ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 10-1347, 10-1348, 10-1349, 10-1350 (Consolidated)

HONEYWELL INTERNATIONAL, INC., et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petitions for Review of Administrative Action
of The United States Environmental Protection Agency

BRIEF OF RESPONDENTS

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DATE: January 30, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondents acknowledges that Petitioner's Brief correctly sets out the parties, rulings and related cases. References to the Ruling at issue appear in the brief for the Petitioner.

CORPRATE DISCLOUSRE STATEMENT

Respondent EPA is a governmental entity for which a corporate disclosure statement is not required.

So certified this 30th day of January, 2012, by

/s/ Perry M. Rosen
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*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

General Terms

CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
EPA	United States Environmental Protection Agency
HCFCs	Hydrochlorofluorocarbons
JA	Joint Appendix
Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer

Pertinent Regulations

1993 Regulation	58 Fed. Reg. 65,018 (Dec. 10, 1993)
2003 Regulation	68 Fed. Reg. 2820, 2821 (Jan. 21, 2003)
Proposed Rule	73 Fed. Reg. 78,680 (Dec. 23, 2008)
2010 Regulation	74 Fed. Reg. 66,412 (Dec. 15, 2009)
Interim Final Rule	76 Fed. Reg. 47,451 (Aug. 5, 2011)

JURISDICTIONAL STATEMENT

Under a program implementing the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Protocol") through Title VI of the Clean Air Act ("CAA"), the Environmental Protection Agency ("EPA") is required to allocate among a small group of suppliers a limited and ever-diminishing number of allowances to produce and consume ozone-depleting substances known as hydrochlorofluorocarbons ("HCFCs"), which EPA must almost entirely phase out (99.5%) by 2020. In accordance with the terms of the Protocol, EPA has been phasing out HCFCs by reducing suppliers' allowances through a series of regulatory step-down periods.

During the 2003-2009 regulatory period, the Intervenors in this case, Arkema Inc. ("Arkema"), Solvay Fluorides, LLC, and Solvay Solexis, Inc. ("Solvay") (collectively "Intervenors"), secured EPA's approval of four 2008 inter-pollutant transfers of HCFC *baseline* allowances that each company conducted through intra-company transfers (the "2008 Approvals"). Through such transfers, a company could essentially increase its ability to produce a higher-demand HCFC during the regulatory period by converting its own baseline in a less desirable HCFC into that of a more marketable HCFC, since production allowances were based on an EPA-designated percentage of each company's baseline in a given HCFC.

At the time of the 2008 Approvals, EPA did not intend for such inter-pollutant transfers to survive beyond the existing regulatory period, which terminated at the end of 2009. Nevertheless, in reviewing EPA's new regulation for the 2010-2014 regulatory period (the "2010 Regulation"),[1] this Court held that although EPA was free to stop recognizing inter-pollutant baseline transfers prospectively, Intervenors in the present case (who were petitioners in the prior case) had gained vested rights in their 2008 transferred baselines that could not be extinguished by EPA when it promulgated a new regulation designed to cover the 2010-2014 regulatory period, assuming the Agency continued to use the same baseline system for allocating HCFC allowances. Arkema, Inc. v. EPA ("Arkema"), 618 F.3d 1 (D.C. Cir. 2010).

Petitioners in the present case, Honeywell International, Inc. ("Honeywell") and E.I. DuPont de Nemours ("DuPont"), competitors of the Intervenors who also are governed by the HCFC allowance program, do not challenge the 2008 Approvals to the extent they allowed for the transfer of Intervenors' baseline allowances from one HCFC to another *for 2008 or 2009*, i.e., within the prior regulatory period. Instead, Petitioners challenge the 2008 Approvals only to the extent that they allow those transferred baseline allowances to be carried forward

[1] "Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export," 74 Fed. Reg. 66,412 (Dec. 15, 2009), which became effective on January 1, 2010.

into the new 2010-2014 regulatory period. In other words, Petitioners challenge this Court's prior holding in Arkema, *not* as a direct challenge to the express ruling in that case (that Intervenors' inter-pollutant baseline transfers must be carried forward into the 2010-2014 regulatory period), but rather through a collateral attack on the original 2008 Approvals.

Although EPA generally agrees with Petitioners' substantive position that inter-pollutant transfers should not be carried forward into a new regulatory step-down period, the Court is without jurisdiction to address Petitioners' specific claims in *this* case. Petitioners lack standing to challenge the 2008 Approvals because, quite simply, they were neither a party to, nor were they injured by, those Approvals. In fact, those Approvals were not even final agency actions as they relate to Petitioners. Whatever lasting effect it may have had on Arkema and Solvay's right to produce HCFCs in the 2010-2014 regulatory period, EPA's action of approving Intervenors' inter-pollutant transfers in 2008 did nothing to alter the HCFC production, consumption *or* baseline allowances *of the Petitioners*. Indeed, not even the Arkema decision reshuffled HCFC allowances at the expense of Petitioners.

The administrative action that gave Petitioners fewer allowances relative to the number of allowances provided to them under the 2010 Regulation (the specific injury asserted by Petitioners here), was the Interim Final Rule that EPA

issued in 2011 in response to the Court's decision in Arkema.[2] Petitioners might have had standing to challenge *that* rule, and Petitioners in fact filed a challenge to that Rule. But, having filed that action two days too late, and then dismissing it voluntarily, any such challenge to the Interim Final Rule is now barred under the applicable 60-day statute of limitations. See 42 U.S.C. §7607(b). Petitioners may not now use notions of ripening of stale claims or "after-arising" events such as the Arkema decision, to provide a jurisdictional basis to challenge an agency action (the 2008 Approvals) that did not actually cause Petitioners' alleged injury.

STATEMENT OF THE ISSUES

1. Does the Court have jurisdiction over Petitioners' claims?

A. Do the Petitioners have standing to challenge the approval by EPA of inter-pollutant transfers of baseline allowances for ozone-depleting substances conducted by the Intervenors in 2008, when Petitioners were neither a party to those approvals nor did they suffer any direct injury as a result of those approvals, and where Petitioners' *own* share of allowances was reduced through a separate rulemaking which Petitioners cannot now challenge?

B. Are the 2008 Approvals final agency actions with regard to the claims being made by Petitioners?

[2] "Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import and Export," 76 Fed. Reg. 47,451 (Aug. 5, 2011) ("Interim Final Rule")

2. Does Title VI of the CAA declare on its face that inter-pollutant baseline transfers may not be carried forward to a new regulatory period?

3. Did EPA alter any policy in issuing the 2008 Approvals, when it has consistently taken the position that it is not required to carry forward inter-pollutant baseline transfers into a new regulatory period and only even arguably took actions inconsistent with that view in its 2011 Interim Final Rule issued in response to this Court's holding in Arkema?

4. Does the record fail to adequately support EPA's approval of Intervenors' 2008 inter-pollutant baseline transfers because EPA did not assess whether Intervenors had adequate allowances to transfer in future years (2010-2014), when EPA was not approving future transfers of allowances and when there did not even exist a regulation governing allowances in future years?

5. Were Petitioners denied due process or otherwise deprived of any right to challenge the lasting nature of EPA's approval of the 2008 inter-pollutant baseline transfers of Intervenors, where EPA expressly called for comment on this issue, Petitioners provided comments on this issue, and Petitioners had the ability to challenge the rule that actually reduced their own share of allowances as a result of the challenged inter-pollutant transfers, filed such a challenge beyond the applicable statute of limitations period, and then voluntarily withdrew that challenge?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the statutory addendum to Petitioners' brief.

STATEMENT OF THE CASE

Pursuant to Title VI of the CAA, 42 U.S.C. §§7671-7671q, EPA has implemented the required phase-out of ozone-depleting substances primarily through the grant of allowances to those companies that historically produced and "consumed" these substances.[3] Allowances, which act as a cap on production, permit companies to produce a designated percentage (established by EPA for each regulatory period) of each individual company's baseline production of specific ozone-depleting substances. The baselines for the ozone-depleting substances at issue in this case, HCFCs, were established by EPA in 2003 and are measured by each company's maximum historical production of HCFCs.

During the prior regulatory period of 2003-2009, companies were permitted to conduct both inter-company and inter-pollutant transfers of HCFC allowances. "Inter-company" transfers permit one company to transfer (sell) allowances for a single HCFC to another company. In contrast, "inter-pollutant" transfers generally permit a single company to convert its own allowances allocated for one HCFC

[3] "Production" refers to the manufacture of a covered substance. "Consumption" means production, plus imports and minus exports. 42 U.S.C. §7671(6),(11). For ease of reference, EPA describes the program in the context of production allowances and differentiates between the two types of allowances where relevant.

into allowances for a different HCFC that is in greater demand. In the 2008 Approvals, Arkema and Solvay availed themselves of the regulations governing the 2003-2009 regulatory period to conduct inter-pollutant transfers to exchange baseline allowances they possessed for the low-demand HCFC-142b (used primarily as a foam blowing agent) for baseline allowances for the high-demand HCFC-22 (used in air-conditioning and refrigeration equipment).

Under this 2003-2009 regulatory regime, transfers of allowances generally occurred within a single control period (i.e., a calendar year), but companies could, under certain circumstances, trade baseline allowances in a manner that would effectively increase (for the transferee) and decrease (for the transferor) their baseline apportionment of allowances for that pollutant for the remainder of the regulatory period. Transfers of *baseline* allowances were, however, designed to be limited to inter-*company*, single-pollutant transfers, to ensure that the overall baseline associated with each chemical was not altered. To the extent inter-*pollutant* baseline transfers occurred, they had no defined status under the regulations past the applicable regulatory period, which expired on December 31, 2009. 73 Fed. Reg. 78,680, 78,686 (Dec. 23, 2008).

