



## D.C. Circuit Rejects EPA's Efforts to Ban Hydrofluorocarbons: Part 2

September 5, 2017

*This Sidebar is the second in a series of two posts analyzing the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit's) decision in [Mexichem Fluor, Inc. v. EPA](#), vacating part of a 2015 rule that would have banned uses of hydrofluorocarbons (HFCs), a class of greenhouse gases (GHGs). [Part 1](#) of this series provided background on the U.S. implementation of the [Montreal Protocol on Substances that Deplete the Ozone Layer](#) (Montreal Protocol) and analyzed the court's opinion. [Part 2](#) of this series discusses the potential implications of the court's decision on further regulation of the HFCs and impacts on the United States implementation of the Montreal Protocol and its amendments.*

### Alternative Legal Options for Reducing HFCs

Although the majority decision in *Mexichem Fluor, Inc. v. EPA* held that EPA could not require manufacturers that previously replaced ODSs with HFCs to replace those HFCs with another acceptable substitute, the majority did provide potential alternative pathways for EPA to regulate HFCs. The majority anticipated that EPA might argue that the agency can retroactively determine that the HFCs should not have been approved as acceptable ODS substitutes under Section 612 in the first place, thus prohibiting manufacturers from continuing to use HFCs as an ODS substitute in their products. However, the majority decision [outlined](#) potential legal obstacles, including due process concerns, to this approach should EPA decide to pursue “retroactive disapproval.”

The majority also highlighted several statutory authorities under the Clean Air Act that could potentially be used to regulate HFCs, including the National Ambient Air Quality Standards (NAAQS) ([Section 109](#)), Hazardous Air Pollutants (HAPs) program ([Section 112](#)), motor vehicle emission standards ([Section 202](#)), and the Prevention of Significant Deterioration (PSD) permitting program ([Sections 160-169](#)). EPA has already used some of these authorities to regulate HFCs. For example, EPA has exercised its authority under Section 202 to reduce the use of HFCs as coolants in automotive air conditioning systems by allowing manufacturers that substitute HFCs with other coolants with lower GWPs to earn [credits](#) that can be used to comply with the [motor vehicle GHG standards](#). In addition, EPA has exercised its authority under the PSD program to [set](#) emission limits on GHGs (including HFCs) for new or modified stationary sources that are required to obtain a PSD permit for non-GHG emissions.

To use the other statutory authorities mentioned in the majority decision, EPA would be required to make

**Congressional Research Service**

<https://crsreports.congress.gov>

LSB10155

specific findings related to the health or environmental effects or endangerment from HFC emissions before it could regulate HFCs. For example, EPA could add HFCs to the [list of HAPs](#) subject to regulation under [Section 112](#) if EPA [determines](#) that HFCs “present or may, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects . . . as a result of emissions to the air.” Similarly, under [Section 109](#), EPA would be required to set NAAQS for HFCs if EPA [determines](#) under [Section 108](#) that (1) HFCs endanger public health or welfare and (2) their presence in ambient air results from numerous or diverse sources. To date, EPA has not made findings under Sections 112 or 108 for any GHG emissions.

It is unclear whether these Clean Air Act authorities would be effective paths to regulate and reduce HFC emissions. Because Section 112 is used to regulate HAPs from stationary sources such as large industrial facilities, some [commentators](#) suggest that Section 112 may not be “a good fit” for phasing down the manufacture and use of products containing HFCs such as spray foam, refrigerators, and air conditioners. Further, EPA has previously [expressed concerns](#) regarding the feasibility, costs, and benefits of regulating of GHGs in general under Sections 112 and 109. However, EPA has not specifically analyzed the potential to regulate HFCs under these statutory provisions.

The majority decision also cited the [Toxic Substances Control Act \(TSCA\)](#) as another means to regulate HFCs. TSCA, as [amended](#) in 2016, [authorizes](#) EPA to regulate the manufacture or use of any substance that it determines poses “an unreasonable risk of injury to health or the environment.” However, TSCA’s prioritization and risk evaluation process limits the number and types of substances that can be regulated under the statute. To regulate HFCs under TSCA, EPA would first have to [prioritize](#) HFCs among other existing chemicals for risk evaluation before it can determine whether such chemicals present unreasonable risks warranting regulation. With the recent release of a [new rule](#) outlining the method to prioritize chemicals for review, it is unknown whether and when EPA may consider HFCs as a candidate substance for prioritization under TSCA before their risks will be evaluated.

Another potential pathway to regulating HFCs could be new legislation that authorizes EPA to ban or limit the use of HFCs. The majority emphasized that “Congress’s failure to enact general climate change legislation does not authorize EPA to act. Under 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.” Congressional action on HFCs could also pave the path for implementation of the Kigali Amendment of the Montreal Protocol, discussed below.

## Implications Related to the Kigali Amendment to the Montreal Protocol

Adopted in Kigali, Rwanda, the [Kigali Amendment](#) to the Montreal Protocol requires parties to the Protocol to [phase down](#) the production and use of HFCs. The Kigali Amendment will only [enter into force](#) on January 1, 2019 if it is ratified (accepted or approved) by at least 20 parties, out of the current 197, to the Montreal Protocol. (“[Ratification](#)” is the action taken by a party to the Montreal Protocol to confirm that it consents to be bound by the Protocol and its amendments.) While the United States has adopted the Amendment, it has not ratified it through the advice and consent of the Senate. To date, [four countries](#) have ratified the Kigali Amendment.

Some members of the heating and cooling industry [support](#) ratification the Kigali Amendment, emphasizing the adverse trade implications for not ratifying it. If the Kigali Amendment goes in effect and the United States does not ratify it, [Article 4](#) of the Amendment requires that all ratifying countries ban exports and imports of HFCs to or from any country that has not ratified the Amendment. Industry Members [assert](#) that “U.S. manufacturers’ goods would not be able to be sold in those countries that have approved the Kigali amendment, which would have a devastating impact on U.S. manufacturing and employment.” While there is [strong industry support](#) for ratifying the Kigali Amendment, some members of Congress have [expressed](#) reservations about addressing GHGs such as HFCs under the Montreal

Protocol. Other stakeholders have [concerns](#) regarding the cost and potential safety issues of some HFC replacements.

If the United States seeks to ratify the Kigali Amendment through the advice and consent of the Senate, Congress will need to determine how the United States will meet its commitments to phase down the production and use of HFCs in light of the majority's decision in *Mexichem Fluor, Inc. v. EPA*. If ratified, the United States would be required under international law to [reduce](#) production and consumption of HFCs by 10% by 2019 and by 85% by 2036, compared to a 2011-2013 baseline. EPA could pursue one or more of the pathways discussed above to reduce the production and use of HFCs. However, if the United States does not ratify the Kigali Amendment, it is unclear whether and how EPA will seek to regulate HFCs.

## Author Information

Linda Tsang  
Legislative Attorney

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.