IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RMS OF GEORGIA, LLC d/b/a CHOICE REFRIGERANTS, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency, Defendants.	Civil Action No. 1:23-cv-04516-VMC

ORDER

Before the Court is the Motion to Dismiss ("Motion," Doc. 17) filed by Defendants United States Environmental Protection Agency and Michael S. Regan, Administrator (collectively "EPA"). Choice RMS of Georgia, doing business as Choice Refrigerants ("Choice") filed a Response in Opposition to the Motion ("Response," Doc. 20). The EPA filed a Reply in Support of the Motion ("Reply," Doc. 22).

For the reasons that follow, the Court will grant the EPA's Motion.

I. Background

Because this case is before the Court on a Motion to Dismiss, the following facts are drawn from Choice's Complaint ("Compl.," Doc. 1) and are accepted as true. *Cooper v. Pate*, 378 U.S. 546, 546 (1964).

In 2020, Congress passed the American Innovation and Manufacturing Act ("AIM Act"), which requires a phasedown of the production and consumption of greenhouse gases called Hydrofluorocarbons ("HFCs") through a cap-and-trade program. *See* 42 U.S.C. § 7675. The AIM Act authorizes the EPA to take certain actions to achieve this statutory requirement. 42 U.S.C. § 7675(c), (e). The AIM Act requires that all future production or consumption (i.e., import) of HFCs requires government-issued "allowances." (Compl. ¶ 23). Allowances are defined as "a limited authorization for the production or consumption of a regulated substance[.]" (*Id.* ¶ 24 (citing 42 U.S.C. § 7675(b)(2)). The number of available allowances decreases over time, and by 2036, the allowances will eliminate 85% of the HFC industry in the United States. (*Id.* ¶ 25 (citing 42 U.S.C. § 7675(e); 40 C.F.R. pt. 84 (2021)). The AIM Act designated the EPA Administrator to carry out its mandates and Congress specified the compounds subject to the Act and prescribed a detailed, technical method for establishing a baseline (i.e., the cap in cap-and-trade) from which to measure the phase-down. (*Id.* ¶ 26 (citing 42 U.S.C. §§ 7675(c), (e)).

Choice sells an HFC-based refrigerant. Choice asserts that "Congress provided EPA with absolutely no guidance as to *who* should receive the 'allowances' now needed to continue to produce or consume regulated HFCs." (*Id.* ¶ 27). Although the AIM Act specifies that some allowances must be allocated on a priority basis to producers and consumers of six essential uses of HFCs, these six uses account for only approximately 2% of regulated HFC consumption. (*Id.* ¶ 29). For roughly 98% of the market, the AIM Act provides no criteria or guidance at all as to who should receive the allowances required to do business. (*Id.* ¶ 30). The AIM Act does not direct EPA to decide what companies should receive allowances based on typical legislative factors such as principles of fairness, expectations of market participants, effect on the HFC market, or sufficient supply to consumers. (*Id.* ¶ 32). Choice asserts that "[a]bsent such principles, Choice's ability to continue the business it has built over a decade and a half, a business it anchored around an environmentally preferable product that it innovated and patented, is now subject to the whim of unknown EPA bureaucrats who are not accountable (or responsive) to Choice or even to Choice's elected officials." (*Id.* ¶ 36).

Choice alleges harm from EPA's "exercise of legislative power in implementing the AIM Act," (*Id.* ¶ 91), explaining it was injured by a series of regulatory actions undertaken without an intelligible principle. (*See id.* ¶¶ 62–76). For example, "when EPA announced the total allowance allocations for calendar

year 2022 on October 7, 2021, Choice saw that it had been shortchanged by some 30% compared to the number of allowances that it had anticipated." (*Id.* ¶ 72). "EPA made a substantially identical allocation of allowances for the 2023 calendar year, which similarly shortchanged Choice. In short, EPA's interpretation of its authority robbed Choice of market share." (*Id.* ¶ 73). "EPA did not explain in either allocation notice how or why it made the decision to allocate a smaller number of allowances to Choice. There was no available written agency memorandum, no letter to Choice, and no explanation anywhere of how EPA 'did the math' or what factual determinations EPA made to support its allocation decision with respect to Choice." (*Id.* ¶ 74). "For calendar years 2024 and forward, EPA subsequently reconsidered how to make allowance allocations for 2024–2028. The related final rule was published in July 2023." (*Id.* ¶ 75). "While EPA did not significantly change its allocation methodology for 2024 from the previous 2022/23 framework, EPA again signaled that it believes it has the power to change its allocation methodology, including switching to a fee-based or auction system, as EPA seemingly amends its own legislative policy priorities." (*Id.* ¶ 76).