In proposing a new regulation to govern HCFC allowances for the next step-down period of 2010-2014 (the "2010 Regulation"), EPA expressly addressed the issue of treatment of inter-pollutant transfers such as the 2008 Approvals given to

the Intervenors. In the preamble to its proposed regulation, EPA called for comments on whether inter-pollutant transfers of baseline allowances approved during the 2003-2009 regulatory period should be reflected in companies' baseline allowances beginning in 2010. After receiving comments on this issue – including comments from both Petitioners – EPA determined that it was both imprudent and inconsistent with the underlying statute to carry forward into this new regulatory period transfers of baseline allowances for different HCFCs that an individual company had conducted with itself (i.e., intra-company, inter-pollutant baseline transfers) during the regulatory period of 2003-2009. 74 Fed. Reg. at 66,419-422.

The Intervenors in this case, Arkema and Solvay, challenged EPA's refusal to recognize their prior inter-pollutant baseline transfers from HCFC-142b to HCFC-22 in setting the baseline allowances for those pollutants for 2010-2014. In that case, Arkema, Inc. v. EPA, 618 F.3d 1 (D.C. Cir. 2010), EPA took the same core position that Petitioners take here: that such inter-pollutant transfers should *not* be carried forward into the new regulatory period. Dkt. 1237311 (EPA's brief in Arkema). The Court in Arkema did *not* disagree with EPA's view that: (a) the underlying statute does not support treating inter-pollutant baseline transfers as perpetual; (b) it was not good policy to carry forward such transfers into a new regulatory period; and (c) EPA had fully articulated its position and views on this issue in its rulemaking. Nevertheless, the Court held that Arkema and Solvay had

gained vested rights in their 2008 transferred baselines that must be reflected in any new rulemaking for the 2010-2014 regulatory period, at least to the extent the new rulemaking incorporated the same historic baseline concept that EPA had previously used. 618 F.3d at 8-10. The Court therefore ordered the 2010 Regulation vacated "insofar as it operates retroactively" to deprive Arkema and Solvay of their transferred baseline allowances for HCFC-22 and remanded the case for resolution consistent with the Court's opinion. Id. at 10.

In the *present* action, Petitioners challenge the 2008 Approvals in which EPA allowed Arkema and Solvay to conduct the inter-pollutant transfers of allowances from HCFC-142b to HCFC-22. Petitioners assert that, in light of the Court's holding in Arkema that the 2008 Approvals created vested rights in Arkema and Solvay to have their transferred baselines carried forward into future regulatory periods, the 2008 Approvals were improper because neither the statute, EPA's regulations, nor EPA's actions, support carrying forward inter-pollutant baseline transfers into an entirely new regulatory period.

For the most part, EPA agrees with Petitioners' central argument that inter-pollutant baseline transfers approved during one regulatory period should not be carried forward to a new regulatory period. This argument, however, was proffered by EPA and expressly rejected by this Court in Arkema, at least with regard to the baseline transfers that were the subject of the 2008 Approvals that are

challenged in this case. While Petitioners have attempted to repackage the same argument in slightly different wrapping, e.g., asserting that carrying forward baseline allowances violates the CAA under Chevron step I, not under Chevron step II as EPA argued in Arkema, that central argument already has been rejected by this Court.

Petitioners do accurately state that EPA did not provide notice of the 2008 Approvals at the time they occurred, because EPA's regulations provided for no such notice. Nor did EPA indicate that it was required to carry the baseline transfers forward to a new regulatory period. Indeed, both Petitioners *and EPA* became aware of this obligation *only* as a result of the Court's decision in Arkema. This sequence of events does not, however, mean that Petitioners were deprived of due process because they never had an opportunity to comment on or challenge the now-perpetual effect of the 2008 Approvals. To the contrary, Petitioners were given the opportunity to comment – and *did* comment in detail – on the potential carry-forward of baseline inter-pollutant transfers, in comments they submitted on the proposed 2010 Regulation. Petitioners had the further opportunity to comment on and challenge the perpetual treatment of transferred baseline allowances in the Arkema litigation, which they again did (but only after the panel's decision in that case, during the en banc petitioning process). Finally, Petitioners had the opportunity to challenge the perpetual treatment of transferred baseline allowances

– and, even more importantly, the effect of such treatment on their own allowances – by commenting on EPA's Interim Final Rule (which Petitioners again took advantage of) and by challenging that Rule in this Court (which they did in an untimely manner and then voluntarily dismissed). Having either afforded themselves of these opportunities or failed to properly do so in a timely manner, Petitioners may not now pursue yet one more challenge to the same alleged injurious action by reaching back to challenge the original 2008 Approvals.

STATEMENT OF FACTS

I. Statutory Background

In the 1970s, scientists determined that certain man-made chemicals that were used as refrigerants and for other industrial purposes, such as HCFCs, were destroying the stratospheric ozone layer, which absorbs ultraviolet radiation and thereby protects us from skin cancer and a host of other ailments. NRDC v. EPA, 464 F.3d 1, 3 (D.C. Cir. 2006). In 1987, the United States signed the Montreal Protocol, which sought "to limit or eliminate the production and/or consumption of ozone-depleting substances in a stepwise fashion over time." 65 Fed. Reg. 42,653, 42,655 (July 11, 2000). Under the terms of the Protocol and amendments thereto, the United States was required to phase out 35% of its historic HCFC production (measured by 1989 levels) by 2004, 75% by 2010, 90% by 2015, 99.5% by 2020, and 100% by 2030. 74 Fed. Reg. 66,412, 66,414 (Dec. 15, 2009).

In 1990, Congress enacted Title VI (Sections 601-618) of the CAA, 42 U.S.C. §§7671-7671q, to protect the stratospheric ozone layer consistent with the Protocol. Honeywell Int'l, Inc. v. EPA, 374 F.3d 1363, 1364 (D.C. Cir. 2004), withdrawn in part, 393 F.3d 1315 (D.C. Cir. 2005). To effectuate the phase-out of these substances, Congress directed EPA to promulgate rules that would create and manage allowances, which affirmatively limit the amount of HCFCs a manufacturer/importer may produce and consume. 42 U.S.C. §7671f. This provision does *not* direct EPA to use any specific system for determining: (a) the underlying nature of allowances (e.g., whether they are based on specific chemicals or the overall ozone-depletion potential of a basket of chemicals); (b) the method of measuring the allowances (e.g., whether the allowances would be based on gross tonnage or a percentage of a defined baseline); or (c) the method of allocating the allowances (e.g., whether they will be auctioned to the highest bidder, allocated based on historical production, or adjusted to reflect changes in the marketplace). All of these (and other) elements of the program were left to EPA's discretion.

Pursuant to the broad authority it was granted, EPA promulgated regulations that, inter alia, allocated allowances on a chemical-by-chemical basis, rather than based on the ozone-depleting potential of a basket of chemicals, the system used by some other countries subject to the Protocol. 68 Fed. Reg. 2820, 2822 (Jan. 21,

2003). Under the "basket" concept, manufacturers can continue to produce all types of HCFCs so long as the aggregate ozone-depletion potential of the entire basket of HCFCs does not exceed the overall cap set by the administering agency. In contrast, the chemical-by-chemical approach, which EPA found considerably easier to administer for regulated entities, focuses on reaching the same overall cap (e.g., 90% reduction by 2015) by initially eliminating those HCFCs with the highest ozone-depletion potential, the so-called "worst-first" approach.

In addition to authorizing EPA to allocate allowances, CAA section 607 specifically provides for two types of allowance transfers. Subsection (c), entitled "Trades with other persons," permits a company to transfer its allowances for a pollutant to another company ("inter-company" transfers). 42 U.S.C. §7671f(c). For instance, a company that has excess allowances for the production of HCFC-22 may transfer (sell) some of those allowances to another company. When such a single-pollutant transfer occurs between companies, the ultimate number of allowances for a particular HCFC to be potentially utilized by all U.S. producers and importers does not increase, since those allowances are merely shifted from one entity to another.

Subsection (b) of CAA §607 permits "inter-pollutant" transfers. 42 U.S.C. §7671f(b). Under this provision, a company that had, for example, expanded its market for HCFC-22, could convert its own unused baseline allowances for a less-

demanded chemical, such as HCFC-142b, to allowances for the high-demand HCFC-22. If given lasting effect, such a shift would increase the aggregate baseline for HCFC-22 while EPA is simultaneously acting under the CAA to phase out that chemical. Unsurprisingly then, §607(b) only permits "a production allowance for a substance for any year to be transferred for a production allowance for *another* substance *for the same year* . . . ." 42 U.S.C. §7671f(b) (emphasis added). No similar "same-year" restriction exists for inter-company, single-pollutant transfers. As explained above, this is understandable since such single-pollutant transfers do not result in an increase in the production of the transferred HCFC, as occurs with an inter-pollutant transfer.

II. Regulatory Background

A. The 1993 Regulation: Governing the 1994-2002 Regulatory Period

In 1993 EPA established its chemical-by-chemical phase-out approach for HCFCs. 58 Fed. Reg. 65,018, 65,025 (Dec. 10, 1993) (the "1993 Regulation"). As part of this approach, EPA restricted the production of particular HCFCs to specified uses at the beginning of certain regulatory step-down periods. Id. at 65,026. For the two HCFCs at issue in this case, HCFC-22 and HCFC-142b, the 1993 Regulation prohibited production in 2010 and thereafter for all domestic uses, with an exemption allowing production until 2020 only for the servicing of air-conditioning and refrigeration equipment manufactured before January 1, 2010

(the "after-market"). 68 Fed. Reg. at 2827. HCFC-22 is used primarily as a refrigerant and thus will be in demand as long as there is a need to replace refrigerant in older equipment. HCFC-142b, on the other hand, is used primarily as a foam-blowing agent and there is virtually no demand for its use for post-construction servicing, i.e., after 2009.

