

Congress of the United States
Washington, DC 20515

September 13, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

We write regarding two Environmental Protection Agency rules, promulgated under the Clean Air Act's Significant New Alternatives Policy program (SNAP), that would place potentially costly restrictions on the use of hydrofluorocarbons (HFCs) in air-conditioning and refrigeration systems. The SNAP 1 rule, finalized on July 20, 2015, places limits on HFC use in several applications and does so on the grounds that they contribute to global warming.¹ We have serious concerns about this rule's impact on American businesses and consumers, and we also believe that it exceeds the agency's statutory authority by establishing a new and expansive global warming program never intended by Congress. It is critical that these concerns be resolved, especially now that the agency has proposed a SNAP 2 rule that places additional restrictions on HFCs and raises many of the same issues.² In addition, the administration is also pursuing international restrictions on HFCs, raising questions about the need for these domestic rules.

Background

The SNAP program was created under Subchapter VI of the Clean Air Act Amendments of 1990, entitled "Stratospheric Ozone Depletion." As the title indicates, this subchapter focuses on the issue of ozone depletion – not global warming – and EPA's SNAP program was devised to evaluate alternatives to the ozone-depleting compounds that were being banned at the time. HFCs are one such class of non-ozone depleting alternatives that were approved by the agency, and in the ensuing two decades they have found widespread use in many applications, including refrigerants and foam-blowing agents in insulation. With the SNAP 1 final rule, however, EPA

¹ "Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program," 80 Fed. Reg. 46,126 (July 20, 2015).

² "Protection of Stratospheric Ozone: Proposed New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," 81 Fed. Reg. 22,810 (April 18, 2016).

has reversed its prior approval of HFCs and is doing so based upon their global warming potential. In separate rulemakings, EPA has approved a number of alternatives to HFCs.

Policy Issues and Legal Concerns With SNAP 1

As initially proposed, SNAP 1 rule would have restricted HFCs by January 1, 2016 in most categories of newly-manufactured commercial refrigeration equipment and by January 1, 2017 for many types of foam insulation. The overwhelming majority of affected industry commenters informed the agency that these proposed deadlines would be impossible to meet and would pose great difficulties for both manufacturers and users of affected products. In the final rule, EPA extended many of the deadlines by an additional one to four years. While these new deadlines are a step in the right direction, the final rule still presents challenges, especially given that many of the EPA-approved alternatives to HFCs have shortcomings – availability, cost, performance, safety, and/or efficiency – that have yet to be overcome.

The difficulties are most severe for small manufacturers, many of whom noted in comments to the agency that they lack the resources to redesign their product lines in a relatively short time frame. Nonetheless, pursuant to § 605(b) of the Regulatory Flexibility Act, EPA certified that SNAP 1 will not have a significant economic impact on a substantial number of small entities. Therefore, the EPA did not convene a Small Business Advocacy Review panel to obtain input from affected small manufacturers or perform an initial and final regulatory flexibility analysis of the rule's effects on small manufacturers.

Beyond the specific implementation challenges, many fundamental issues with this final rule remain unresolved. Most significantly, there are serious questions about whether EPA has the legal authority to take such action. The provisions in the 1990 Clean Air Act amendments relied upon by the agency specifically address ozone depletion, but the agency is now using them as a means to set global warming policy. Nothing in the statutory language suggests that such an interpretation is appropriate. In fact, global warming provisions were included in the Senate version of the 1990 Amendments (S. 1630), but were ultimately taken out of the version that was signed into law - the only surviving statutory reference being an admonition that the global warming potential of a compound “shall not be construed to be the basis of any additional regulation under this chapter.” In addition, subsequent bills amending the Clean Air Act to restrict HFCs and other chemicals on the basis of their contribution to global warming have all failed to become law. Congressional intent is clear that the ozone depletion provisions in the Clean Air Act cannot be used by EPA to create a new program focused on global warming.

Furthermore, the law does not appear to include provisions authorizing EPA to reverse its prior approval of HFCs as substitutes for ozone-depleting substances in favor of other compounds – in effect mandating substitutes for substitutes. Indeed, the final rule represents the first time in the two decades-long history of the SNAP program that previously-approved compounds are being banned because of a claimed contribution to global warming. The relevant provisions in the Clean Air Act apply only to direct replacements for banned ozone depleting chemicals. It was never the intent of Congress to establish an open-ended program reviewing subsequent generations of compounds based on their relative global warming potentials. For these reasons, we have significant concerns that EPA has acted beyond the scope of its authority.

Moreover, even assuming that addressing global warming is a legally-justified purpose for a SNAP rulemaking and that previously-approved HFCs can be targeted based on their contribution to it, EPA has failed to show that its final rule would make a non-negligible impact. The agency declined to quantify the estimated impact on future temperatures and sea levels as it has done for other global warming rules. For example, EPA's recently finalized greenhouse gas emissions standards for heavy-duty vehicles are estimated by the agency to reduce temperatures by 0.0026 to 0.0065 degrees Celsius and reduce sea levels by 0.023 to 0.057 centimeters in the year 2100 – to its credit, the agency did not conceal the fact that the heavy-duty vehicle rule's impact is likely to be minimal. In contrast, EPA did not publish a similar analysis for the SNAP 1 rule, so we presume that its estimated effect on future temperatures and sea levels would be even smaller. In order to provide the public with fuller information, we believe such estimates should be included in this and all subsequent SNAP rulemakings that purport to address global warming.

In light of the unquantified but likely modest climate impact of the final rule, and given that many EPA-approved substitutes for HFCs present risks of their own, there are questions whether replacing HFCs meets the statutory requirement that doing so “reduces the overall risk to human health and the environment.” We believe that no SNAP rulemaking limiting HFC use should go forward unless the agency can clearly demonstrate net benefits using objective and quantifiable criteria.

