United States Department of State

Washington, D.C. 20520

June 4, 1987

RELEASED IN FULL

MEMORANDUM

TO: OES - Ambassador Negroponte

FROM: L/OES - David Colson

SUBJECT: L/OES' Evaluation of Litigation Risks in Relation to Government Decisions on the Regulation of Ozone-depleting Substances

The attached assessment has been prepared by Debbie Kennedy. I concur with it.

It is our best judgment that, in light of the statements on the record that there is a large risk of ozone depletion if CFC use continues at present levels, a decision to take no action would not be sustained.

The L front office has not reviewed this memo.

cc: L - Ms. Verville
OES/E - Mr. Benedick

REVIEW AUTHORITY: Adolph Eisner, Senior Reviewer

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box 5
59.56.1262

This memorandum is subject to
the attorney-client privilege

QUESTION:

What are the chances that an EPA decision to take no action to regulate ozone-depleting substances or to impose minimal regulations on these substances would be upheld if challenged?

DISCUSSION:

NRDC Litigation and Standard for Review of EPA's Decision

Under a modification of the schedule that was imposed by an order of the D.C. federal district court approving settlement of the NRDC v. Thomas litigation, the EPA Administrator must issue proposed regulations for the control of CFCs or a basis for a proposed decision to take no action by December 1, 1987. Final regulations or a final decision to take no action must be issued by August 1, 1988. An important point to note about the district court's order is that it only requires that a decision (one way or the other) be made by a certain date; it does not address at all what that decision should be.

The EPA Administrator's final action may be challenged, within sixty days from the date that the notice of the action appears in the Federal Register, by filing a petition for review in the United States Court of Appeal for the District of Columbia ("D.C. Circuit"). 42 U.S.C. § 7607(b)(1). The sustainability of the Administrator's decision depends largely on the information contained in the administrative record -- i.e., facts collected by, documents prepared by, and information submitted to the Administrator in connection with his review.

EPA's decision will not be overturned by the court unless it is judged to be "arbitrary and capricious". Under this standard of review, the agency's determination is afforded substantial deference. The decision will be upheld if the agency considered all of the relevant factors and demonstrated "a reasonable connection" between the facts on the record and the resulting policy choice.

A memorandum that I prepared in July 1986 provides additional background information on the NRDC suit and the Court of Appeals standard of review. I have attached a copy of this memo for your convenience.

United States Department of State

Washington, D.C. 20520

July 14, 1986

RELEASED IN FULL

MEMORANDUM

TO: OES - John Negroponte

THROUGH: L/OES - David Colson
OES/E - Richard Benedick

FROM: L/OES - Deborah Kennedy

SUBJECT: CFC Litigation

In response to your request, this memorandum reports on the lawsuit filed by the Natural Resources Defense Council, Inc. ("NRDC") against the EPA Administrator challenging the agency's failure to propose regulations for the control of chlorofluorocarbons ("CFCs"). It also outlines the terms of a settlement agreement entered in the case, describes EPA's flexibility in deciding whether to impose additional domestic controls on CFCs, and discusses the statutory provision which permits judicial review of EPA's ultimate decision regarding CFC controls.

BACKGROUND

On November 27, 1984, NRDC filed an action against the Administrator of EPA in the United States Dsitrict Court for the District of Columbia (Judge Richey presiding) seeking an order requiring EPA to promulgate regulations controlling emissions of CFCs. NRDC based it complaint on an Advance Notice of Proposed Rulemaking (ANPR) issued by EPA in October 1980 in which the Administrator stated (1) that continued global emissions of CFCs are "considered a significant and increasing threat to human health and the environment" and (2) that substantial CFC emissions reductions are "the only acceptable long-term strategy" given substantial evidence indicating that the ozone layer is threatened with depletion. 45 Fed. Reg. 66726, 66729 (1980).

REVIEW AUTHORITY: Adolph Eisner, Senior Reviewer

NRDC argued that section 157 of the Clean Air Act, 42 U.S.C. §7457, requires the Administrator to promulgate regulations to control any substance which he determines may reasonably be anticipated to affect the stratosphere (especially the stratospheric ozone layer) if the stratospheric effects reasonably could endanger public health or welfare. Citing the statements contained in the 1980 ANPR, NRDC thus contended that pursuant to section 157 the Administrator had a "mandatory, non-discretionary duty" to promulgate regulations for the control of CFCs.1/

Shortly after the suit was filed, EPA and NRDC entered into settlement negotiations. To ensure its active involvement in these negotiations and in further litigation if agreement could not be reached, the Alliance for Responsible CFC Policy, Inc. ("CFC Alliance") requested the Court's permission to intervene as a defendant in the action. This request was granted on March 1, 1985.