B. The 2003 Regulation: Governing the 2003-2009 Regulatory Period

In 2003 EPA set the baselines for the production and consumption of three HCFCs (HCFC-141b, HCFC-22, and HCFC-142b) and established the allowances for each company that would apply through December 31, 2009. 68 Fed. Reg. at 2831-33 (the "2003 Regulation"). EPA first determined that each company's baseline would be measured by the maximum HCFCs produced and consumed by the company in any year between 1994 and 1997. 68 Fed. Reg. at 2824, 2832.

EPA next determined that each company could produce 100% of its baseline of HCFC-22 and HCFC-142b in 2003-2009. Id. at 2849. This is because, using its "worst-first" approach, EPA achieved the initial phase-out levels of HCFCs required by the Protocol (35% reduction) through a total ban of HCFC-141b, which had a higher ozone depletion potential than either HCFC-22 or HCFC-142b. 74 Fed. Reg. at 66,415. Identifying the two chemicals at issue in this case as next on the "worst-first" list, EPA expressly warned in the 2003 Regulation that prior to 2010 it would issue a new regulation to implement the 2010-2014 step-down

reductions for HCFC-22 and HCFC-142b, consistent with the obligation of the United States under the Protocol to achieve a 65% reduction (later changed to 75%) of HCFCs from 1989 levels. 68 Fed. Reg. at 2821.

The 2003 Regulation also spoke directly to the transfer of allowances. EPA explained that while companies might choose to "conduct [] inter-pollutant transfers *during the short term . . . , the opportunities for inter-pollutant transfers will decrease over time*." 68 Fed. Reg. at 2833 (emphasis added). The 2003 Regulation also included a specific section labeled "Permanent Transfers of Baseline Allowances," in which EPA expressly defined a "permanent" transfer of baseline allowances as one that occurs, not through intra-company, inter-pollutant transfers, but rather as inter-company transfers: "The *permanent* transfer of baseline allowances is a lasting shift of some quantity of a company's allowances *to another company*." Id. at 2835 (emphasis added). Thus, permanent baseline transfers did *not* include intra-company, inter-pollutant baseline transfers such as those that were the subject of the 2008 Approvals.

III. Intervenors' Inter-Pollutant Transfers and the Rulemaking For the 2010-2014 Regulatory Period

EPA's actions challenged in this Petition (the 2008 Approvals) are four "non-objection notices" sent by EPA to Intervenors covering inter-pollutant transfers that occurred within Arkema and within Solvay between February 15 and April 18, 2008. Pet. Br. 2-3. Each of these non-objection notices was sent only to

the requesting party (Arkema and Solvay). That is because EPA's regulations provide only for notice to the transfer applicant. 40 C.F.R. §82.23(b)(4).

Whatever inter-company or inter-pollutant transfers may have occurred between 2003 and 2009, *all* allowances of *all* entities expired on December 31, 2009. As EPA explained in 2008, unless EPA issued a new regulation establishing new allowances, as of January 1, 2010, no company would be permitted to produce or consume *any* of the HCFCs at issue. See, e.g., JA __[80] ("EPA noted that until a [new] rule is finalized, there are no allowances after 2009 for HCFC-22 or HCFC-142b production or import."); JA __[63] ("No allowances exist after 2009 without [a new] rulemaking, [which] means no HCFC-22 or HCFC-142b production or import unless the rule is complete.").

Because of the pending expiration of all allowances on December 31, 2009, EPA initiated early steps to evaluate how to structure and operate an allowance system in the next regulatory period, 74 Fed. Reg. at 66,424, and to analyze its "regulatory options for allocating HCFC allowances after 2009." JA __[15-23]. Approximately eight months after the last approval of Intervenors' transfers, on December 23, 2008, EPA issued its initial proposal for allocating allowances for the 2010-2014 regulatory period. 73 Fed. Reg. 78,680 ("Proposed Rule"). As explained in that Proposed Rule, in the next regulatory period EPA was not wedded to using an allowance system that relied on each company's historical

production and consumption baselines. EPA stated, for instance, that it was considering alternatives such as an auction system or a system based on recent sales and use data, both of which would have abandoned the historic production and consumption baselines as bases for allocating allowances. Id. at 78,687.

In proposing as one alternative the possible continued use of the baselines it had used for the 2003-2009 regulatory period, EPA explained that although the Proposed Rule contained a table that reflected adjustments resulting from past inter-company and inter-pollutant transfers, EPA was still considering whether to allocate allowances "*with or without* considering any permanent baseline transfers and/or inter-pollutant transfers that resulted in a different amount of production or consumption for a specific HCFC." Id. at 78,687/2 (emphasis added). Thus, recognizing that it was not required by law to include inter-pollutant baseline transfers in baselines for the new regulatory period, EPA publicly announced that it was considering whether it was good policy to recognize those past transfers in setting baselines for the new regulatory period, assuming that EPA chose to continue to apply an allocation system that utilized historic production and consumption baselines. See Arkema, 618 F.3d at 11 (Randolph, J., dissenting).

Both Petitioners in this case commented on the Proposed Rule, focusing specifically on the possibility that EPA might carry forward baseline allowances that were effectuated through past inter-pollutant transfers. JA __[163-193].

Petitioners asserted that it was both bad public policy and legally insupportable to carry forward such transfers into the new regulatory period. Id.

On December 15, 2009, EPA issued its final rule governing the 2010-2014 regulatory period. 74 Fed. Reg. 66,412. Under this 2010 Regulation, Arkema and Solvay did not receive credit for their past inter-pollutant baseline transfers. Instead, each was granted the identical baseline it received in the 2003 Regulation, which was based on each company's highest consumption and production years and on the same metric applied to all other regulated companies. Id. at 66,446-47. In rejecting the option to carry forward past inter-pollutant baseline transfers to the new regulatory period, EPA explained that recognition of such baseline transfers for the new regulatory period could likely: (a) create incentives for manipulation of the allocation system; (b) effectively transform EPA's chemical-by-chemical, "worst-first" phase-out system into one based instead on ozone depletion potential aggregated over a basket of chemicals, the system EPA rejected in 2003 and again as one of the alternatives in the 2010 Regulation; (c) have an outsized impact on small companies involved in the production of HCFCs and interfere with market expectations; (d) adversely impact not only manufacturers and importers of HCFCs but also distributors and customers; (e) encourage disruption in future control periods and reduce market flexibility; and (f) potentially require 19 of the 21 companies originally granted allowances in 2003 to relinquish nearly 16% of their

allowances to compensate for Arkema and Solvay being awarded baselines 38% and 912%, respectively, above their original baselines, an action that could significantly impact the market for HCFCs. 74 Fed. Reg. at 66,420-21; Arkema, 618 F.3d at 5-6, 8-9. EPA further concluded that the language of Title VI of the CAA did not support giving long-term effect to inter-pollutant baseline transfers. 74 Fed. Reg. at 66,421-422; Arkema, 618 F.3d at 5-6.

IV. This Court's Decision in *Arkema v. EPA*

In Arkema, Arkema and Solvay challenged the 2010 Regulation, asserting that they were entitled to baselines of HCFC-22 for the 2010-2014 regulatory period *larger* than their original baselines because of the inter-pollutant transfers that EPA approved in 2008. The Court in Arkema did *not* find either EPA's policy reasoning or its conclusion that the CAA did not support the carry-forward of inter-pollutant baseline transfers between regulatory periods, to be unreasonable or inconsistent with the provisions of the CAA. Nevertheless, in a 2-1 decision, the panel majority concluded that EPA's non-objection to the 2008 inter-pollutant transfers by Arkema and Solvay had created "vested rights" in *permanent* inter-pollutant baseline transfers from HCFC-142b to HCFC-22 that *must* be reflected in any subsequent rule using the historical production and consumption baselines for the 2010-2014 regulatory period. 618 F.3d at 7-10.

According to the majority, it was not the statute or regulation that created these vested rights, but rather actions of EPA, specifically: (1) an EPA application form that allowed suppliers to request "inter-pollutant baseline transfers," although the form said nothing about those transfers being permanent; (2) EPA's non-objection notice regarding inter-pollutant baseline transfer requests made by Arkema and Solvay, although those notices contained no reference to the transfers being permanent; (3) EPA's subsequent recognition of those transfers in a letter, again without any statement implying those transfers were permanent; and (4) EPA's statement, in a *proposed* rule, that it was *considering* allocations for the new regulatory period based on prior inter-pollutant transfers, a proposal that EPA affirmatively rejected in the final rule. 618 F.3d at 6-8. In fact, nothing on the approval forms or related documents that EPA issued stated that baseline transfers applied beyond the existing 2003-2009 regulatory period. As Judge Randolph summarized in his dissent, "EPA never stated, not once, that a company's inter-pollutant transfers would permanently and forever alter the company's baselines for these pollutants . . . . In fact, the regulations indicated otherwise." 618 F.3d at 10 (Randolph, J., dissenting).