Choice filed a challenge to the 2024 rule in the United States Court of Appeals for the District of Columbia Circuit as required by the Clean Air Act which remains pending. (*Id.* ¶ 76 n.8). "Since implementation of the AIM Act, Choice has actively been seeking to vindicate the protections afforded to it in the

text and structure of the Constitution. After EPA published its initial framework allocating allowances in 2021, Choice filed a petition in the United States Court of Appeals for the District of Columbia Circuit to challenge, among other things, the improper delegation of legislative power to EPA." (*Id.* ¶ 77 (citing *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA* ("HARDI"), No. 21-1251 (D.C. Cir. July 22, 2022)). "Because Choice filed its 2021 petition pursuant to the judicial review provision in Section 304 of the Clean Air Act, the D.C. Circuit interpreted the petition as a challenge to EPA's rule, not a challenge directly to the AIM Act itself." *HARDI*, 71 F.4th 59, 65 (D.C. Cir. 2023). "The D.C. Circuit then held that although Choice had provided comments during EPA's rulemaking, it had not specifically administratively exhausted its challenge to the unconstitutional transfer of legislative power and thus, under exhaustion requirements in the Clean Air Act, the court could not reach the merits of Choice's claim." (*Id.*).

On October 4, 2023, Choice filed this action seeking a declaratory judgment and injunction arguing that the AIM Act "violates fundamental protections that exist in the United States Constitution" because "Congress transgressed constitutional limitations when it transferred legislative power to the [EPA]". (*Id.* at 1). Choice asserts that it "is not challenging EPA's rule or rulemaking and is not invoking the Clean Air Act, rather Choice brings this case under Article I of the United States Constitution and general federal question jurisdiction to enjoin EPA

from continued action taken pursuant to an unconstitutional statute." (*Id.* ¶ 79). Choice demands "[a] declaration that 42 U.S.C. § 7675(e)(3) of the AIM Act violates the United States Constitution because it fails to provide an intelligible principle as to how an executive agency is to identify allowance recipients or to distribute allowances among recipients, resulting in the transfer of legislative power to the Executive Branch," a permanent injunction "enjoining Defendants from enforcing or implementing regulations based on the unconstitutional subsections of the AIM Act," an "award to Choice of the costs of this action and reasonable attorney fees" and any other relief the Court deems "just and appropriate." (*Id.* at 25).

II. Legal Standard

The Court should dismiss a complaint under Fed. R. Civ. P. 12(b)(1) only where it lacks jurisdiction over the subject matter of the dispute. A motion to dismiss for lack of subject matter jurisdiction may be based on either a facial or factual challenge to the complaint. *See McElmurray v. Consol. Gov't of Augusta–Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). "A 'facial attack' on the complaint 'require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). "Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the

pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." *Id.* (internal quotations omitted). The EPA's Motion to Dismiss is a facial attack. Accordingly, the Court will accept as true the allegations in the Complaint for the purpose of ruling on the Motion.

III. Discussion

The EPA argues that Choice's Complaint should be dismissed for lack of subject matter jurisdiction because "the courts of appeals have exclusive original jurisdiction to consider claims like the one Choice brings here." (Doc. 17-1 at 13). "Even if the Court had subject-matter jurisdiction," it argues, the Court "should dismiss Choice's suit for impermissibly splitting claims with the earlier-filed suit pending in the D.C. Circuit . . . [or] should stay these proceedings pending resolution of Choice's D.C. Circuit case." (*Id*).

The AIM Act makes § 307 of the Clean Air Act ("CAA"), 42 U.S.C. § 7607, applicable to "this section and any rule, rulemaking, or regulation promulgated by the Administrator[.]" 42 U.S.C. § 7675(k)(1)(C). As a result, challenges to EPA action under the AIM Act "may be filed only" in the appropriate court of appeals. 42 U.S.C. § 7607(b)(1) (emphasis added); *see also Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973) ("The intent of Congress to make the court of appeals the exclusive forum is apparent from that wording."). And "any" such challenges "shall be filed within 60 days" of the grounds giving rise to the suit. *Id.*

That mandate for timely, direct circuit court review "displaces district court jurisdiction under 28 U.S.C. § 1331" and deprives district courts of subject matter jurisdiction over cases brought under the AIM Act. *Virginia v. United States*, 74 F.3d 517, 526 (4th Cir. 1996).