In December 1985, EPA and NRC agreed on the terms of settlement and jointly moved the Court to enter a proposed order which established a timetable for scientific review and documentation and regulatory analysis of stratospheric ozone protection, leading to a final agency decision on control of CFCs by November 1987. While the CFC Alliance did not object to the schedule outlined in the proposed order, it remained neutral on entry of the order. Although the rationale for adopting this noncommittal stance is not altogether clear, it may have been prompted by a desire to avoid conceding that the deadline established in the proposed order represented a sufficient amount of time to arrive at a reasoned decision on CFC regulation.

1/ With respect to its 1980 ANPR and in justification of its postponing a decision on further regulation of domestic CFC production or use, EPA has noted that the scientific information summarized in that notice was soon superceded by more recent work in the field which revealed that "changes in the ozone layer are affected by a more complex array of physical and chemical forces than previously thought and that substantial uncertainties remain to be resolved before such changes can be predicted with confidence." 51 Fed. Reg. 1257 (1986). As you know, the agency is currently engaged in activities designed to develop the scientific, technical, and economic information needed to make a decision concerning further control of CFCs.

Terms of the Settlement

On May 17, 1986, Judge Richey entered an order approving the settlement of the litigation. The order requires EPA to take the following actions:

- o No later than the week of October 27, 1986, to request that its Science Advisory Board convene "if it is necessary" to review staff papers presenting EPA's assessment of scientific information on the health and environmental effects of stratospheric perturbants;

- o Not later than May 1, 1987, to issue a Federal Register notice proposing regulatory action on CFCs or presenting a basis for a proposed decision to take no action;

- o Not later than November 1, 1987, to issue a Federal Register notice promulgating final regulations to control CFCs or announcing a final decision to take no action;

- o Beginning on July 15, 1986, to file a status report on the agency's implementation of the above schedule.

Although the order differs from the proposed order jointly filed by NRDC and EPA in some respects, the differences are essentially inconsequential. For example, the Court's Order makes no mention of EPA's sponsorship of and participation in a series of domestic and international workshops and conferences on scientific, technical, and economic issues related to stratospheric ozone protection. Some of these programs were completed and preparations for others well advanced, however, by the time this Order was entered.

The NRDC litigation currently stands dismissed, but the parties retain the right to reopen the case, upon oral request, for the Court to examine EPA's compliance with the schedule outlined in the Order, or for the Court to consider motions related to the schedule (e.g., motions to modify the schedule).

EPA Regulatory Options

The essence of the settlement decree is the establishment of a timetable and a deadline for EPA to reach a determination on additional regulation of domestic CFC production or use. The Court's Order preserves EPA's option not to promulgate

additional regulations to control CFC emissions. In short, the settlement decree neither requires EPA to take, nor prohibits the agency from taking, regulatory action to control CFC emissions. It clearly contemplates, nevertheless, that EPA's final decision will be determined by available scientific information regarding the health and environmental effects of CFCs.

Judicial Review of EPA Regulatory Decision

A final action of the EPA Administrator under the Clean Air Act may be challenged by filing a petition for review in the United States Courts of Appeals. 42 U.S.C. § 7607(b). Where that action has national application, scope, or effect, the appropriate forum is the United States Court of Appeal for the District of Columbia.

The settlement agreement reached by NRDC and EPA does not affect NRDC's right to invoke this provision to petition the Court of Appeals for review of EPA's ultimate decision regarding further regulation of CFC emissions. Similarly, the CFC Alliance is not prevented from seeking judicial review of the Administator's final action in the Court of Appeals. 2/

Standard of Court of Appeals Review

If the challenge to EPA's final determination regarding controls on CFC emission is based on an allegation that the decision is not supported by substantial evidence, the decision will not be reversed unless it is arbitrary and capricious. See Sierra Club v. Costle, 657 F.2d 298, 323 (D.C. Cir. 1981). Under this standard of review, the agency's determination is afforded substantial deference, and the decision will be upheld if the agency considered all of the relevant factors and demonstrated "a reasonable connection between the facts on the record and the resulting policy choice." Sierra Club, 657 F.2d at 323; Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1145 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

In cases involving procedural challenges, the alleged procedural error must also be "arbitrary and capricious" for the reviewing court to reverse action taken by EPA under the Clean Air Act. In the procedural context, the "aribitrary and

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2/ Procedural or substantive challenges to the final determination regarding CFC controls would be reviewed by the Court of Appeals. The District Court's jurisdiction would extend over any allegations that EPA failed to comply with the terms of the settlement agreement -- i.e., the timetable for reaching its decision.

capricious" standard means that the court must affirm "reasonable" EPA decisions regarding the implementation of procedures. See Small Refinery Lead Phase-down Task Force v. EPA, 705 F.2d 506, 523 (D.C. Cir. 1983). Exhibiting Congress' concern that EPA's action not be casually overturned for procedural reasons, the Clean Air Act also provides that a rule may be invalidated because of procedural error "only if the errors were no serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. §7607(d)(8).

Comment: The connection between EPA's obligation pursuant to the lawsuit settlement to make a decision on further domestic CFC regulations and the international CFC initiative is obvious. The two tracks can proceed independently, or they can be coordinated; but at some point it makes sense for them to come together.

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