In the end, the majority in Arkema found that EPA had created vested rights for increased baselines in the 2010-2014 regulatory period, even though: (a) the regulation under which those transfers occurred expired in 2009 and there did not

exist *any* allowances for 2010-2014 until EPA announced its new allocation system in a new rulemaking; (b) as Judge Randolph pointed out, EPA's regulations indicated that inter-pollutant transfers were *not* permanent; (c) EPA was not bound even to use a system incorporating baselines in establishing allowances for the 2010-2014 regulatory period; (d) EPA's interpretation that the CAA did not support treating inter-pollutant transfers as permanent was never deemed unreasonable, even by the panel majority; (e) there was no disagreement with EPA's conclusion that carry-over of inter-pollutant baseline transfers from one regulatory period to a subsequent period would allow producers to manipulate the allowance allocation system and could destroy the carefully-crafted worst-first regulatory framework; (f) allowances are expressly identified in EPA's regulations as "privileges," not enforceable entitlements, and their allocation is fully subject to EPA's discretion; and (g) one of the two transfer applicants, Solvay, expressly acknowledged that the inter-pollutant transfers for which it sought EPA's approval in 2008, "are for *Baseline Year Allowances* and, therefore, are being done on a permanent basis (i.e. multi-year transfer for 2008 and 2009)," i.e., Solvay clearly understood that "permanent basis" in the context of inter-pollutant transfers meant only through the end of the 2003-2009 regulatory period. 74 Fed. Reg. at 66,420-22; JA __[3, 261-65].

Judge Randolph, writing in dissent, explained, *inter alia*, that: (a) EPA *never* took the position that inter-pollutant transfers were permanent; (b) there was no expectation, as evidenced by language in one of the Petitioners' own transfer requests, that baseline transfers were required to be carried forward into a wholly new regulatory period; (c) in any event, EPA was free to change course in its treatment of inter-pollutant transfers and had good reason to do so in this case; (d) Petitioners held no vested rights in future baselines; and (e) the majority failed to grant EPA proper deference in interpreting its own regulations and application forms. 618 F.3d at 10-13.

Noting that the Court's decision in Arkema could have potentially troubling consequences not only on EPA's statutory mandate to eliminate ozone-depleting substances in accordance with the schedule set forth in the Montreal Protocol and with Title VI of the CAA, but also on other "cap-and-trade" programs, EPA petitioned for rehearing and rehearing en banc. Honeywell and DuPont, having failed to seek to intervene in the Arkema case previously, on or about October 18, 2010, filed motions to intervene out-of-time in EPA's petitions for rehearing. Dkt. 1272251, 1271929. Eight days later, Honeywell and DuPont filed their Petitions for Review in this case challenging the 2008 Approvals.

Honeywell and DuPont's motions to intervene out-of-time in the Arkema case were denied on December 7, 2010. Dkt. 1281676. EPA's petitions for

rehearing and rehearing en banc in Arkema were denied on January 21, 2011. Dkt. 1289392, 1289396.

V. EPA's Actions Following the Decision in *Arkema v. EPA*

While the decision in Arkema required EPA to address the retroactive effect of the 2010 Regulation on the baseline allowances of Arkema and Solvay, it did not directly affect the allowances – either baseline, production or consumption allowances – of any other company. EPA had yet to consider precisely how it would address the Court's mandate, and its response could have been to eliminate any retroactive effect of the 2010 Regulation on the Intervenors by completely eliminating the use of baselines and instead turning to a different allowance allocation system, such as those considered as alternatives in the proposed 2010 Regulation, e.g., an auction system or basing allocation of allowances on recent sales data. Under either of these two systems, there would be no "reallocation" of allowances from Petitioners (and other suppliers) to Intervenors.

On January 21, 2011, EPA issued a "No Action Assurance" to Honeywell, DuPont, and all other suppliers of HCFCs. Pet. Br., Austin Decl., Ex. 1 ("First No-Action Letter"). In that Letter, EPA informed Petitioners that while EPA was seeking en banc review of Arkema in the D.C. Circuit, EPA would not pursue an enforcement action against an HCFC producer so long as Petitioners (and other suppliers) did not exceed the *lesser* of the allowances allocated to them in the

Proposed 2010 Rule or the final 2010 Regulation. Id. Both the Proposed and Final Rules maintained Petitioners' baseline allowances at exactly the same level they had always been set. The difference was that because the Proposed Rule reflected the carry-forward of the inter-pollutant transfers by Arkema and Solvay, it assigned a higher HCFC-22 baseline to those companies. Because the Proposed rule then had a higher *aggregate* HCFC-22 baseline, the percentage of each company's baseline allocated as production allowances was lower in the Proposed Rule than in the final 2010 Regulation, so as to keep the absolute number of production allowances (and hence the environmental impact) the same.

For example, Honeywell was allocated 42,638,049 baseline production allowances for HCFC-22 in *both* the Proposed and Final Rule. The Proposed Rule allowed Honeywell to produce 32% of those baseline allowances while the Final Rule allowed Honeywell to produce 38% of those same baseline allowances for 2011. Under the First No-Action Letter, Honeywell could be subject to an enforcement action by EPA if it produced in excess of 32% of its baseline allowances (the lesser of the two). Thus, Honeywell was subject to an enforcement action if it exceeded the allowances granted it in the Proposed Rule, which reflected the carry-forward of Intervenors' inter-pollutant transfers.

On April 28, 2011, EPA issued another "No Action Assurance" to Honeywell, DuPont, and all other suppliers of HCFCs. Pet. Br., Austin Decl., Ex.

2 ("Second No-Action Letter"). Because by that time this Court had denied EPA's petition for rehearing en banc, EPA eliminated the option of allowing Petitioners to produce the number of allowances permitted in the Final 2010 Regulation and instead made clear that it would only assure that a producer would not be subject to an enforcement action if it produced no more than the amount permitted under the Proposed Rule: 32% of the company's baseline allowances of HCFC-22.

On August 5, 2011, EPA issued its Interim Final Rule. In that Rule, EPA once again kept the baselines of Honeywell and DuPont constant, the same as they have always been since originally set in 2003. 76 Fed. Reg. at 47,464. Under the Interim Final Rule, Honeywell and DuPont could produce 32% of their baseline, the identical amount they were permitted to produce under both No-Action Letters. Id. at 47,467. While EPA issued the Rule as an interim final rule to address the urgent need for certainty regarding the allowance allocations for the 2011 control period, EPA made clear that it would consider written comments submitted through September 6, 2011. Id. at 47,451. Honeywell and DuPont both submitted comments. JA __.

Honeywell and DuPont filed a Petition for Review challenging the Interim Final Rule. Honeywell International, Inc., et al. v. EPA, No. 11-1370 (D.C. Cir., Oct. 6, 2011) (Dkt. 1334076). For reasons unknown to EPA, that petition was filed two days too late. Before EPA had an opportunity to move to dismiss that Petition

as untimely, on October 26, 2011, Petitioners (with the assent of EPA) filed a Stipulation of Dismissal of that action. Dkt. 1337833. The Order dismissing that action was issued on Nov. 18, 2011. Dkt. 1342874. Because the Interim Final Rule could only have been challenged within sixty days of its issuance, which occurred on August 5, 2011, 42 U.S.C. §7607(b)(1), Petitioners' challenge to the Interim Final Rule may not be resubmitted or otherwise resurrected.

SUMMARY OF ARGUMENT

From the very outset of the HCFC allowance program EPA has worked assiduously to implement the mandate of the Montreal Protocol and Title VI of the CAA in a manner that is as equitable as possible to all suppliers of HCFCs. Accordingly, in defending this Petition for Review, EPA has no interest or intent to favor one set of suppliers over another. Instead, EPA responds to the Petition based on its paramount interest, which is to ensure that it is free to carry out its statutory duty to complete the phase-out of HCFCs in accordance with the step-down periods of the Protocol and the requirements of Title VI of the CAA, while at the same time ensuring, to the extent possible given the required reductions, that the marketplace as a whole has an adequate supply of HCFCs for after-market use.

It should come as no surprise, given the position it took in Arkema, that EPA agrees with Petitioners' central contention that the baseline transfers that were the subject of the 2008 Approvals should not be carried forward into the 2010-2014

regulatory period. Moreover, as outlined in its en banc petition in Arkema, EPA is concerned that a ruling that accords vested rights to future allowances for periods of time for which there does not even exist a regulation establishing how or at what levels allowances will be allocated, could significantly hinder EPA's ability to achieve the phase-out of pollutants that Congress has mandated.

That being said, the Court rejected EPA's position in Arkema. Thus, unless and until the Court limits or overrules that decision, EPA is duty-bound to abide by the holding in that case. As part of that duty, EPA must address the legal infirmities in Petitioners' specific arguments.

Petitioners assert that they may challenge the 2008 Approvals through petitions for review filed in 2010 because they could not have understood the impact of the 2008 Approvals prior to the Arkema decision. Regardless of whether this assertion is accurate, it is of no import, because it is not the 2008 Approvals that injured the Petitioners; thus, Petitioners lack standing to challenge those Approvals. Petitioners themselves explain that their injury is the loss of production and consumption allowances deducted from what they would otherwise have received under the 2010 Regulation, which they explain was effectuated by EPA in order to accommodate the Court's ruling in Arkema. As Petitioners readily admit, that injury did not occur until the Interim Final Rule was issued. That Rule is not a subject of the present challenge and, when Petitioners did challenge the Interim

Final Rule, they did so too late. Petitioners then correctly withdrew that challenge and it may not now be reinstated. Petitioners may not seek to cure their jurisdictional defect by using notions of ripening of claims or the "arising after" doctrine to challenge an agency action (the 2008 Approvals) that had no direct effect on them, even when the Arkema decision is applied to those Approvals.