EPA has also left unresolved the potential conflicts between its SNAP rules restricting HFC use and Department of Energy efficiency standards that apply to some of the same categories of equipment. HFCs came into widespread use as refrigerants and foam blowing agents in large part because of their high efficiency, and their continued use was assumed by DOE in setting several recent efficiency standards such as those for commercial refrigeration equipment. In contrast, the energy efficiency of many HFC substitutes is unproven, thus the SNAP rule will complicate compliance with DOE standards. The administration has also failed to apply its own executive orders requiring agencies to consider cumulative regulatory burdens and to coordinate multiple rulemakings targeting the same industry. Despite these directives, EPA states that “we do not have a practice in the SNAP program of including energy efficiency in the overall risk analysis.”

Beyond the potential conflicts with DOE efficiency standards, we also believe there are policy reasons why EPA should not ignore energy efficiency. Any EPA SNAP rule that may force a switch to less energy efficient replacements in some applications would undercut the agency's global warming rationale, since less efficient equipment uses more electricity and thus results in higher electricity-related greenhouse gas emissions.

Furthermore, there are questions whether EPA should continue pursuing regulatory restrictions on HFCs at the same time that the administration is also seeking international measures under the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol). Imposing domestic restrictions in addition to international ones would only serve to disproportionately burden American businesses and consumers, especially if the domestic deadlines are considerably more stringent than the international ones.

Similar Concerns With SNAP 2

On April 18, 2016, EPA proposed the SNAP 2 rule placing additional restrictions on previously-approved uses of HFCs, including residential refrigerators. Based on the content of the proposed rule, it appears that none of concerns raised by SNAP 1 have been adequately addressed.

As with SNAP 1, SNAP 2 ventures beyond EPA's statutory duties approving direct replacements for ozone depleting compounds and instead implements a global warming program never authorized by Congress. And once again the agency has not shown that the proposed provisions reduce the overall risk to human health and the environment – EPA did not quantify the benefits of its proposed restrictions on HFCs nor did it weigh any such benefits against the potential risks of using replacement compounds.

The stringent deadlines in SNAP 2 pose a challenge for manufacturers, especially small ones, though EPA again declined to conduct an analysis pursuant to the Regulatory Flexibility Act. Many of the leading HFC replacements are flammable, raising safety concerns as well as building code issues that may take more time to address than the proposed deadlines allow. Further, the proposed rule may again compromise energy efficiency in some affected equipment, creating potential conflicts with DOE efficiency standards as well as undercutting any environmental benefits. Finally, the administration has yet to explain, for both SNAP 1 and SNAP 2, why domestic measures are needed when it is also pursuing international restrictions on HFCs.

In light of these and other concerns with SNAP 1, as well as similar concerns with SNAP 2, please respond to the following questions by September 30, 2016:

1. What statutory provisions in the Clean Air Act expressly provide for the use of the SNAP program to target non-ozone depleting compounds that EPA believes contribute more to global warming than other non-ozone depleting compounds?
 - a. What statutory provisions allow EPA to reverse its prior approval of HFCs in favor of later-generation compounds, especially now that HFCs have come into widespread use as a direct consequence of the agency's approval?
 - b. What statutory provisions allow for the creation of a new global warming-focused program that is no longer related to the original ozone depletion intent of the statute?
 - c. Does EPA believe it can permanently regulate substitutes for substitutes of ozone depleting compounds?
2. Using the same methodology employed by EPA to estimate the temperature and sea level impact of the heavy-duty vehicle rule as well as other global warming rules, what is the estimated impact of SNAP 1 on temperatures and sea levels?
 - a. Describe how this impact was weighed against the risks associated with HFC substitutes in coming to the conclusion that SNAP 1 would reduce the overall risk to human health and the environment?
 - b. What is the estimated temperature and sea level impact of SNAP 2?
 - c. Does EPA believe it can restrict HFCs based upon any non-zero impact on the climate, no matter how miniscule?

- d. Would considerably longer transition periods than those in SNAP 1 and SNAP 2, for example ten years, make an appreciable difference in the ultimate climate impact?
3. Why does EPA's conclusion that SNAP 1 would not have a significant economic impact on a substantial number of small entities differ so sharply from the majority of comments submitted by those representing small businesses?
 - a. Is it because EPA compares only the costs of substitutes and does not consider all of the costs of transitioning to new compounds?
 - b. Based upon the input from small businesses of SNAP 1, why hasn't EPA made any methodological changes to the way it assesses the small business impacts in its proposed SNAP 2 rule?
4. Does EPA believe it can promulgate SNAP rules restricting HFC use without considering the impact of current and proposed DOE efficiency standards affecting the same equipment?
 - a. What obligations does the agency believe are created by Executive Order 13563 requiring agencies to consider cumulative regulatory burdens, and the March 20, 2012 Office of Information and Regulatory Affairs memorandum requiring better coordination of the timing, content, and requirements of multiple rulemakings affecting the same industry?
 - b. Is EPA reconsidering its position that energy efficiency is not a factor taken into account in SNAP risk assessments, especially if global warming is the agency's justification for taking action?
5. Why does EPA believe that domestic regulations under SNAP are needed when the administration is also seeking international restrictions of HFCs under the Montreal Protocol?
 - a. If international restrictions on HFCs are enacted, would EPA reconsider the domestic measures under SNAP?

Should you have any questions, please contact Ben Lieberman of the Committee on Energy and Commerce majority staff at (202) 225-2927.

Sincerely,



Pete Olson
Vice Chairman
Subcommittee on Energy and Power



Steve Chabot
Chairman
Small Business Committee