing (AIM) Act, 42 U.S.C. § 7675 *et seq*. The court rejected two additional challenges to the HFC rules: it upheld EPA's authority to regulate HFCs used in refrigerant blends and rejected a challenge to EPA's authority based on the non-delegation doctrine.

Background on the HFC Phasedown under the Kigali Amendment and the AIM Act

HFCs are used in various everyday products, including air conditioning and refrigeration equipment. Under the Kigali Amendment to the Montreal Protocol, the United States and other nations agreed to phase out HFCs from many of these uses. This is a critical step in mitigating climate change, as HFCs can be hundreds to thousands of times more potent than carbon dioxide when they are released into the stratosphere. HFCs are a particularly important piece to the climate puzzle because the world's demand for HFCs is accelerating rapidly as developing nations increase their demand for comfort items, such as air conditioning. According to the Institute for Governance & Sustainable Development, "[t]he market for room air conditioning is growing 10-15% per year in many emerging

economies, including India, China, and Brazil . . . Ownership of room air conditioners in India, for example, is projected to increase to 73% in 2030 from 30% in 2020."

The United States recently ratified the Kigali Amendment but had previously enacted analogous requirements under the AIM Act. Under the AIM Act, EPA created a program that limits the total amount of HFCs imported and produced in the United States, and allocates that limited amount among domestic importers and refrigerant manufacturers.

EPA's Measures to Implement the HFC Phasedown

EPA has taken the position in implementing regulations and this litigation that the phasedown program would only work if it is rigorously enforced to ensure a limited volume of HFC molecules in the U.S. market.

To prevent circumvention, EPA adopted various rules to implement the phasedown, including the QR code requirement at issue in this case. Although the AIM Act itself did not direct EPA to adopt container labeling requirements, EPA cited 42 U.S.C. § 7675(e)(2)(b), which requires the agency to "ensure" an orderly HFC phasedown, and 42 U.S.C. § 7675(k)(1)(A), which allows the agency to "promulgate such regulations as are necessary to carry out" that phasedown.

EPA argued that the QR codes placed on cylinders are critical for cracking down on HFC smuggling from abroad because customs enforcement agents can track each HFC shipment and verify that they are linked to a specific party's allocation allowances. Shipments containing disposable cylinders can circumvent the allocation program because HFCs can be hidden in those vessels and imported surreptitiously.

Reusable cylinders encourage recapture/reclamation and responsible lifecycle management of HFCs. Using reusable cylinders, technicians servicing air conditioning and refrigeration equipment can capture used HFC molecules, which can be taken to EPA-certified reclaimers to be cleaned and re-circulated into the marketplace, rather than into the atmosphere. Additionally, leftover HFCs contained in disposable cylinder "heels" leak into the environment, further contributing to climate change. Industry groups argued that EPA did not have authority under the AIM Act to ban non-refillable cylinders or to require electronic tracking of the reusable cylinders.

The D.C. Circuit's decision holds that Congress did not expressly authorize EPA to adopt these measures. The court therefore vacated the rule that requires those cylinders and QR codes. The court's narrow interpretation of EPA's implied implementing authorities could have significant implications for EPA's ability to implement a host of other measures that are not expressly authorized in the parent statute.

It will remain to be seen whether EPA seeks an *en banc* appeal or whether it might also be evaluating whether other AIM Act provisions provide an alternative basis for these or similar measures. For example, EPA might seek to impose similar requirements through a pending rulemaking under subsection (h) of the AIM Act—which authorizes EPA to maximize reclamation and minimize releases of HFCs—to adopt refillable cartridge controls as conditions to avoid releases.

EPA's Authority to Regulate Blends Containing HFCs

Unsurprisingly, the court upheld the agency's authority to regulate HFC "blends" because blends do not change the nature of the regulated substance. HFC blends are materials created to replace

traditional CFC/HCFC substitutes that are high-GWP, highly flammable, or both. These blends contain a mixture of traditional HFCs and new alternatives, such as hydrofluoroolefins (HFOs), and are useful because lower GWP materials may dilute the GWP effect of HFCs in a blended format.

The parties disagreed on whether the AIM Act gave EPA authority to regulate HFC molecules blended with other unregulated molecules. The D.C. Circuit's decision means EPA can continue regulating HFCs even if they are blended with substances that EPA does not have the authority to regulate. Currently, EPA regulates blends by evaluating the percentage of the blend containing HFCs, and requiring allowance expenditures commensurate with the GWP associated with the volume of HFCs used in the blends.

Implications for the Nondelegation and Exhaustion Doctrines

The decision is also noteworthy for its discussion of the exhaustion doctrine as it relates to certain constitutional claims. The petitioners had asked the court to invalidate the HFC allocation program because Congress had impermissibly delegated authority over the HFC phasedown to EPA, violating the federal Constitution and the nondelegation doctrine. The nondelegation doctrine imposes some limits on the degree to which Congress can delegate its legislative powers to administrative agencies, such as EPA. The court rejected this argument on administrative exhaustion grounds because the petitioners had not raised this issue to EPA during the notice and comment rulemaking procedure.

Under the exhaustion requirements of Clean Air Act Section 307, a petitioner must exhaust administrative remedies relating to a final agency action before seeking a remedy from any court. Therefore, the court held that *any* claim arising under Section 307 must be raised during the notice and comment period of a rulemaking, even if it is challenging the limits of the agency's authority under a constitutional basis, such as the nondelegation doctrine.

Though the court only examined the specific exhaustion requirement contained in Section 307, its reasoning could extend to challenges under other statutes, such as the Administrative Procedure Act, that has similar exhaustion requirements. This holding highlights the importance of raising issues during the public comment process to preserve arguments for future rulemaking challenges. If parties fail to raise such challenges during the administrative rulemaking stage of the process, they will be unable to fully defend their interests if they choose to challenge a final rule in court.

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