In setting forth their substantive claims, Petitioners have labored mightily to repackage the arguments made by EPA to the Court in Arkema into what appear to be new arguments. In seeking to reconfigure these arguments, however, Petitioners expose the flaws in each of them. Thus, for example, while both Petitioners and EPA agree that Title VI of the CAA does not support carrying forward inter-pollutant baseline transfers into a new regulatory period, Petitioners' efforts to argue this point under Chevron step I, rather than Chevron step II as EPA did in Arkema, must be rejected because the statute simply is not clear on its face. To the extent Petitioners raise arguments not specifically addressed in Arkema, such as purported procedural flaws in the 2008 Approvals or EPA's purported change in policy, they are legally and factually flawed and otherwise fail to present a proper basis for reversing the 2008 Approvals. Finally, while Petitioners feel aggrieved because they were left out of the 2008 Approval process to their ultimate detriment, Petitioners were not denied an entitlement protected under the Due Process Clause and, in any event, they were provided considerable opportunities to

both comment on (which they did) and affirmatively challenge the decisions that affected their purported entitlement, i.e., their allowances to produce HCFCs.

While EPA believes that Petitioners' position reflects the proper and superior means to implement Title VI of CAA in accordance with its language and intent, EPA must oppose the arguments made by Petitioners *in this case* due to their internal flaws. Accordingly, unless the Court was to overrule, limit or otherwise revisit the decision in Arkema, EPA submits that the Petition for Review must be denied.

ARGUMENT

I. STANDARD OF REVIEW

Contrary to Petitioners' assertion (Pet. Br. 17), the Court's review of the 2008 Approvals is not subject to the standard of review set forth in 42 U.S.C. §7607(d)(9)(D). Section 7607(d) applies only to the specifically-denoted rulemakings set forth in that section and the 2008 Approvals cannot in any manner be classified as rulemaking, let alone one of the specific types of rules issued under subsection (d). See 42 U.S.C. §7607(d)(1) (listing the rulemakings covered by subsection (d)). See also Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 497 n.18 (2004); Am. Forest & Paper Ass'n, Inc. v. EPA, 294 F.3d 113, 116 n.3 (D.C. Cir. 2002). Nevertheless, EPA's action in approving the 2008 inter-pollutant transfers should be reviewed under essentially the same standard as

provided for in §7607(d): it may only be set aside to the extent it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or in excess of EPA's statutory jurisdiction and authority. 5 U.S.C. §706; United States v. Mead Corp., 533 U.S. 218, 227 (2001). See also Pet. Br. 17 (explaining that the two statutory standards are similarly applied). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). See also FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009).

II. THE COURT LACKS JURISDICTION TO ADDRESS PETITIONERS' CLAIMS

A. Petitioners Lack Standing

As the Supreme Court has explained, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341-42 (2006) (quoting Raines v. Byrd, 521 U.S. 811, 881 (1997)). This jurisdictional bar is based not only on the requirement that the Court have statutory jurisdiction over a matter. For a court to exercise jurisdiction over a claim, the petitioner also must have standing. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Nat'l Ass'n of

Home Builders v. EPA, No. 10-5341, 2011 WL 6118589, at *2, *5 (D.C. Cir. Dec. 9, 2011).

To establish standing, a petitioner must have suffered an "injury in fact" that: (a) is personal, distinct, palpable, actual, concrete, and imminent, not conjectural, speculative or hypothetical; (b) was caused by the conduct complained of; and (c) is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Pet. Br. 14. Petitioners have the burden of establishing that the action they challenge, the 2008 Approvals, resulted in a "personal injury fairly traceable to the *defendant's allegedly unlawful* conduct and *likely to be redressed* by the requested relief." DaimlerChrysler, 547 U.S. at 342 (citations omitted, emphasis added).

As Petitioners explain, the cap-and-trade system utilized by EPA for stratospheric ozone allowances is a "zero sum game," in which the permanent enlargement of one company's baseline allowances necessarily affects all other companies in the same market *if* EPA extracts corresponding production allowances from other companies to keep the total allowance allocation at the same level. Pet. Br. 15. Petitioners are quite correct that, so long as EPA determined in response to Arkema that it would continue to allocate allowances using the previous baseline system, *and* kept the overall allocation level the same by lowering the percentage of all suppliers' HCFC baselines permitted to be

produced, thus effectively reducing the allowances of other suppliers as compared to Arkema and Solvay, such action would arguably "injure" Petitioners.

The fatal flaw in Petitioners' argument, however, is that Petitioners were not injured *by the 2008 Approvals* because those Approvals did not in any way adjust the percentage of Petitioners' baseline that was to be used to allocate production allowances. As Petitioners themselves repeatedly explain, that injury did not occur until EPA issued its Interim Final Rule, which actually made such adjustment.

As Petitioners explain, "on remand from Arkema, EPA has reduced Petitioners' HCFC-22 production and consumption allowances from the amount that would have been annually allocated under the Final 2010-2014 Step-down Rule [the 2010 Regulation]. This deprived Petitioners of allowances and significantly reduced Petitioners' share of the HCFC-22 market, with considerable economic effect." Pet. Br. 12. The EPA action that Petitioners cite for imposing this economic injury is "the interim final rule . . . ." Id. Similarly, Petitioners explain that it was through "its 2011 interim rule, [that] EPA increased HCFC-22 baseline allowances apportioned to Intervenors, and allocated Intervenors additional allowances, to the detriment of Petitioners and all other allowances recipients. 76 Fed. Reg. at 47,462, 47,467-68 [the Interim Final Rule]." Pet. Br. 15. As Petitioners further explain, "the [2008 inter-pollutant] transfers [were] made effective, for the first time, in an interim final rule on remand from the

Arkema Court." Pet. Br. 40-41. See also id. at 41, n.16 (explaining precisely how the Interim Final Rule injured the Petitioners by lowering the percentage of allowances allocated); id. at 16 (explaining that it is "[t]hese decreases in Petitioners' production and consumption allowances and market share of baseline allowances themselves [that] have resulted, and will continue to result, in significant harm to Petitioners"); id. at 2 (noting that it is "[s]uch reduction [that] harms the Petitioners economically"); Pet. Appx. B, Diggs Decl. at 7, ¶12 (explaining that it was the Interim Final Rule that reduced Honeywell's production and consumption allowances by 16% and thereby caused the Company to suffer "severe economic consequences . . . ."); Pet. Appx. B, Austin Decl. at 4, ¶9 (citing the No-Action Letters as well as the Interim Final Rule as the agency actions which caused a 16% reduction in DuPont's allowances).

Petitioners admit that they are not challenging the validity of the 2008 Approvals as they were applied in 2008-09. Instead, Petitioners are challenging *only* the effect of those transfers in the 2010-2014 regulatory period. Pet. Br. 25, n.9, p. 38, n.14. As noted, that *effect* did not even exist until EPA issued the Interim Final Rule. Indeed, Petitioners assert that EPA had a policy prior to 2008 of *not* carrying forward inter-pollutant transfers and that such policy could not be changed without a rulemaking. Pet. Br. 13. In fact, EPA had no such policy, as it

had not considered the issue until the 2010 Regulation, but even if it did have such a policy, the rulemaking that would have changed it was the Interim Final Rule.

The reality that Petitioners were not injured by the 2008 Approvals but rather by the Interim Final Rule is made clear by the fact that EPA was not required to reduce the percentage of baseline allowances – and thereby injure Petitioners – in issuing its response to the Arkema decision. As outlined above, EPA considered at least five options for allocating allowances in the 2010-2014 regulatory period, and EPA could have applied any of those options (or others) in responding to the Arkema decision. Some of those options included an auction system or basing allowances on recent sales, neither of which would have even utilized the previous baseline concept. Not only may an auction system or a system based on recent sales data not have injured Petitioners, each may have significantly benefited Petitioners, since both Petitioners are the largest producers of HCFC-22. Because it was not until EPA issued the Interim Final Rule that the Agency reduced production and consumption allowances of the Petitioners relative to the 2010 Rule, it was not until EPA issued the Interim Final Rule that Petitioners suffered any injury.

An injury is speculative, hypothetical or conjectural, i.e., there is no "injury in fact," and hence no standing, when the injury depends on how regulators will act at some time in the future. DaimlerChrysler, 547 U.S. at 344. Any potential injury

from the 2008 Approvals or even the Arkema decision depended on the final response by EPA to the Arkema decision which, as noted above, could have resulted in no injury whatsoever to Petitioners, or even a benefit. Thus, any injury that may have resulted *from the 2008 Approvals* would have been speculative, hypothetical and conjectural and therefore cannot support standing to challenge those Approvals.

Moreover, the 2008 Approvals did not, in contrast to the Interim Final Rule, occur as part of a rule but, at best, occurred in the context of an agency adjudication. Decisions made in adjudications may often have a potential or precedential effect on competitors. As this Court has stated numerous times, however, the potential impact of the precedential effect from an agency action or decision relating to industry competitors is not sufficient to establish an injury supporting standing. See Brazos Elec. Power Coop., Inc. v. FERC, 208 Fed. Appx. 2 (D.C. Cir. 2006); Am. Family Life Assurance Co. v. FCC, 129 F.3d 625, 629 (D.C. Cir. 1997); Shell Oil Co. v. FERC, 47 F.3d 1186, 1202-03 (D.C. Cir. 1995); Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 674 (D.C. Cir. 1994); Radiofone, Inc. v. FCC, 759 F.2d 936, 939 (D.C. Cir. 1985). Petitioners needed to wait until they were injured – that is, until the Interim Final Rule was promulgated – to have standing, and challenge their purported injury in a petition seeking review of *that* Rule, which is not presently before this Court.

In addition to Article III standing, courts also require that prudential notions of standing be met. Allen v. Wright, 468 U.S. 737, 750-51 (1984). Under these requirements, "[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Summers v. Earth Island Inst., 555 U.S. 488, 493-94 (2009) (quoting Lujan, 504 U.S. at 562). Here, Petitioners were not the subject of the 2008 Approvals. Indeed, because they are neither the subject of nor directly affected by another company's inter-pollutant transfers, EPA's regulations do not even provide for notice of such Approvals. Petitioners *were* the subject (along with other suppliers) of the Interim Final Rule, but again that Rule is not challenged in this case.

Recognizing that their purported injury was, in fact, caused by the Interim Final Rule, Petitioners filed a Petition for Review of that Rule, but voluntarily withdrew it. See p. 26-27, supra. Because 42 U.S.C. §7607(b)(1) requires a petition for review to be filed within 60 days of the challenged action, and because that requirement "'is jurisdictional in nature, and may not be enlarged or altered by the courts,'" NRDC v. EPA, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (citation omitted), Petitioners, whose original petition challenging the Interim Final Rule

was filed 62 days after the August 5, 2011 publication of the Rule in the Federal Register, may not now reinstate their challenge to the Interim Final Rule.[4]

Petitioners seek to circumvent the fatal infirmity to their assertion of standing by contending that the doctrine of "competitor standing" provides a basis to challenge the 2008 Approvals. Pet. Br. 16. While the cases announcing this doctrine help define what *type* of injury may form a basis for standing, they do not eliminate the requirements that the action being challenged must be the direct cause of the injury. In this case, the alleged injury is Petitioners' effective loss of production allowances. As noted, that injury was not caused by the 2008 Approvals, but rather by the Interim Final Rule.

Focusing instead on the "advantage" afforded to the Intervenors, Petitioners cite several cases for the proposition that a business may suffer an injury when the government lifts restrictions on one of its competitors. Pet. Br. 16. But just as Petitioners were not injured until the Interim Final Rule assigned them a lower level of production allowances relative to the previous rule, Intervenors were not advantaged until that same Rule increased Intervenors' baseline allowances (and

[4] It is not necessary for the purposes of this case to determine whether the No-Action letters are final agency actions that injured Petitioners and, therefore, would be the trigger for the 60-day filing period in which to challenge the effect of the 2008 Approvals. Because Petitioners failed to challenge either of these letters *or* the Interim Final Rule in a timely manner, any such challenge would now be barred. 42 U.S.C. §7607(b)(1).

thereby their production allowances), i.e., any "restriction" on Intervenors was not lifted until issuance of the Interim Final Rule.

Petitioners further seek to cure their jurisdictional defect by relying on the "arising-after" doctrine and the argument that their challenge to the 2008 approvals did not ripen until the Arkema decision was issued. Pet. Br. 2. For a claim to be ripe, a plaintiff must establish that it will suffer significant hardship if review is delayed and that the issue is fit for judicial review at this time. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001). Here, a challenge to the 2008 Approvals at the time they were issued would clearly have been unripe. Indeed, Petitioners concede that a challenge to the 2008 Approvals would not have been ripe at the time of those approvals. Pet. Br. 21 (explaining that a challenge to the 2008 Approvals would have been "clearly unripe."); Pet. Br. 2 (noting that the claim they raise in this case "was ripened by the Arkema Court's findings.").

The so-called "ripening event," the Arkema decision, did not occur until 2010, two years after the 2008 Approvals. But a change in an interpretation of a statute, regulation or agency action does not allow a party to go back and challenge past administrative actions from time in memoriam. Indeed, even decisions of the Supreme Court announcing wholly new interpretations of law or agency actions may be applied retroactively only to challenges still pending in court. See, e.g., Harper v. Virginia Dept of Taxation, 509 U.S. 86, 97 (1993) (the Supreme Court's

new "controlling interpretation of federal law … must be given full retroactive effect in all cases still open on direct review . . . .); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 539-41 (1991).

Moreover, the Arkema decision cannot be said to have ripened Petitioners' claim because it caused no injury to Petitioners. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (citations omitted). As outlined above, Petitioners' injury was contingent on what actions EPA would take in response to the Arkema decision. That purportedly injurious action, the Interim Final Rule, was a separate action subject to challenge; it does not ripen for challenge partial, non-injurious administrative actions that may have occurred along the way.[5]

Petitioners raise the "arising-after" doctrine, under which they assert that they may bring their challenge to the 2008 Approvals because that challenge is based solely on actions arising after the challenged action, in this case the decision in Arkema. Pet. Br. 19-22. This doctrine, however, applies only to the 60-day filing requirement under 42 U.S.C. §7607(b)(1) and, indeed, the express "arising after" wording of that provision is the sole source of the arising-after doctrine.

[5] EPA does not assert that Petitioners' claims are unripe because Petitioners' administrative Petition for Reconsideration has not been acted upon, and thus does not address this issue. See Pet. Br. 22-24.

EPA does not assert that a direct challenge to the 2008 Approvals would be barred by 42 U.S.C. §7607(b)(1), since Petitioners filed such challenge (albeit prematurely) within sixty days of EPA's publication in the Federal Register of notice of the 2008 approvals, which occurred in the context of publishing the Interim Final Rule. See 76 Fed. Reg. at 47,455.[6] Instead, EPA contends that even if timely filed, Petitioners simply lack standing to challenge the 2008 Approvals, and the arising-after language contained in section 7607(b)(1) provides no relief for this jurisdictional defect. Petitioners simply may not circumvent their failure to challenge the *proper* action by using a court decision to "ripen" challenges to old agency actions that Petitioners had no standing to challenge in the first instance.

Finally, Petitioners' purported injury cannot be redressed by overturning the 2008 Approvals, since EPA action to implement any ruling overturning the 2008 Approvals would not necessarily reinstate the 2010 Regulation (Petitioners' preferred result). EPA might instead choose to address a new ruling by this Court

[6] Intervenors assert that Petitioners' challenge to the 2008 Approvals should be barred by 42 U.S.C. §7607(b)(1) because Petitioners failed to file their petition for review within 60 days of publication in the Federal Register of EPA's Proposed Rule for 2010-2014, in which the Agency explained that it was *considering* carrying forward inter-pollutant transfers into the next regulatory period. Petitioners' Motion to Dismiss at 8-10 (citing 73 Fed. Reg. 78,680 (Dec. 23, 2008)). But that was notice of a *proposed rule*, not notice of EPA's approval of individual companies' past HCFC allowance transfers, such as the 2008 Approvals at issue in this case, and that proposal was never adopted. Additionally, neither the Proposed Rule nor its preamble ever mentions the specific inter-pollutant transfers by Arkema and Solvay that Petitioners challenge in this case.

by scrapping the concept of historical production and consumption baselines altogether. Lacking both a direct injury from the 2008 Approvals or the ability to redress their claimed injury by overturning those Approvals, Petitioners lack standing to bring the challenge raised in this action.

B. The 2008 Approvals Are Not Final Orders Subject to Challenge by Non-Parties to the Approvals

An agency action may not be challenged unless it is final. Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Indeed, this Court lacks *statutory* jurisdiction to review non-final actions since the provision under which Petitioners have brought this action, 42 U.S.C. §7607(b), expressly covers only final actions taken by EPA. Agency policy statements, enforcement letters and other statements of an agency's view that do not have binding applicability on specific parties, are not final agency actions. See, e.g., P&V Enters. v. Corps of Eng'rs, 516 F.3d 1021, 1025-26 (D.C. Cir. 2008); Village of Bensenville v. FAA, 457 F.3d 52, 68-69 (D.C. Cir. 2006); General Motors Corp. v. EPA, 363 F.3d 442, 449-50 (D.C. Cir. 2004).

In this case, the 2008 Approvals (nothing more than letters to Arkema and Solvay) were not final agency actions as applied to Petitioners because, as outlined above, the granting of a request for an inter-pollutant baseline transfer has no direct effect on other allowance holders unless and until EPA takes a separate action that affects the actual allowances of those other parties. Moreover, as noted supra, Petitioners do not challenge the 2008 Approvals as they were immediately applied

but challenge only the long-term effect of such transfers starting in 2010. Pet. Br. 25, n.9, p. 38, n.14. EPA did not decide what long-term effect those transfers would have until the 2010 Regulation. Thus, the determination being challenged in this case could not possibly have been final until EPA issued the 2010 Regulation. For example, if EPA determined in the 2010 Regulation that prior inter-pollutant baseline transfers *should*, in fact, be carried forward into the new regulatory period, that would have been a final decision subject to challenge. The fact that EPA came to the opposite determination, later overturned by this Court in Arkema, does not push back EPA's final decision two years to the 2008 Approvals.

An agency order is "non-final [where it] 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) (quoting DRG Funding Corp. v. Sec'y of Housing & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996)). As noted, the 2008 Approvals did not adversely affect Petitioners. The adverse affect of that non-final decision was contingent on future administrative action by EPA to actually reduce the production allowances Petitioners would otherwise have received. That contingent action, as noted, did not occur until the promulgation of the Interim Final Rule. That Rule was the final agency action that Petitioners should have challenged.

That Petitioners failed to challenge that Rule in a timely manner is not license to mount a challenge to the 2008 Approvals.

III. PETITIONERS' SUBSTANTIVE ARGUMENTS ARE FLAWED

Petitioners make a series of substantive arguments attacking EPA's approval of the 2008 inter-pollutant transfers made by the Intervenors. A number of these arguments are consistent with EPA's position on the proper treatment of inter-pollutant transfers, as espoused by EPA in the Arkema case. Nevertheless, in repackaging EPA's arguments in somewhat different forms (in an apparent effort to assert that they are raising new claims not considered by the Arkema Court), Petitioners' arguments are fraught with internal inconsistencies and infirmities.

A. The 2008 Approvals Cannot be Struck Down as Violative of the Clean Air Act Under *Chevron* Step One

EPA argued in Arkema that although the CAA was ambiguous with regard to the permanence of inter-pollutant baseline transfers, the Act as EPA interpreted it prohibits the carrying forward of inter-pollutant transfers into a new regulatory period. As EPA explained, CAA §607 declares: "The rules under this section [to be promulgated by EPA] shall permit a production [and consumption] allowance for a substance for any year to be transferred for a production [or consumption] allowance for another substance *for the same year* on an ozone depletion weighted basis." 42 U.S.C. §7671f(b) (emphasis added). EPA summed up its analysis of this operative language as follows:

> After considering the language of section 607 and the legislative history, EPA believes that section 607(b) is *best read* as permitting *only* year-by-year inter-pollutant transfers. Section 607(b) states that EPA's rules are to permit "a production allowance for a substance for any year to be transferred for a production allowance for another substance for the same year." This language emphasizes the year-by-year nature of such transactions. No parallel language appears in section 607(c) [which governs inter-company transfers]. That section does, however, provide that any inter-pollutant transfers between two or more persons must meet the requirements of section 607(b). Hence, EPA *interprets* section 607 as *requiring* that all inter-pollutant transfers, whether occurring between companies or within a single company, be conducted on a yearly – and thus temporary – basis.

74 Fed. Reg. at 66,421-22 (emphasis added), quoted in EPA's brief, Dkt. 1237311.

Contrary to Petitioners' assertion that the Court in Arkema never examined the statutory language that governs EPA's inter-pollutant transfers, Pet. Br. 26, the Court did exactly that. See, e.g., Arkema, 618 F.3d at 9 (explaining that the 2010 Regulation, which does not treat the 2008 baseline transfers as permanent, "may more accurately track the statutory mandate and may better reflect the Agency's commitment to a 'worst-first' HCFC reduction strategy . . . ."). While the Court agreed that EPA applied a reasonable interpretation of the statute in concluding that EPA is *required* to treat inter-pollutant transfers as *non*-permanent, it nevertheless concluded that failing to carry forward the 2008 inter-pollutant transfers, i.e., failing to treat those transfers as permanent, would interfere with what it characterized as Intervenors' vested right to increased baselines. Id.

Relying on essentially the identical language, legislative history and reasoning as presented by EPA in Arkema, Petitioners seek to circumvent the Court's ruling by asserting that the 2008 Approvals violate the statute under Chevron step I. Pet Br. 26-28 ("Congress has spoken clearly and directly."). Under Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984), the Court first inquires whether Congress "has directly spoken to the precise question at issue," in which case the Court "must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 ("Chevron step I"). If the statute is "silent or ambiguous with respect to the specific issue," the Court moves to Chevron's second step and must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." Id. at 843 ("Chevron step II").

It is quite evident that CAA §607, the provision dealing with transfers of allowances, does not *expressly* address whether inter-pollutant transfers characterized as "baseline" are to be deemed "permanent" and reflected in subsequent regulatory periods. Indeed, the words "permanent" and "baseline" appear nowhere in section 607. As outlined at p. 12, supra, Congress left it to the broad discretion of EPA to determine how transfers of baselines are to be treated. Given this built-in discretion and the silence of section 607, EPA may reasonably interpret what constraints, if any, Congress placed on the establishment of baselines for each regulatory period.

It is apparent that EPA agrees with Petitioners' view that the better reading of Title VI precludes carrying forward inter-pollutant transfers into a new regulatory period. EPA cannot, however, agree with Petitioners' view that Congress "has directly spoken to the precise question at issue" and that, therefore, the Court must reach this conclusion under Chevron step I.

B. EPA Did Not Alter Past Interpretations Without Notice and Comment

Petitioners argue that in issuing the 2008 Approvals, EPA altered its past interpretations of the CAA without providing notice and an opportunity for comment. Pet. Br. 29-35. Asserting that EPA had historically applied a "phasedown follows the allowance" principle, a label conjured up by Petitioners, Petitioners contend that EPA altered this "policy" in issuing the 2008 Approvals without allowing Petitioners the opportunity to comment on this purported change in policy. Id.

First, Petitioners are misinterpreting past EPA statements to derive a principle that simply does not exist. Petitioners cite several statements contained in the preambles leading up to and accompanying the 2003 Regulation, which addressed the complete phase-out of a single HCFC not at issue in this case. In contrast, the 2010 Regulation and the Interim Final Rule implement a partial phase-out (or "phase-down") of certain other HCFCs. Petitioners attempt to apply a concept directed to the complete contemporaneous elimination of a chemical,

instead to a mere phase-down of chemicals that are not scheduled for elimination until 2020. This is an extension of EPA's explanatory statements that is unsupportable and that certainly does not reflect any established EPA policy.

For example, in the preambles cited by Petitioners, EPA addressed permanent inter-company transfers of baseline allowances, stating that upon the phase-*out* date of a specific HCFC, the baseline allowances associated with that chemical would be deducted from the current holder's balance. See, e.g., 64 Fed. Reg. 16,373, 16,378 (April 5, 1999), 66 Fed. Reg. 38,064, 38,068-69 (July 20, 2001). EPA further noted that the deduction would occur even if the recipient of the inter-company transfer performed a subsequent inter-pollutant transfer: "EPA will allow permanent transfers of baseline allowances with those allowances disappearing at the phase-out date for the specific HCFC, regardless of what inter-pollutant transfers had taken place." 68 Fed. Reg. at 2835. While the preamble to the 2003 Regulation leaves open the possibility that an adjustment to the current holder's baseline allowances could also be made "at the time of a reduction step," id., EPA had no reason to determine at that time what adjustments, if any, it might make to baseline allowances prior to a chemical's complete phase-out.

Petitioners also rely upon the regulatory language at 40 C.F.R. §82.23(d) for their "phase-down follows the allowance" argument. But that provision addresses permanent transfers of baseline allowances, explained as "a lasting shift of some

quantity of a company's allowances *to another company*," 68 Fed. Reg. at 2835 (emphasis added), and does not even mention inter-pollutant transfers. It merely identifies the recipient of the transfer as the person whose baseline will be adjusted "in accordance with phase-out schedules."

Second, and perhaps most importantly, EPA did not change any policy in issuing the 2008 Approvals. Petitioners do not contend that it was improper or inconsistent with prior policy or interpretations for EPA to approve inter-pollutant transfers. To the contrary, Petitioners affirmatively state that they are not challenging the 2008 Approvals to the extent they allowed for transfers in 2008 and 2009 (the last two years of the 2003-2009 regulatory period). Pet. Br. 25, n.9, 38, n.14. Petitioners' complaint is that the decision to make inter-pollutant transfers permanent was inconsistent with past policy. But EPA neither had a policy about whether inter-pollutant transfers would carry forward into the next regulatory period nor did it change any prior policy. As outlined above, in the Proposed Rule for 2010-2014, issued after the 2008 Approvals, EPA sought comment on whether it should, or should not, carry forward past inter-pollutant baseline transfers. Thus, EPA was creating a policy as part of the 2010 Regulation; it had no policy prior to that time.

Furthermore, to the extent EPA can be said to have had a policy prior to the 2008 Approvals not to carry forward inter-pollutant transfers, any change in that

policy was caused by the Arkema Court's opinion, *not* by any action of EPA. An agency cannot be required to provide notice of, comment on, or explanation of, a policy change it is not itself making and that occurs only by virtue of a court decision issued two years later.

Moreover, EPA *did* provide an opportunity to comment on the central issue in this case: the permanence of inter-pollutant transfers. In the proposed 2010 Regulation, EPA expressly called for comment on whether inter-pollutant baseline transfers approved in the 2003-2009 regulatory period should be carried forward to the 2010-2014 regulatory period. 74 Fed. Reg. at 66,420/3. Both Petitioners commented on such a policy and EPA eventually adopted the general position argued for by Petitioners in those comments. The fact that the Court in Arkema rejected EPA's conclusion in light of what the Court saw as Arkema and Solvay's "vested" interests in previously transferred allowances, does not mean that EPA failed to provide opportunity for comment on the very issue raised by Petitioners in this case. Moreover, EPA provided opportunity for comment as part of its issuance of the Interim Final Rule. While Petitioners could have asserted that the opportunity for comment was insufficient, any such challenge was waived as a result of Petitioners' withdrawal of their challenge to that Rule.

C. Petitioners Have No Basis to Challenge the Record Supporting the 2008 Approvals

Petitioners raise a number of issues regarding the adequacy of the administrative record supporting the 2008 Approvals. This Court, however, may not consider issues not raised before the Agency during the challenged administrative process. Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1231 (D.C. Cir. 2007) ("Petitioners who fail to comply with this exhaustion requirement are barred from seeking judicial review."); Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1238 (D.C. Cir. 2004). None of the "adequacy of the record" issues asserted by Petitioners was raised before the Agency. While Petitioners would rightly explain that they had no opportunity to raise such issues because they were neither a party to, nor directly informed of, the process EPA was conducting to issue the 2008 Approvals, this further evidences the fact that the 2008 Approvals were not final agency actions with regard to Petitioners. Instead, any opportunity to challenge the record for the 2008 Approvals arose, if at all, in conjunction with the promulgation of the Interim Final Rule, which as noted is unchallenged.

Turning to Petitioners' specific arguments, they assert that EPA could not have approved the 2008 inter-pollutant transfers on a permanent basis because EPA regulations provide for transfers only during the control period (i.e., the specific calendar year) and for 30 days thereafter. Pet. Br. 37-38. As noted supra,

notwithstanding the holding in Arkema that Arkema and Solvay gained "vested rights" in the transferred baseline allowances through EPA's issuance of the 2008 Approvals, EPA did not intend to approve the 2008 transfers on a permanent basis. Indeed, EPA argued in Arkema that its regulations did not, in fact, support transfers lasting beyond the existing regulatory period. The permanent nature of these transfers arose only as a result of the Court's decision in Arkema. EPA can hardly be said to have approved the permanent nature of the transfers on an inadequate record (or in an arbitrary and capricious manner) when EPA has *never* approved the permanent nature of those transfers.[7]

Petitioners further contend that because EPA's regulations require it to assure that the applicant has sufficient allowances to transfer, and because the Arkema Court decided that the 2008 inter-pollutant transfers are permanent, it was impossible for EPA to certify that Intervenors had enough allowances to transfer in the years 2010-2014, because EPA had not even established baseline allowances for 2010-2014 at the time it approved the 2008 transfers. Pet. Br. 35-37.[8] But

[7] Petitioners describe this as an "adequacy of the record" issue, but they essentially argue that EPA's *regulations* do not support treating the 2008 transfers as permanent. Pet. Br. 37-38. EPA (and Judge Randolph, Arkema, 618 F.3d at 10) agree, but this view was rejected by the panel majority in Arkema.

[8] Petitioners alternatively assert that EPA's failure to assess whether Intervenors had sufficient allowances in years 2010-2014 means that EPA failed to comply with the CAA's procedural requirements set forth in 42 U.S.C. §7607(d)(2)-(6). Pet. Br. 38. As noted at p. 30, supra, §7607(d) has no application to this case

EPA looks only at whether the company has sufficient allowances to cover the transfer "on the date the transfer claim is processed," 40 C.F.R. §82.23(b)(4); because the transfer occurs only once, EPA has no need to consider future years' allowances. Under Petitioners' reasoning, no inter-pollutant baseline transfers can ever occur because, under the Arkema decision, they live on in perpetuity while under the statute every HCFC will be phased out, so eventually everyone will have insufficient allowances to transfer. While Petitioners' argument may accentuate the difficulties of implementing the Court's decision in Arkema, it does not mean that EPA's decision at the time was improper, arbitrary or based on an insufficient administrative record.

In a footnote, Petitioners make a third argument, asserting that the record fails to establish that the EPA employee who signed the 2008 Approvals was authorized to do so. Pet. Br. 38, n.15. This Court has often explained that it will not address arguments made only in a footnote. Meijer, Inc. v. Biovail Corp**.,** 533 F.3d 857, 864 n.4 (D.C. Cir. 2008); Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 29 (D.C. Cir. 2008). Moreover, this is also an issue not raised before EPA as part of the 2008 Approvals and that presumably *could* have been raised in a challenge to the Interim Final Rule. In any event, EPA's

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because that provision applies only to specifically designated rulemakings, and the 2008 Approvals are not rulemakings of any kind, much less rulemakings subject to section 7607(d).

regulations provide that "[t]he transferor may proceed with the transfer if the Administrator does not respond to a transfer claim within the three working days specified…." 40 C.F.R. § 82.23(b)(4)(iii). Thus, even if Petitioners could establish that the person who approved the 2008 transfers was not authorized to provide such approval, such approval would nevertheless have occurred by operation of regulation three working days after submission of the transfer requests.

IV. PETITIONERS WERE NOT DENIED DUE PROCESS

Petitioners assert that they have been deprived of a property right – the right to a certain number of HCFC production allowances – without due process because they were never given the opportunity to comment on the permanence of the 2008 Approvals. Pet. Br. 39-44.

The basis for assessing a due process claim was summed up in General Electric Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010). As the Court explained:

> "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'liberty' or 'property.' Only after finding the deprivation of a protected interest do we look to see if the [government's] procedures comport with due process." Amer. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 . . . . At this second step, we apply the now-familiar Mathews v. Eldridge balancing test, considering (1) the significance of the private party's protected interest, (2) the government's interest, and (3) the risk of erroneous deprivation and the "probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335.

General Electric, 610 F.3d at 117. Because Petitioners were not deprived of a property right, and because they were nevertheless provided full due process to comment on the permanence of the 2008 Approvals and did in fact comment, no due process rights were deprived.

EPA's regulations make clear that permission to produce and consume HCFCs (through the grant of allowances) is not a right but a "privilege" granted by EPA under the terms of its own regulations. See, e.g., 40 C.F.R. §82.3: "*Consumption allowances* means the *privileges* granted by this subpart to produce and import controlled substances . . . . *Production allowances* means the *privileges* granted by this subpart . . . ." (Emphasis in original and added). While the Court in Arkema found that the transferred baselines that Solvay and Arkema created for themselves were vested rights, it did not hold that such transferred baselines, or allowances in general, are property rights or entitlements protected under the Due Process Clause, nor did it hold that companies had any right whatsoever to a specific number of production allowances. In fact, the Court noted that "the 2010 stepdown gave the EPA occasion to adjust its distribution of allowances." 618 F.3d at 25.

To have a protectable property interest in a government benefit, the party "must have a legitimate claim of entitlement to it." Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005). As the Supreme Court explained, "[o]ur cases recognize that a benefit is not a protected entitlement if government officials

may grant or deny it in their discretion." Id. (citing Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462-63 (1989)). See also Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999) ("Entitlement turns on whether the issuing authority lacks discretion to deny [it]."). As outlined at p. 12, supra, the number of allowances, the type of allowances, the basis for allocating allowances, and even the continued existence of allowances for each HCFC, was within the full and broad discretion of EPA. Indeed, Petitioners readily admit that in the 2003 Regulation "EPA was clear that it was allocating each company's HCFC baseline allowances 'on a one-time-basis' and that the same number of allowances would not necessarily be granted for future step-down periods." Pet. Br. 7. Moreover, uncertainty as to whether a specific grant of allowances would or would not be carried forward does not create a protectable entitlement. See, e.g., Town of Castle Rock, 545 U.S. at 763; Greenbriar Village, LLC v. Mountain Brook, City, 345 F.3d 1258, 1265-66 (11th Cir. 2003) ("[U]ncertainty in the existence of a property right . . . does not add up to a federally protectable property claim."). Under EPA's regulatory regime, Petitioners possessed no entitlement to any specific number or percentage of HCFC production allowances, and thus no due process rights were deprived.

Even if Petitioners could assert that they possessed an entitlement subject to due process protection, such process was provided. Petitioners contend that they

were not provided notice of the 2008 Approvals, so they could not challenge the Agency's action. Pet. Br. 40-42. EPA's regulations establish the process for seeking approval of inter-pollutant transfers and call for notice only to the requesting party and for an appeal process only if the transfer request is rejected. 40 C.F.R. §82.23(b)(4). This is because, as discussed supra, the approval of an inter-pollutant transfer does not on its own affect the allowances granted to competitors. If Petitioners believed that such notice and appeal process would be inadequate because of the possibility that approvals of baseline transfers might eventually be deemed to create vested rights, they were required to challenge that regulation when issued in 2003 (see 68 Fed. Reg. 2820, 2848 (Jan. 21, 2003)), and they may not do so now. See 42 U.S.C. §7607(b) (requiring challenge to such an EPA regulation to be filed within 60 days of its issuance).

Moreover, as Petitioners themselves assert, a challenge to the 2008 Approvals would not have been ripe at the time because it was only the 2010 Arkema decision that "ripened" their claim. Indeed, it is unclear what notice Petitioners assert EPA was required to give. If EPA did not believe at the time that the 2008 Approvals would have any effect on future allowances unless EPA decided in its discretion after a separate rulemaking to carry forward baseline transfers, there was nothing EPA could have given notice of, except perhaps an

approval of inter-pollutant transfers that had no known effect on other allowance holders.

Finally, Petitioners were given the opportunity to comment the first time EPA considered whether to treat inter-pollutant transfers as permanent transfers (in response to the Proposed Rule for 2010-2014), and they did in fact submit substantial comments on that issue. JA __[163-93]. The fact that the Court in Arkema eventually disagreed with Petitioners – and with EPA – does not mean that they were denied full consideration of the issue. Moreover, Petitioners had an opportunity to seek to participate in the Arkema case and, in fact, did seek to so participate, albeit in an untimely manner. Again, the fact that this Court denied Petitioners' out-of-time request to participate, or that Petitioners failed to understand that the Arkema litigation had been filed and was being briefed, does not equate to a denial of due process.

Lastly, Petitioners were afforded due process when the Interim Final Rule, the rule that actually caused their alleged injury, was issued. Comments were requested on that rule, Petitioners submitted such comments, and Petitioners had the opportunity to challenge that rule. Again, the fact that Petitioners failed to challenge that rule in a timely manner does not equate to the government denying Petitioners a forum to challenge the rule that visited upon them the injury they assert.

CONCLUSION

For the foregoing reasons, the Petition for Review should be dismissed for lack of jurisdiction or denied on its merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 37(A)(7)(b)

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and the orders of the Court in this case because this brief contains 13,823, excluding the parts of the brief exempt under Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type.

So certified this 30th day of January, 2012, by

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF RESPONDENTS was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties who have registered with the Court's CM/ECF system.

Date: January 30, 2012

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