No. 14-60535

United States Court of Appeals for the Fifth Circuit

LENNOX INTERNATIONAL, INCORPORATED & AIR CONDITIONING, HEATING AND REFRIGERATION INSTITUTE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY & ERNEST MONIZ, in his official capacity as Secretary, United States Department of Energy,

Respondents.

On Petition for Review of an Order of the Department of Energy
Agency No. EERE-2008–BT–STD–0015 &
Agency No. EERE-2014-BT-PET-0041 (consolidated)

BRIEF OF INTERVENOR AIR CONDITIONING CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS

Lennox International, Inc., et al. v. U.S. Department of Energy, et al.
(No. 14-60535)

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

For the reasons discussed in this Brief, the Air Conditioning Contractors of America, Intervenors in Support of the Petitioners, respectfully request that oral argument be granted in this case, because oral argument would assist this Court in resolving the complex issues that the case presents.

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INTRODUCTION

The U.S. Department of Energy ("DOE") has issued complex new energy conservation requirements for walk-in coolers and walk-in freezers (the "WICF Standards"). The Air Conditioning Contractors of America ("ACCA") asked DOE to consider how these standards would affect small businesses. DOE violated both the Energy Policy and Conservation Act and the Regulatory Flexibility Act when it promulgated the WICF Standards without considering the impacts of the standards on the many small businesses that assemble WICF. Because the regulations establishing the energy conservation standard program's certification, compliance, and enforcement requirements include WICF assemblers in the definition of manufacturers, assemblers can be liable for violations of the WICF Standards. Under the WICF Standards, assemblers will need to ensure that each component of a WICF system meets the applicable standards when the system will be installed, and this additional verification burden will increase costs for WICF assemblers.

DOE's analyses of the impacts of the standards under both the Energy Policy and Conservation Act and the Regulatory Flexibility Act do not address the impacts of the standards on WICF assemblers, many of whom are small businesses. Accordingly, the standards were promulgated in violation of both their authorizing statute and the Regulatory Flexibility Act. This Court should vacate the Standards and remand them to DOE so that the necessary analyses can be done

and the determination whether the WICF Standards are justified can be made considering all of the necessary factors.

JURISDICTIONAL STATEMENT

This Court has original jurisdiction to review the WICF Standard under 42 U.S.C. § 6306(b)(1) because ACCA members will be adversely affected by the rule. The WICF Standards directly regulate and create enforcement and compliance-related costs for ACCA members, small and large businesses that design, install, and maintain heating, ventilating, air conditioning, and refrigeration systems. Thus, ACCA's members have standing to sue in their own right, because they allege that they have suffered an injury in fact that is concrete and actual or imminent, not conjectural or hypothetical; that the injury is fairly traceable to the complained-of conduct of the Agency; and that the requested relief will redress the harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998). As a trade association representing heating, ventilation, air conditioning, and refrigeration contractors, ACCA has standing to sue on behalf of its members because its members would have standing to sue individually; the organization is seeking to protect interests that are germane to its purpose; and neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555-56 (5th Cir.

1996). Finally, it is proper for this Court to consider ACCA's arguments because ACCA participated in the challenged rulemaking and timely submitted comments to DOE that addressed the arguments made herein. *See Gulf Restoration Network, Inc. v. Salazar*, 683 F.3d 158, 174-75 (5th Cir. 2012).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the Manufacturers Impact Analysis supporting the WICF Standards is flawed, because it fails to consider impacts on assemblers, who are subject to enforcement as manufacturers.

(2) Whether the WICF Standards violate the Regulatory Flexibility Act, because DOE failed to conduct a Regulatory Flexibility Analysis of the impact of the WICF Standards on small businesses that assemble walk-in coolers and walk-in freezers.

STATEMENT OF THE CASE AND FACTS

A. Statutory Background

1. The Energy Policy and Conservation Act

The Energy Policy and Conservation Act ("EPCA") authorizes DOE to establish performance standards for walk-in coolers and walk-in freezers. 42 U.S.C. §§ 6311(1)(G), (20), 6313(f), and 6313(a)(9). The statute defines "walk-in cooler" and "walk-in freezer" as "an enclosed storage space refrigerated to temperatures, respectively, above, and at or below 32 degrees Fahrenheit that can

be walked into, and has a total chilled storage area of less than 3,000 square feet." 42 U.S.C. § 6311(20)(A). The performance standards also must "be designed to achieve the maximum improvement in energy efficiency … which the Secretary determines is technologically feasible and economically justified." 42 U.S.C. § 6295(o)(2)(A). To determine whether a performance standard is "economically justified," the Secretary must consider six specific factors, including "the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard." 42 U.S.C. § 6295(o)(2)(B)(I). The Secretary also has discretion to consider "other factors" that he "considers relevant." 42 U.S.C. § 6295(o)(2)(B)(VII).

2. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Fairness Act of 1996, requires any agency engaged in a federal rulemaking to prepare an initial and a final regulatory flexibility analysis, describing the impact of the proposed rule on small entities. 5 U.S.C. §§ 603-604. The analyses must include "a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply." 5 U.S.C. § 603(b)(3). The initial regulatory flexibility analysis must identify significant alternatives to the proposed rule, including "the establishment of differing compliance or reporting requirements . . . that take into account the resources

available to small entities" and "an exemption from coverage of the rule, or any part thereof, for such small entities." 5 U.S.C. § 603(c)(1), (4). The final regulatory flexibility analysis must include, among other things, "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes …." 5 U.S.C. § 604(a)(6). The Regulatory Flexibility Act provides for judicial review of an agency's compliance. 5 U.S.C. § 611(a)-(b).

B. Factual Background

This rulemaking affects the substantive standards for WICF. In 2011, DOE finalized revisions to the enforcement and compliance requirements for WICF which apply to "manufacturers" of WICF. 76 Fed. Reg. 12,422 (March 7, 2011). The 2011 revisions added language specifying that WICF assemblers are deemed manufacturers. 10 C.F.R. § 431.302.

DOE began the process leading to the WICF Standards early in 2009. *See* 79 Fed. Reg. 32,050, 32,056 (June 3, 2014). Over the following four years, DOE held public meetings and conducted various analyses. *Id.* at 32,057. ACCA timely commented on the 2013 Notice of Proposed Rulemaking (Doc. No. 0119-A1)[1] and participated in the public meetings held on February 4, 2009 (Doc. No. 0015) and on October 9, 2013 (Doc. No. 0088).

[1] References to "Doc. No." are to the documents listed in the Amended Administrative Record, which was filed on March 10, 2015.

ACCA's comments asked DOE to clarify the enforcement and compliance requirements that WICF installers would face under the WICF Standards. Doc. No. 0119-A1 at 2. ACCA also specifically asked DOE whether the Manufacturers Impact Analysis should also cover WICF assemblers. *Id.*

Rather than responding to ACCA's concerns in any meaningful way, DOE responded:

> DOE has taken a component based approach in setting standards for WICF. As such, the MIA focuses on manufacturers of WICF panels, WICF refrigeration, and WICF doors. *DOE does not consider the installation contractors to be manufacturers for the purpose for* [sic] *the Manufacturer Impact Analysis* as they do not produce the panels, refrigeration components, or doors being tested, labeled, and certified.

79 Fed. Reg. at 32,092 (emphasis added)(internal citations omitted).

The preamble to the proposed WICF Standards contains a discussion that is described as an Initial Regulatory Flexibility Analysis. 78 Fed. Reg. 55,782, 55,876 (Sept. 11, 2013). This section of the preamble makes no mention of potential impacts on small WICF assemblers. Similarly, the preamble to the final WICF Standards contains a discussion that is described as a "FRFA analysis" (final regulatory flexibility analysis). 79 Fed. Reg. at 32,120. Even after ACCA commented, pointing out that many WICF assemblers are small businesses, Doc.

No. 0119-A1 at 2, the discussion fails to include any reference to WICF assemblers.

DOE issued the WICF Standards on June 3, 2014. 79 Fed. Reg. at 32,050. Petitioners filed this action for judicial review of the WICF Standards on August 4, 2014. 5th Cir. Doc. No. 00512853727. ACCA timely moved to intervene on September 3, 2014. 5th Cir. Doc. No. 00512755823. This Court granted ACCA's motion to intervene on September 9, 2014. 5th Cir. Doc. No. 00512761561.

STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act, a reviewing court must set aside the challenged action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))(internal quotations omitted).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. The "fundamental precept" of the arbitrary-and-capricious standard of review is that "'an agency must cogently explain why it has exercised its discretion in a given manner' and 'must supply a reasoned analysis' for any departure from other agency decisions." *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48, 57).

SUMMARY OF ARGUMENT

The WICF Standards should be vacated and remanded. First, the Manufacturers Impact Analysis, which is required under EPCA to determine whether the standards are justified, failed to consider how the WICF Standards would affect assemblers of WICF systems, even though the WICF enforcement and compliance regulations include WICF assemblers in the definition of WICF manufacturers. DOE's refusal to consider assemblers to be manufacturers in the context of this rulemaking, despite having recently revised its compliance and enforcement regulations to specify that assemblers are considered manufacturers, is arbitrary and capricious. Second, the WICF Standards violate the Regulatory Flexibility Act, because DOE failed to consider the impacts of the WICF Standards on small businesses that assemble WICF systems in either the initial or the final Regulatory Flexibility Analysis.

ARGUMENT[2]

I. The Manufacturers Impact Analysis Supporting the WICF Standards Is Flawed, Because it Fails to Consider Impacts on Assemblers, Who Are Subject to Enforcement as Manufacturers.

The energy conservation standards regulations are organized such that the enforcement and compliance provisions are promulgated separately from the actual substantive standards. In 2011, DOE promulgated a regulation providing that the "manufacturer of a walk-in cooler or walk-in freezer means any person who . . . [m]anufactures or assembles the complete walk-in cooler or walk-in freezer." 76 Fed. Reg. 12,422, 12,504 (March 7, 2011). Accordingly, ACCA member companies can be liable for violating the WICF Standards even though they have nothing to do with the manufacture of the component parts and are not positioned to investigate whether claims of the component manufacturer are accurate.

