United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1054 **September Term, 2014**

EPA-78FR20004

Filed On: October 3, 2014

New Era Group, Inc.,

Petitioner

v.

Environmental Protection Agency,

Respondent

Arkema Inc., et al.,
Intervenors

BEFORE: Tatel, Brown, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary denial of the petition for review, the responses thereto, and the reply; and the motion to supplement the administrative record, the responses thereto, and the reply, it is

ORDERED that the motion to supplement the administrative record be denied. Parties are not allowed "to supplement the record unless they can demonstrate unusual circumstances" that justify doing so. City of Dania Beach v. FAA, 628 F.3d 581, 590 (D.C. Cir. 2010) (internal quotation omitted). Petitioner, however, has not shown that the documents withheld from the certified index to the administrative record are relevant to the petition for review of the denial of the petition for reconsideration. And to the extent petitioner seeks to supplement the record with the EPA's internal emails and notes related to the promulgation of the final rule, such deliberative documents were properly excluded from the administrative record. See Kansas State Network, Inc. v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983) ("In general, an agency's action should be reviewed based upon ... the agency's stated justifications" rather than "intra-agency memoranda and documents recording the deliberative process leading to an agency decision...."). It is

FURTHER ORDERED that the motion for summary denial of the petition for review be granted. The merits of the parties' positions are so clear as to warrant summary action. See Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam). Petitioner sought reconsideration on the grounds that the EPA's final rule allocating production allowances for hydrochlorofluorocarbons ("HCFCs") (1) had an adverse environmental impact; (2) improperly provided allowances to foreign-based companies; and (3) harmed the HCFC reclamation and alternative-refrigerant industries by allocating excessively high HCFC production allowances. Petitioner has forfeited any challenge to the denial of the petition for reconsideration on the first two grounds by not addressing these issues in its response to the motion for summary denial. See generally United States ex rel. Totten v. Bombadier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

As for the third issue, petitioner argues it was impracticable to raise its objections during the public comment period because the EPA failed to inform the public of the size of the HCFC-22 inventory. The EPA, however, provided such information. See 77 Fed. Reg. 237, 244 (Jan. 4, 2012) ("EPA undertook an analysis to gauge whether there is a surplus of HCFC-22 and, if so, how large the surplus is. A memo in the docket for this rulemaking details EPA's analysis of the HCFC-22 market."). In addition, the EPA received comments about the HCFC-22 inventory and its effect on the reclamation industry. See, e.g., No. EPA-HQ-OAR-2011-0354, Response to Comments at 14. Accordingly, petitioner has not shown that it was impracticable to raise its objections during the public comment period. See 42 U.S.C. § 7607(d)(7)(B); see also Nat'l Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1158 (D.C. Cir. 2013) (stating that the court "require[s] some degree of foresight on the part of commenters") (internal quotation omitted).

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. Rule 41.

Per Curiam