The Future of EPA’s ‘Covert’ Regulation of GHGs

By Banning Them as Substitutes for Ozone-Depleting Substances under SNAP

A look at efforts by the U.S. Environmental Protection Agency (EPA) to regulate greenhouse gas (GHG) emissions under a statutory provision designed to address ozone-depleting substances.
The Intersection of GHG and ODS Regulations
The phaseout of ozone-depleting substances (ODS) by EPA under Title VI of the U.S. Clean Air Act (CAA) pursuant to the Montreal Protocol has been a 20-plus-year exercise in American businesses delivering global environmental benefits through technology forcing. The cost has taken the form of untold research and development dollars spent seeking acceptable alternatives to ODS. In addition, ODS phaseout and emerging alternatives have led to massive corporate capital investment into new facilities, new manufacturing equipment, and retrofits to existing facilities to accommodate non-ODS alternatives approved under EPA’s Significant New Alternatives Policy (SNAP) Program.

In September 2016, EPA issued a final rule under SNAP targeting hydrofluorocarbons (HFCs) and HFC-containing blends. These once acceptable ODS alternatives suddenly became unacceptable due to their global warming potential (GWP) and their resultant impact on climate change. Industry’s reception of the rule was neatly split. In opposition are producers of HFCs and HFC-containing blends who have been making and selling these previously EPA-approved ODS alternatives profitably for years. Joining EPA in support are chemical companies who developed several non-HFC ODS alternatives (with low or no GWP) that are now christened as the new non-HFC ‘go-to’ alternatives under SNAP.

The U.S. Court of Appeals for the D.C. Circuit heard oral arguments on challenges to the SNAP final rule on February 17, 2017. Petitioners Mexichem, Arkema, Compsys, and other intervenors arguing against the rule allege that EPA overstepped its authority under Section 612 of the CAA and SNAP by revisiting previously approved ODS alternatives for what amount to non-ODS-related reasons (i.e., the GWP of HFCs and their potential impact on climate change). EPA, in turn, defended its rulemaking by asserting that CAA Section 612 requires the agency to review ODS alternatives and, where an alternative presents a higher overall risk to human health and/or the environment, replace that alternative with a more acceptable option. The court issued its decision on August 8, 2017. The court’s opinion and its impact on EPA will be discussed below.

The Historic Regulation of ODS and Approved Alternatives under SNAP
The Montreal Protocol on Substances that Deplete the Ozone Layer was agreed to in September 1987 and entered into force on January 1, 1989. Designed to phaseout the production, use, and emission of ODS, the United States’ commitment to implementing the Montreal Protocol led to the creation of Title VI of the 1990 CAA Amendments. EPA regulations issued pursuant to Sections 601 through 607 of Title VI established the phaseout schedules for Class I and Class II ODS in accord-
relied-upon by industrial users and chemical industry producers of targeted ODS and acceptable alternatives—to inform both research and development investment into alternatives and capital investment into updating manufacturing capabilities to utilize the acceptable alternatives identified by EPA under SNAP. All told, the total cost of Title VI compliance is estimated to range from hundreds of millions of dollars to tens of billions of dollars.11

**HFCs under Attack: The Kigali Amendment to the Montreal Protocol**

With Class I ODS already phased-out and Class II substances nearing phaseout, it appeared to many that Title VI had largely run its course. Late in the second term of the Obama Administration, however, EPA reenergized the mission of Title VI by revisiting several previously approved ODS alternatives with an eye toward the substances’ GWP and their impact on climate change. These high GWP ODS alternatives included HFCs and HFC-containing blends. President Obama’s June 2013 Climate Action Plan included a line item committing the United States to becoming a leader in HFC emission reduction by utilizing EPA’s power under the SNAP Program of Section 612 of the CAA.12

The Kigali Amendment to the Montreal Protocol was the driver for EPA’s move to eliminate HFCs and HFC-containing blends through SNAP.13 Agreed to in October 2016 at the 28th Meeting of the Parties to the Montreal Protocol in Kigali, Rwanda, the Kigali Amendment establishes a 30-year schedule for the phasedown of the production, consumption, import/export, and emission of HFCs as an additional means to combat climate change.14 The United Nations Environment Programme reports that scientists believe the move could prevent up to 0.5 degrees Celsius of global warming by the end of the century.15 The Kigali Amendment will enter into force on January 1, 2019—assuming it is ratified by at least 20 parties to the Montreal Protocol. As of this writing (Summer 2017), only four parties had ratified the Amendment.

**The Mexichem Appeal and the Limits of EPA’s Power under CAA Section 612**

In their February 2017 oral arguments before the U.S. Court of Appeals for the D.C. Circuit, the petitioners opposing EPA’s rulemaking focused primarily on the proposition that the applicability of the SNAP Program is narrowly limited to replacing ODS with non-ODS alternatives.16 In addition to alleging that EPA overstepped its statutory authority under CAA Section 612, petitioners also argued that other statutory alternatives provide EPA with more suitable authority to regulate or prohibit the use of any non-ODS alternative that the agency subsequently concludes poses a risk of adverse impacts on human health and the environment.17

In defense of its rulemaking, EPA argued that Title VI gives the agency authority to delist any ODS alternative that may pose a higher overall risk to human health and the environment than some other alternative.18 EPA also took the position that Section 612 is about regulating ODS substitutes, and that the statute establishes an ongoing obligation for EPA to continually review and revise the list of ODS alternatives as more data inevitably becomes available over time. When the court questioned the agency as to whether it was fair to “pull the rug out from under” those industrial users of, and chemical industry producers of, previously approved HFC ODS alternatives, EPA responded that the regulated community had been on notice since its initial rulemaking on the subject in March 1994 that the list of ODS alternatives was subject to refinement and evolution over time.19

**In Next Month’s Issue…**

**Next-Gen Air Sensors and Compliance**

The U.S. Environmental Protection Agency (EPA), states, and regulated industry continue to address technical, regulatory, and legal issues related to next-generation air quality sensors, citizen science, and next-generation compliance/enforcement. The November issue of *EM* will provide stakeholder views on key developments and challenges.
Conclusion: The Future of GHGs as ODS Substitutes under SNAP

From a legal academic standpoint, EPA's arguments appeared to be quite sound with respect to the language of CAA Section 612 and the breadth of the agency's powers to list, reevaluate, and delist ODS alternatives. Under a longstanding legal doctrine referred to universally by attorneys simply as “Chevron”, administrative agencies are afforded great deference when reasonably interpreting a statute that they administer. Applying Chevron deference here could lead a court to conclude that EPA acted properly and ODS alternatives can be delisted under SNAP for non-ODS-related reasons.

On the other hand, EPA's efforts to regulate climate change have been subject to increased scrutiny (judicial and otherwise) for more than a decade now. What could be conceived as a “covert” effort by EPA to regulate GHG emissions under a statutory provision designed to address ODS emissions may be subject to less Chevron deference than the agency otherwise might expect. Although it is unlikely that the economic impact on industry would ultimately carry the day for petitioners, a court could give substantial consideration to the huge investment made by the regulated community in reliance on EPA's initial listing of HFCs as acceptable ODS alternatives.

Ultimately, the court's August 8, 2017, decision held that EPA does not have authority under the CAA to delist ODS alternatives for non-ODS-related under SNAP. A split three-judge panel of the court vacated the rule to the extent it compelled manufacturers to replace HFCs, and remanded the rule to EPA for further consideration. The majority opinion placed great weight on a 1994 EPA statement in which the agency admitted that it was not authorized under CAA Section 612 to “review substitutes for substances that are not themselves” ODS. The court then focused on the interpretation and application of the word “replace,” and refused to afford the agency Chevron deference to the extent that EPA's use and application of the word “replace” would have authorized its actions under SNAP. Judge Robert Wilkins dissented from the majority opinion, and wrote that his belief was that Chevron deference supported EPA's interpretation and application of the word.

While EPA's usage of Title VI of the CAA and SNAP to address GHG emissions and climate change mirrored the manner in which the Parties to the Montreal Protocol employed the Kigali Amendment to the same end, the ultimate outcome for EPA was very different. Given the Trump Administration's stance on climate change and early efforts to undo climate-related initiatives undertaken by the Obama Administration's EPA, an appeal of the Mexichem decision by EPA appears highly unlikely (though NRDC and the industry intervenors who sided with EPA may choose to appeal separately). Further, it is a near certainty that the United States will not ratify the Kigali Amendment before it enters into force.

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References

1. Title VI of the U.S. Clean Air Act (CAA) is codified at 42 U.S.C. §7671 et seq.
2. 81 Fed. Reg. 86778 (December 1, 2016).
3. The global warming potentials of HFCs can range from approximately 100 times to 15,000 times greater than carbon dioxide. See Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Table 2.14 (2007).
4. The Natural Resources Defense Council also intervened in defense of EPA's rulemaking.
6. Petitioners also allege, inter alia, that EPA's rulemaking was arbitrary and capricious in that the agency failed to explain the materiality of differences in GWP, improperly used GWP as a measure of atmospheric impacts, and failed to provide an objective standard for comparing ODS alternatives that established an acceptable GWP for an ODS alternative.
10. 42 U.S.C. §7671k(c).
13. Although EPA's move slightly pre-dates Kigali, the agency's action was taken in anticipation of Kigali.
17. For example, the Toxic Substances Control Act at 15 U.S.C. §2601 et seq.
18. EPA's argument suggests, by logical extension, and in keeping with the technology forcing nature of the CAA, Title VI, and SNAP, that an approved ODS alternative could be delisted even if no readily available safer alternative currently exists.