EPCA requires DOE to consider, in determining whether a standard is economically justified, "the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard." 42 U.S.C. § 6295(o)(2)(B). The Manufacturers Impact Analysis for the WICF Standards does not include any analysis of the impacts of the standards on WICF *assemblers*, even though DOE's certification, compliance, and enforcement regulations specify that WICF assemblers are deemed manufacturers. 10 C.F.R. § 431.302. ACCA noted

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[2] In addition to the arguments made herein, ACCA adopts the arguments in Sections II and III of the Argument in Petitioners' Brief.

this omission in its comments. *See* 79 Fed. Reg. at 32,092. DOE's response in the preamble to the final rule sidesteps ACCA's comment, explaining that because the standards are component-based, the Manufacturers Impact Analysis "focuses on manufacturers of WICF panels, WICF refrigeration, and WICF doors." *Id.* This response runs directly counter to DOE's own regulations including WICF assemblers in the definition of "manufacturer." *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence").

The inconsistency between DOE's considering assemblers to be manufacturers for enforcement purposes but not for impact analysis purposes renders this rulemaking arbitrary and capricious. *See, e.g., Lee Lumber and Building Material Corp. v. National Labor Relations Board*, 117 F.3d 1454, 1460 (D.C. Cir. 1997) (finding agency decision arbitrary where "clear and fundamental inconsistency" existed in agency's reasoning and agency failed to explain inconsistency); *Air Line Pilots Ass'n v. United Stated DOT*, 3 F.3d 449, 453 (D.C. Cir. 1993) (remanding agency rule as a result of "a basic inconsistency in [the agency's] reasoning"); *Meds Co. v. Kappos*, 699 F. Supp. 2d 804, 809 (E.D. Va. 2010) ("Agency action resting on an inconsistent or self-contradictory explanation is, by definition, arbitrary and capricious."). Because DOE failed to meaningfully respond to "objections that on their face seem legitimate, its [conclusion] can

hardly be classified as reasoned." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011)(citation omitted); *see also National Fisheries Institute, Inc. v. U.S. Bureau of Customs and Border Protection*, 637 F. Supp. 2d 1270, 1298-99 (Ct. Int'l Trade 2009) (finding agency decision arbitrary and capricious where agency failed to address a relevant factor) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.* 419 U.S. 281 (1974)). Further, DOE's finding that the WICF Standards are economically justified, as required under 42 U.S.C. § 6925(o)(6)(D), was not supported by substantial evidence, because DOE admittedly failed to measure the enforcement and compliance costs of the standards for a subsection of WICF manufacturers. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007)("'[A]gency's unsupported assertion does not amount to substantial evidence.'") (citation omitted); *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 535 (D.C. Cir. 1978) (agency "cannot take refuge in its alleged expertise in [the] field, when it does not set forth convincing reasons for its determination in sufficient detail to allow the validity of those reasons to be critically examined by the parties adversely affected and to allow [the reviewing] Court to pass on the reasonableness of the [agency's] conclusions") (citations omitted).

II. The WICF Standards Violate the Regulatory Flexibility Act, Because DOE Failed to Conduct a Regulatory Flexibility Analysis of the Impact of the WICF Standards on Small Businesses that Assemble Walk-in Coolers and Freezers.

Many of ACCA's members are small businesses that assemble WICF from component parts to meet the specific needs of their clients. The Regulatory Flexibility Act review for the Standards does not include any information on the impacts of potential liability under the Standards on small-business assemblers of WICF systems. The review focuses on small businesses that manufacture WICF panels, doors, and refrigeration systems. 79 Fed. Reg. at 32,120.

The Regulatory Flexibility Act requires agencies to certify that a rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). *See Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 1756-77 (D.C. Cir. 2007). A final Regulatory Flexibility Analysis must contain "a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments." 5 U.S.C. § 604(a)(2); *see generally Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009)(discussing requirements for final regulatory flexibility analysis).

DOE describes a section of the preamble to the Final Standards as the "FRFA Analysis." 79 Fed. Reg. at 32,120. This discussion makes no reference to WICF assemblers. *See* 79 Fed. Reg. at 32,120-32,121. It makes no determination respecting the impact that the Final Standards may have on small WICF

assemblers. *See id.* Neither did DOE make a certification under 5 U.S.C. § 605(b) that the WICF Standards would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE violated the Regulatory Flexibility Act by failing to either analyze the impacts of the WICF Standards on small WICF assemblers or to certify that no such analysis was necessary.

CONCLUSION

For the foregoing reasons, this Court should vacate the WICF Standards and remand them to DOE to conduct the required analyses with instruction to re-evaluate the required impacts and make a new determination as to whether the WICF Standards are justified.

Dated: April 9, 2015

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) because it contains 3,977 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in proportionally spaced, Roman style typeface of 14 points or more.

/s/ Monica Derbes Gibson
Counsel for Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of the Intervenor – Air Conditioning Contractors of America was filed electronically on April 15, 2015, and will, therefore, be served electronically upon all counsel of record.

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