Choice argues that its case sits outside this review scheme because it does not challenge a final agency action. (Doc. 20 at 13). Instead, it "facially challenge[s] the AIM Act itself—specifically, Congress's unconstitutional act of transferring legislative power to the executive branch. To avoid confusion, Choice's Complaint explicitly states that this case 'does not challenge the substance of EPA's rulemaking.'" (Doc. 20 at 11 (citing Compl. ¶¶ 61, 79)). Choice further explains that the "EPA was named as the defendant because the injunction would run against EPA since Congress is not subject to suit, nor could it be." (*Id.*).

However, two courts of appeals have considered and rejected similar arguments. First, in *Virginia v. United States*, 74 F.3d 517, 522 (4th Cir. 1996), the Fourth Circuit rejected the state's argument that it "d[id] not seek a review of any final EPA action" but instead raised "constitutional challenge . . . directed to the statute itself." The court explained its decision by noting that "[a] review of the complaint reveals that, although it seeks a ruling that certain parts of the CAA are unconstitutional, the practical objective of the complaint is to nullify final actions of EPA." *Id.* at 523. "Because jurisdiction under § 307(b)(1) turns on whether final

agency action is the target of the challenger's claim," the court wrote, "it is of no consequence that Virginia has armed itself with the Constitution." *Id.*

In *Missouri v. United States*, 109 F.3d 440, 441 (8th Cir. 1997), "Missouri [attempted to] make[] a slightly different argument in support of the District Court's jurisdiction . . . argu[ing] that it sought to challenge only the constitutionality of the CAA's statutory scheme, and not specific final actions of the EPA." The Eighth Circuit, following the Fourth Circuit's decision, rejected this argument too, writing "[w]e cannot accept the argument that Missouri sought only to challenge the constitutionality of the statute, completely apart from EPA action." *Id.* "While it is true that Missouri's complaint questions the constitutionality of the overall sanctions scheme of the CAA," the court explained, "this challenge is not separate and apart from EPA action . . . . Since Missouri's challenge, as fashioned in its complaint, is to EPA actions as well as to the CAA itself, its lawsuit is covered by the jurisdictional command of § 7607." *Id.* at 442.

The Court agrees with the reasoning of the Fourth and Eighth Circuits, and therefore holds it lacks subject matter jurisdiction over this challenge.[1] While Choice alleges harm from EPA's "exercise of legislative power in implementing the AIM Act," (Doc. 1 ¶ 91), it traces its injuries to a series of regulatory actions by

[1] The parties extensively discuss the applicability of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). While *Virginia* and *Missouri* both cited *Thunder Basin*, they did not discuss it in detail and the Court sees no reason to do so here.

the EPA. (*See id.* ¶¶ 62–76). Choice contends that its "cause of action here would exist even if the agency had not taken any implementing actions," (Doc. 20 at 28) but it is puzzling why that would be so, absent any imminent regulatory injury and with no statutory waiver of sovereign immunity aside from the Administrative Procedure Act. (Doc. 22 at 10). Moreover, there is no question that a nondelegation doctrine challenge can be raised in a CAA § 307 proceeding; that was the procedural posture of *Whitman v. American Trucking Associations*, 531 U.S. 457, 463 (2001) ("American Trucking Associations, Inc., and its co-respondents in No. 99–1257—which include, in addition to other private companies, the States of Michigan, Ohio, and West Virginia—challenged the new standards in the Court of Appeals for the District of Columbia Circuit, pursuant to 42 U.S.C. § 7607(b)(1)."). Accordingly, the EPA's Motion is granted. The Court need not reach the parties' discussion regarding the claim-splitting doctrine.

IV. Conclusion

For the above reasons, it is **ORDERED** that the EPA's Motion to Dismiss (Doc. 17) is **GRANTED** and this civil action is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

SO ORDERED this 3rd day of September, 2024.

Victoria Marie Calvert
United States District Judge