United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1024 **September Term, 2018**

FILED ON: APRIL 5, 2019

MEXICHEM FLUOR, INC.,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

HONEYWELL INTERNATIONAL, INC., ET AL.,
INTERVENORS

Consolidated with 17-1030

On Petition for Review of an Action of the
United States Environmental Protection Agency

Before: ROGERS and WILKINS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the Environmental Protection Agency (EPA) and on the briefs and oral arguments of the parties. *See* FED. R. APP. P. 36(a)(2); D.C. CIR. R. 34(j). We have afforded the issues full consideration and have determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the petitions for review be **GRANTED**.

Above the Earth's surface is a layer of ozone gas absorbing ultraviolet radiation. Decades ago, "scientists discovered that certain man-made chemicals can destroy" the layer. *NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). Because "[i]ncreased human exposure to ultraviolet radiation is linked to a range of ailments, including skin cancer and cataracts," *id.*, Congress sought to combat ozone depletion and enacted Title VI of the Clean Air Act (Act). Section 612 of the Act mandates, "[t]o the maximum extent practicable," the "replace[ment]" of ozone-depleting substances with substitutes "that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a).

Relatedly, § 612 requires the EPA Administrator to issue rules generally banning the "replace[ment]" of ozone-depleting substances with "any substitute which the Administrator determines may present adverse effects to human health or the environment." *Id.* § 7671k(c).

For a time, the EPA deemed as suitable substitutes the greenhouse gases known as hydrofluorocarbons (HFCs). But fearing their contributions to climate change, the EPA recently promulgated two rules rendering certain HFCs unacceptable for various uses in aerosols, motor vehicle air conditioners, commercial refrigerators, and foams.

Two HFC manufacturers – Mexichem Fluor, Inc. and Arkema Inc. – filed petitions for review challenging the first rule, promulgated in 2015. In *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), we partially granted the petitions and partially vacated the rule. The EPA claimed that it could require manufacturers to replace HFCs they had installed as substitutes, "even though HFCs are not ozone-depleting substances" and the EPA had never asserted that the prior installations were unlawful. *Id.* at 456; *see also id.* at 458 & n.3, 461-62. We concluded that § 612 does not grant the EPA authority to place such a burden on manufacturers; otherwise, we worried, the EPA would "have indefinite authority to regulate a manufacturer's use" of substitutes after the first swap. *Id.* at 458-62. But we recognized that the rule permissibly "prohibit[s] any manufacturers that still use ozone-depleting substances . . . from deciding in the future to replace those substances with HFCs." *Id.* at 460. Indeed, we sustained as well-reasoned the EPA's decision to ban further substitution of ozone-depleting substances with certain HFCs. *Id.* at 460 n.5, 462-64. Thus, we vacated the rule only "to the extent" it required manufacturers to replace already lawfully installed HFC substitutes. *Id.* at 464.

Before us is the second rule, promulgated in 2016 and challenged by the same manufacturers. *See* Protection of Stratospheric Ozone: New Listing 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. 86,778 (Dec. 1, 2016). This time, the companies in their petitions for review seek only the partial remedy afforded in *Mexichem*. *See* Pet'rs' Br. 13, 20. At the onset, we note that the prior merits holding binds us, and that we must grant the new petitions if no procedural issues detain us. Here, three Intervenors – Honeywell International Inc., the Natural Resources Defense Council, and The Chemours Company FC, LLC – raise a timeliness challenge that we did not expressly decide in *Mexichem*. We lack jurisdiction "unless the petition for review is brought within sixty days of the challenged action appearing in the Federal Register." *Sierra Club v. EPA*, 895 F.3d 1, 16 (D.C. Cir. 2018); *see also* 42 U.S.C. § 7607(b)(1). The manufacturers argue that the law-of-the-circuit doctrine and issue preclusion require us to find jurisdiction, and that, in any event, we should find the petitions timely on *de novo* review. Because we agree with the issue preclusion argument, we reject the jurisdictional challenge.

Under the doctrine of offensive issue preclusion, a party "is precluded from relitigating identical issues that [it] litigated and lost against" another party. *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984). Issue preclusion may operate against any named party, including an intervenor. *See, e.g.*, *Cutler v. Hayes*, 818 F.2d 879, 887-90 (D.C. Cir.

1987). And litigants may be barred from disputing even jurisdictional issues that a tribunal previously decided. *See, e.g.*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009); *Durfee v. Duke*, 375 U.S. 106, 111-16 (1963); *Cutler*, 818 F.2d at 887-90.

"[T]hree conditions must be satisfied before a party can use issue preclusion to estop a party from relitigating an identical issue previously decided." *Jack Faucett*, 744 F.2d at 125. First, the issue must have been "actually litigated" – that is, "contested by the parties and submitted for determination by the court." *Id.* Second, it must have been "actually and necessarily determined by a court of competent jurisdiction" in the prior case. *Id.* (citation omitted). Third, preclusion "must not work an unfairness" on the bound party. *Id.*

The three prongs are easily met here. The same timeliness challenge was briefed in *Mexichem*. As for the second prong, we "must assume that the court rendering the [prior] judgment acted in accordance with governing law." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1190 (D.C. Cir. 1983). Because governing law requires us in granting relief to "establish as 'an antecedent' matter that [we have] jurisdiction," *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018) (citation omitted), we must assume that we implicitly found timely the petitions in *Mexichem*. Silent holdings necessary to the judgment preclude relitigation just as well as stated ones. *See, e.g.*, *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990). With respect to the third prong, the "incentives to litigate the point now disputed were no less present in the prior case, nor are the stakes of the present case of 'vastly greater magnitude.'" *Martin v. DOJ*, 488 F.3d 446, 455 (D.C. Cir. 2007) (citation omitted). And we "see no risk that the 'prior proceedings were seriously defective.'" *Id.* (citation omitted).

The presence of EPA and Boeing Inc. as parties does not alter our analysis. Boeing appears to support the petitions. *See* Resp't's Br. 18 n.6. The EPA does not challenge timeliness and, as a losing party in *Mexichem*, is precluded from doing so against the parties in that case.

In sum, we reject the timeliness challenge raised by the three Intervenors. Seeing no other jurisdictional issue, we vacate the 2016 rule only to the extent it requires manufacturers to replace HFCs that were previously and lawfully installed as substitutes for ozone-depleting substances.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk