ORAL ARGUMENT NOT YET SCHEDULED

No. 10–1347 (consolidated with Nos. 10–1348, 10–1349, 10–1350)

United States Court of Appeals for the D.C. Circuit

HONEYWELL INTERNATIONAL INC. AND
E. I. DU PONT DE NEMOURS AND COMPANY,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, ADMINISTRATOR,

Respondents,

ARKEMA INC., SOLVAY FLUORIDES, LLC, AND SOLVAY SOLEXIS, INC.,

Intervenors for Respondents.

FINAL JOINT BRIEF OF INTERVENORS ARKEMA INC., SOLVAY FLUORIDES, LLC, AND SOLVAY SOLEXIS, INC.

On Petitions for Review from the United States Environmental Protection Agency

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1) AND RULE 26.1 STATEMENT

A. Parties. All parties, intervenors, and *amici* appearing before this Court are correctly listed in petitioners' brief.

Intervenor Arkema Inc. certifies that it is a wholly owned subsidiary of Arkema Delaware, Inc. There are no publicly held companies that own 10% or more of the stock of Arkema Inc. However, Arkema Inc. is indirectly owned by Arkema, S.A., a French public company. Arkema Inc. is a world-class producer of industrial chemicals. Among its products are hydrochlorofluorocarbons, which are regulated pursuant to Title VI of the Clean Air Act, 42 U.S.C. §§ 7671-7671q. As relevant here, Arkema Inc. is a recipient of baseline production and consumption allowances for HCFC-22 and HCFC-142b from the U.S. Environmental Protection Agency.

Intervenor Solvay Fluorides, LLC, a Delaware limited liability company, certifies that it is a wholly owned subsidiary of Solvay Chemicals, Inc. Intervenor Solvay Solexis, Inc., a Delaware corporation, certifies that it is a wholly owned subsidiary of Ausimont Industries, Inc. No publicly held corporation owns 10% or more of the membership inter-

ests of Solvay Fluorides, LLC or 10% or more of the stock of Solvay Solexis, Inc. Solvay Fluorides, LLC and Solvay Solexis, Inc. are indirectly owned by Solvay, S.A., a Belgian public company. Solvac S.A. owns approximately 30% of Solvay S.A. and is also publicly traded in Europe. Solvay Fluorides, LLC and Solvay Solexis, Inc. are not aware of any other publicly held corporation that owns 10% or more of their stock.

B. Rulings Under Review. Accurate references to the rulings at issue appear in petitioners' brief.

C. Related Cases. There are two sets of related cases: (1) *Arkema Inc. v. EPA*, Nos. 09-1318, 09-1335, 618 F.3d 1 (D.C. Cir. 2010), in which this Court granted intervenors' petitions for review of EPA's 2010-2014 Final Rule entitled *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 74 Fed. Reg. 66,412 (Dec. 15, 2009), and (2) *Honeywell International, Inc. v. EPA*, No. 11-1370, in which petitioners untimely filed, and then voluntarily dismissed, a petition for review of EPA's Interim Final Rule entitled *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 76 Fed. Reg. 47,451 (Aug. 5, 2011).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES*

Page(s)

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

GLOSSARY

2003 Rule	*Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export*, 68 Fed. Reg. 2820 (Jan. 21, 2003)
2006 Reporting and Recordkeeping Rule	*Reporting and Recordkeeping Requirements of the HCFC Allowance System*, 71 Fed. Reg. 30,675 (May 30, 2006)
2008 Approvals	The four 2008 interpollutant transfer approvals at issue in these petitions
2010-2014 Proposed Rule	Proposed Rule, *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 73 Fed. Reg. 78,680 (Dec. 23, 2008)
2010-2014 Final Rule	*Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 74 Fed. Reg. 66,412 (Dec. 15, 2009)
Interim Final Rule	*Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 76 Fed. Reg. 47,451 (Aug. 5, 2011)
Post-*Arkema* Proposed Rule	Proposed Rule, *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*, 77 Fed. Reg. 237 (Jan. 4, 2012)
APA	Administrative Procedure Act
Arkema	Arkema Inc.
Arkema EPA Br.	Brief of Respondent Environmental Protection Agency, Doc. No. 1237311, *Arkema*, 618 F.3d 1 (Nos. 09-1318 et al.) (filed Mar. 30, 2010)
Arkema Pet'rs' Br.	Joint Brief of Petitioners Arkema Inc., Solvay Fluorides, LLC, and Solvay Solexis, Inc., Doc. No. 1230210, *Arkema*, 618 F.3d 1 (Nos. 09-1318 et al.)

	(filed Feb. 16, 2010)
Arkema Reply Br.	Joint Reply Brief of Petitioners Arkema Inc., Solvay Fluorides, LLC, and Solvay Solexis, Inc., Doc. No. 1239208, *Arkema*, 618 F.3d 1 (Nos. 09-1318 et al.) (filed Apr. 9, 2010)
CAA	Clean Air Act
CFC	Chlorofluorocarbon
DuPont	E.I. Du Pont de Nemours and Company
EPA	U.S. Environmental Protection Agency
EPA's Response to Intervenors' MTD	EPA's Substantive Response to Intervenors' Motion to Dismiss, Doc. No. 1296479 (Nos. 10-1347 et al.) (filed Mar. 4, 2011)
HCFC	Hydrochlorofluorocarbon
HCFC-22	Chlorodifluoromethane
HCFC-142b	1-chloro-1,1-difluoroethane
Honeywell	Honeywell International Inc.
Intervenors' MTD	Joint Motion of Arkema Inc., Solvay Fluorides, LLC, and Solvay Solexis, Inc. to Dismiss Petitions for Lack of Jurisdiction, Doc. No. 1287346 (Nos. 10-1347 et al.) (filed Jan. 11, 2011)
ODP	Ozone depletion potential
Solvay	Solvay Fluorides, LLC and Solvay Solexis, Inc.

JURISDICTIONAL STATEMENT

For two independent reasons, the Court lacks jurisdiction. First, petitioners do not have standing to challenge the 2008 Approvals. Second, even if petitioners have standing, their challenge is untimely under 42 U.S.C. § 7607(b)(1).[1]

STATEMENT OF ISSUES

1. Whether this Court lacks jurisdiction to consider the petitions for review, in that:

a. petitioners lack standing to challenge the 2008 Approvals, because the approvals themselves did not reduce the quantity of HCFC-22 that petitioners could produce in 2008 and 2009 and their effect in any subsequent years was contingent on, *inter alia*, EPA's decision—made in a separate rulemaking not before this Court—to retain the baseline-based allocation system; and

b. if petitioners do have standing, the petitions for review are untimely under Section 307(b)(1) of the CAA, § 7607(b)(1), which requires petitions for review to be filed "within sixty days from the date

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[1] Unless otherwise stated, all subsequent statutory references are to Title 42 of the United States Code.

notice of such promulgation, approval, or action appears in the Federal Register."

2. Whether, if this Court has jurisdiction, the petitions for review should be denied, in that:

a. the 2008 Approvals were not unambiguously forbidden by statute, because, *inter alia*, this Court held in *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), that the CAA gave EPA the interpretive discretion under step two of *Chevron* to permit interpollutant baseline transfers and that EPA could not retroactively invalidate them;

b. it was EPA's longstanding policy and "practice under the 2003 Rule" to allow interpollutant baseline transfers, *Arkema*, 618 F.3d at 8, which was established at the latest by 2006, and therefore the 2008 Approvals did not effect a change in policy;

c. the 2008 Approvals were supported by the record; and

d. the 2008 Approvals did not deprive petitioners of property without due process.

STATUTES AND REGULATIONS

All applicable materials are contained in petitioners' brief.

STATEMENT OF FACTS

A. The CAA And The 2003 Rule

The CAA requires EPA to "promulgate rules * * * providing for the issuance of allowances" for the production and consumption of HCFCs. § 7671f(a), (d). EPA's 2003 Rule allocated "baseline" production and consumption allowances for several HCFCs to companies based on their shares of the then-existing market. 68 Fed. Reg. at 2823; *see also* 40 C.F.R. §§ 82.17, 82.19. To determine the quantity that each company could produce or consume in a specific calendar year, EPA multiplied that company's number of baseline allowances by a percentage stated in the rule (which we will call the "calendar-year percentage multiplier") that is fixed across all companies. *Id.* § 82.16. Thus, EPA can reduce the total output of a given HCFC—and each company's allocation *pro rata*—by decreasing that percentage over time.[2] The 2003 Rule specified

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[2] Put mathematically, suppose that EPA's desired total quantity of HCFC-22 to be produced in a given year was Q, and there were three companies that produced HCFC-22 with respective baseline allowances X, Y, and Z. EPA would set the calendar-year percentage multiplier, P, for HCFC-22 in that year such that $(X + Y + Z) \times P = Q$. Stated differently, P would be equal to Q divided by the sum of X plus Y plus Z, or, in other words, $P = Q / (X + Y + Z)$.

calendar-year percentage multipliers for each HCFC for the years 2003 through 2008. 68 Fed. Reg. at 2849.

The CAA provides that allowances may be traded between companies, between different HCFCs, or both, so long as the trades decrease the overall potential for ozone depletion. § 7671f. Under EPA's 2003 Rule, a company could apply to transfer either an allowance for a specific calendar year or a baseline allowance. *See* 40 C.F.R. § 82.23(d). What distinguishes calendar-year trades from baseline trades is "[t]he permanent nature of the [baseline] transfer." 68 Fed. Reg. at 2835. "Only through permanent transfers of allowances would a company's baseline allocation be changed." *Id.* at 2823. EPA would review applications and either allow or disallow the transfer, notifying the parties to the transfer and giving the transferor 10 days to appeal if the transfer is disallowed. 40 C.F.R. § 82.23(b)(4)(ii).

B. EPA's 2008 Approvals Of Intervenors' Interpollutant Baseline Transfers

Intervenors Arkema and Solvay each hold substantial baseline allowances to produce and consume HCFC-22 and HCFC-142b. Petitioners Honeywell and DuPont also hold such allowances and are their principal competitors. In April 2008, Arkema applied to convert base-

line allowances from HCFC-142b to HCFC-22. JA43-49. EPA issued "non objection notices" approving Arkema's "baseline" transfers. JA50-51. In subsequent letters, EPA re-confirmed that Arkema's baseline allocations reflected the 2008 transfers. JA64-69. Solvay, too, chose to convert baseline allowances from HCFC-142b to HCFC-22. JA22-25, 28-31. EPA approved those transfers in February and March 2008. JA26-27, 41-42.

The 2008 Approvals had no effect on petitioners' baseline allowances. Furthermore, because EPA did not adjust the calendar-year percentage multipliers—which had already been set through 2009 in the 2003 Rule—the 2008 Approvals had no effect on the quantity of HCFC-22 that petitioners could produce or consume in either 2008 or 2009.

C. EPA's 2010-2014 Proposed Rule And Final Rule

On December 23, 2008, EPA initiated a rulemaking to reduce U.S. production and consumption of HCFCs in the 2010-2014 period. In its 2010-2014 Proposed Rule, EPA explicitly reaffirmed that "[b]oth *inter-pollutant* and inter-company transfers of allowances are possible, either on a calendar-year or *permanent* basis." 73 Fed. Reg. at 78,701 (emphasis added). EPA therefore proposed to continue in force the existing

company-specific allocations, which "reflect[ed] adjustments resulting from approved inter-pollutant and/or inter-company transfers of baseline allowances (*i.e.*, permanent rather than calendar-year allowances) through the process described in [40 C.F.R.] § 82.23." *Id.* at 78,693. The figures printed in the Federal Register reflected EPA's 2008 approvals of intervenors' baseline transfers. *Id.* at 78,694.

Petitioners did not challenge intervenors' transfers in court within 60 days after publication of the 2010-2014 Proposed Rule. Instead, 76 days later (on March 9, 2009), they submitted comments to EPA arguing that the CAA and EPA regulations forbade interpollutant baseline transfers. Intervenors' MTD Exs. 11-12. The comments stated that intervenors had made "permanent inter-pollutant transfers," *id.* Ex. 11 at 2, from "HCFC-142b baseline [allowances] into permanent baseline allowances for HCFC-22," *id.* Ex. 12 at 3. On the basis of the tables supplied in the 2010-2014 Proposed Rule, petitioners identified the precise amounts of these transfers and the parties and substances involved. *Id.* Ex. 11 at 5-7; *id.* Ex. 12 at 6-9. Petitioners called on EPA to disregard the 2008 Approvals and to recalculate each company's baselines.

EPA published the 2010-2014 Final Rule on December 15, 2009. The Rule reversed EPA's longstanding policy on permanent interpollutant transfers in general, as well as its position on intervenors' transfers in particular, contending that it never had confirmed them and indeed was prohibited from doing so under Section 607(b) of the CAA. 74 Fed. Reg. at 66,419, 66,421-66,422. The HCFC-22 baseline allowances for intervenors in the 2010-2014 Final Rule did not reflect the 2008 Approvals.

D. Intervenors' Successful Challenge To The 2010-2014 Final Rule

Intervenors timely sought review of the 2010-2014 Final Rule in this Court. They argued, *inter alia*, that the rule had an impermissibly retroactive effect, in that it invalidated EPA's 2008 approvals of intervenors' permanent baseline transfers. *Arkema* Pet'rs' Br. 61-65.

On August 27, 2010, the Court granted the petitions for review. The Court agreed with intervenors that the "2003 Rule allowed these companies to trade their allocations, subject to EPA approval, * * * between regulated HCFCs on a[] * * * permanent basis" and that EPA had, in fact, "approved changes to [Arkema's and Solvay's] baseline allowances as a result of [the 2008] inter-pollutant trades." *Arkema*, 618

F.3d at 2, 7-8. The Court understood EPA's policy of approving such transfers as a permissible exercise of its interpretive discretion under the CAA. *Id.* at 6, 9-10; *see id.* at 7 (agreeing that "Congress left it to the broad discretion of EPA to determine how transfers of baselines are to be treated") (internal quotation marks omitted). But EPA could not "*chang[e]* its interpretation" of the CAA, the Court said, and then use "its *new* statutory interpretation to undo these completed transactions." *Id.* at 9-10 (emphasis added). Thus, the Court concluded that EPA's "refusal to account for [the 2008] baseline transfers of inter-pollutant allowances in the [2010-2014] Final Rule is impermissibly retroactive." *Id.* at 9. Accordingly, the Court "vacate[d] the Final Rule insofar as it operate[d] retroactively" and "remand[ed] the case for prompt resolution consistent with this opinion." *Id.* at 10.

EPA filed a petition for rehearing and rehearing en banc, which the Court denied. Orders of Jan. 21, 2011, *Arkema*, 618 F.3d 1 (No. 09-1318). Because EPA did not petition for certiorari, the Court's decision in *Arkema* is final and the law of the Circuit.

E. The Instant Petitions For Review

Petitioners were not parties to *Arkema*. They did not timely intervene in the case, but tried to intervene out of time after this Court issued its opinion. The Court denied the motions for leave to intervene. Order of Dec. 7, 2010, *Arkema*, 618 F.3d 1 (No. 09-1318).

While petitioners' unsuccessful attempt to intervene in *Arkema* was pending, they filed the instant consolidated petitions for review on October 26, 2010, arguing that the 2008 Approvals were unlawful. Each petition alleged that it had been "filed within 60 days of new grounds for petitioning for review," which supposedly "arose no earlier than August 27, 2010," the date of the *Arkema* decision. Pet. for Review 1 (Nos. 10-1347 et al.).

F. Subsequent Proceedings Before EPA

The same day that Honeywell and DuPont filed the petitions for review in this Court, they petitioned EPA to reconsider and rescind the 2008 Approvals. Intervenors' MTD Ex. 13. Petitioners acknowledged in the EPA petition that the 2010-2014 Proposed Rule had "publicly disclosed the Solvay and Arkema interpollutant transfers from earlier in 2008," *id.* at 2, but argued that "new grounds * * * arose" with this

Court's decision in *Arkema*, *id.* at 4. EPA has not yet responded to that petition.

On August 5, 2011, after this Court's decision in *Arkema* became final, EPA promulgated the Interim Final Rule. The rule "adjust[ed] baseline allowances to reflect" the "2008 inter-pollutant transfers," 76 Fed. Reg. at 47,459-47,460, which it specifically identified by date, *id.* at 47,455. As relevant here, the Interim Final Rule revised (for the 2011 calendar year) the baseline allowances for HCFC-22 and HCFC-142b, so as to reflect the 2008 Approvals that this Court held EPA could not retroactively disapprove. *Id.* at 47,467-47,468.

Petitioners' baseline allowances were unaltered by the Interim Final Rule—*i.e.*, they were identical to those set forth in the 2003 Rule and the 2010-2014 Final Rule. *See id.* However, because the Interim Final Rule (like the 2010-2014 Proposed Rule and unlike the 2010-2014 Final Rule) reflected the carrying forward of intervenors' HCFC-142b-to-HCFC-22 interpollutant baseline transfers, the *total* (*i.e.*, summed over all companies) HCFC-22 baseline increased. In order to maintain the same cap on the total quantity of HCFC-22 produced and consumed in 2011, the Interim Final Rule prescribed lower calendar-year percen-

tage multipliers in 40 C.F.R. § 82.16(a) than did the 2010-2014 Final Rule. *See id.* Thus, it was only following EPA's 2011 promulgation of the Interim Final Rule that the "aspect" of the 2008 Approvals that petitioners challenge here—reduction of the quantity of HCFC-22 that they are permitted to produce or consume after 2010, Pet'rs' Br. 19, 25 n.9, 38 n.14—came into being for the first time.

Honeywell and DuPont filed a petition for review challenging the Interim Final Rule on October 6, 2011, which was two days late. *See* Pet. for Review (No. 11-1370). Twenty days later, they voluntarily dismissed that petition. *See* Joint Stipulation of Dismissal (No. 11-1370) (filed Oct. 26, 2011).

SUMMARY OF ARGUMENT

If successful, these petitions for review would effectively nullify this Court's decision in *Arkema* by depriving intervenors of the very allowances that this Court held EPA could not retroactively disapprove. Petitioners obviously disagree with the *Arkema* decision. They tried, and failed, to intervene in *Arkema* after the decision was issued. Now, in an attempted collateral attack on the decision, petitioners seek re-

view of the 2008 Approvals. The petitions should be dismissed for lack of jurisdiction or, in the alternative, denied.

I. This Court lacks jurisdiction to consider the petitions. As a threshold matter, petitioners lack standing to challenge the 2008 Approvals, because the approvals themselves had no direct effect on them. But even supposing that the 2008 Approvals directly injured petitioners, the petitions are untimely.

Challenges to final EPA action under the CAA must be brought within 60 days after notice of the action is published in the Federal Register. Notice of the basis of petitioners' claims appeared in the Federal Register on December 23, 2008, with publication of the 2010-2014 Proposed Rule, which gave petitioners actual knowledge of the total quantity of baseline allowances transferred. Indeed, petitioners' comments to EPA admitted that the 2008 Approvals were "publicly disclosed" in the rule and discussed the approvals at length. Petitioners complain that the rule did not specify the dates and number of the transfers, but this level of detail is unnecessary, as demonstrated by the fact that none of petitioners' arguments relies on it. The petitions therefore were filed 612 days late.

If such detail *is* required, the 60-day period for filing a petition for review did not begin until August 5, 2011, with publication of the Interim Final Rule. If that is when the period began, the petitions were filed 284 days *early*.

Insofar as petitioners claim that this Court's decision in *Arkema* created new "grounds arising after [the] sixtieth day," § 7607(b)(1), that contention is inconsistent with *Arkema*'s status as law of the Circuit. *Arkema* authoritatively described the legal regime that existed under the 2003 Rule and EPA's interpretation of the CAA at the time of the 2008 Approvals. It therefore cannot have created any new grounds for reviewing the transfers. Even if Honeywell and DuPont did not appreciate the legal and practical consequences of the 2008 Approvals prior to the Court's ruling, that would not toll the 60-day limitation period. The present challenge is based on purely legal arguments that have been available all along.

II. On the merits, petitioners' central claims are foreclosed by *Arkema*. In particular, their claim that the 2008 Approvals were unlawful under the CAA runs headlong into the decision. Even putting *Arke-*

ma aside, however, there is no basis for reading the CAA as unambiguously forbidding interpollutant baseline transfers.

Petitioners' contention that EPA's issuance of the 2008 Approvals itself amounted to a change in policy without notice-and-comment rulemaking also is meritless. It was EPA's policy predating the approvals to allow permanent interpollutant transfers under the 2003 Rule. The procedures that EPA followed in approving intervenors' transfers are a matter of public record, set forth in the rule itself and a notice-and-comment rulemaking that was completed in 2006. Considering the same materials, *Arkema* held that EPA's "practice" and "policy" was to approve changes to baseline allowances as a result of interpollutant transfers. 618 F.3d at 7-9. Even assuming that there had been a relevant shift in policy, it must have taken place *before* the 2008 Approvals.

Petitioners' other complaints are makeweight. Their challenges to the adequacy of the record supporting the 2008 Approvals are largely repackaged collateral attacks on *Arkema*—*e.g.*, the claim that the 2003 Rule does not permit interpollutant baseline transfers. And those that are not are patently insubstantial—*e.g.*, petitioners' desperate assertion

that the individual who signed the 2008 Approvals was not authorized to do so.

Finally, the 2008 Approvals did not deprive petitioners of property without due process. It has never been the case that a company has a right to produce or consume any particular *quantity* of HCFCs in perpetuity. To the extent that there is a property interest in *baseline allowances*, the 2008 Approvals did not affect those belonging to petitioners, so there was no deprivation. To be sure, *any* sort of interpollutant transfer—whether calendar-year or baseline—might affect market shares. But that possibility always has been inherent in the regulatory scheme set up by the 2003 Rule, under which notice of EPA's transfer decisions ordinarily is communicated only to those privy to the transfer. And the time for challenging that rule has long since expired. Petitioners thus are unable to demonstrate a property interest, a deprivation of property, or a lack of due process.

ARGUMENT

I. THE COURT LACKS JURISDICTION

Petitioners lack standing to challenge the 2008 Approvals, and therefore this Court has no jurisdiction to consider their petitions for

review. But even assuming that they have standing, petitioners' challenge is jurisdictionally out of time.

A. Petitioners Were Not Injured By The 2008 Approvals And Thus Lack Standing To Challenge Them

The 2008 Approvals did not cause petitioners any cognizable injury. For that reason, the petitions must be dismissed on standing grounds. *See generally* EPA Br. 31-42.

Petitioners' baseline HCFC-22 allowances indisputably were (and remain) unaffected by the 2008 Approvals themselves. Petitioners do not challenge the validity of the approvals in the 2008 and 2009 period. Pet'rs' Br. 25 n.9, 38 n.14. And for good reason. The 2008 Approvals did not affect the quantity of HCFC-22 that they could produce or consume in 2008 and 2009, because the approvals did not result in any adjustment to the calendar-year percentage multipliers for those years, which already were established in the 2003 Rule.

Petitioners' sole asserted injury is that in *future* years—*i.e.*, 2010 and beyond—the consequence of the 2008 Approvals is that petitioners are not allowed to produce or consume as much HCFC-22 as they could if intervenors' baseline transfers had *not* been carried forward. Pet'rs' Br. 15-16. That injury exists, however, only because EPA provided in

other rulemaking that (1) the same baseline system would be perpetuated into the 2010-2014 period and (2) the industry-wide calendar-year percentage multipliers applicable to HCFC-22 would be decreased in those years.

Yet, as EPA explains, it could have adopted any number of methods for allocating allowances—*e.g.*, an auction system—without violating retroactivity doctrine. *See* EPA Br. 17-18, 35 (citing alternatives discussed in the 2010-2014 Proposed Rule); *see also* Post-*Arkema* Proposed Rule, 77 Fed. Reg. at 245. In particular, it was not until the Interim Final Rule decreased the calendar-year percentage multipliers applicable to HCFC-22 in 2011, *see* 76 Fed. Reg. at 47,362, 47,467, that the quantity of HCFC-22 that petitioners were permitted to produce or consume was for the first time reduced. Petitioners perhaps could have challenged the *Interim Final Rule*. But that rule is not before this Court, because petitioners sought review two days late and then voluntarily dismissed their petition.

B. If Petitioners Have Standing To Challenge The 2008 Approvals, The Petitions For Review Are Untimely

The petitions must be dismissed on the independent ground that they were filed outside the window within which challenges have to be

brought. A petition for review must be filed "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." § 7607(b)(1). The only exception to the 60-day limitation is for petitions "based solely on grounds arising after" the period closed. *Id.* This time limitation is jurisdictional, *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009); *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (per curiam), and the Court may dismiss the petitions on the basis of this jurisdictional defect without considering others that may be present, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998).

1. Notice of the 2008 Approvals appeared in the Federal Register with publication of the 2010-2014 Proposed Rule, and so the petitions were filed too late

The petitions were filed 612 days too late to challenge the 2008 Approvals. Intervenors' motion to dismiss pointed out that petitioners have conceded elsewhere that the "'Solvay and Arkema interpollutant transfers from earlier in 2008'" were "'publicly disclosed'" with publication of the 2010-2014 Proposed Rule in the Federal Register, which occurred on December 23, 2008. Intervenors' MTD at 8, 10 (quoting Ex. 13

at 2). Tellingly, petitioners do not even *try* to explain away this dispositive concession.

Instead, petitioners argue that the 2010-2014 Proposed Rule did not set forth the *text* of the 2008 Approvals. Pet'rs' Br. 18. That is true but irrelevant, since the CAA's 60-day period starts running from "the date *notice* of such promulgation, approval, or action appears in the Federal Register." § 7607(b)(1) (emphasis added). The statute thus makes clear that it is publication of the *notice* of approval, not of the approval itself, that is required. And as EPA observes, it is routine for agencies to provide notice in terse form, leaving it to potentially affected parties to ferret out the particulars. *See* EPA's Response to Intervenors' MTD at 14 (citing EPA's "applicability determinations" under the CAA).

Notice of the 2008 Approvals appeared in the Federal Register when the 2010-2014 Proposed Rule identified the effect of the interpollutant baseline transfers that EPA previously had approved by reporting increased HCFC-22 baselines and diminished HCFC-142b baselines for Arkema and Solvay. *See* 73 Fed. Reg. at 78,693-78,694. At that point, the basis of the instant petitions was available to petitioners.

This is clear beyond doubt. The comments that petitioners submitted to EPA in connection with the 2010-2014 Proposed Rule show that they were able to infer not only the *existence* of the approvals challenged here, but also (1) Arkema and Solvay's identities; (2) the types of HCFCs involved; (3) the precise amounts transferred; and (4) the potential effect of the baseline transfers on petitioners themselves. For example, Honeywell ascertained that it would experience a decrease of 2,346,010 kilograms in proposed HCFC-22 consumption allowances, Intervenors' MTD Ex. 11 at 6, and created a chart illustrating shifts in market share, *id.* at 10. For its part, DuPont, drawing on the "[b]aseline allowances taken from [the 2010-2014 Proposed Rule] that include * * * permanent * * * inter-pollutant transfers," put together a table that detailed the transfers' effect on every single company producing or consuming HCFC-22. *Id.* Ex. 12 at 9-10.[3]

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[3] Petitioners' proffered declarations concerning their knowledge of the 2008 Approvals are worded with great artfulness. They say that petitioners lacked "contemporaneous" notice of the 2008 Approvals as they were issued; that the 2010-2014 Proposed Rule did not apprise them of the "specifics" of the 2008 Approvals (by which they presumably mean their dates); and that it was not until the *Arkema* decision that they obtained "copies" of the approvals themselves. Diggs Decl. ¶¶ 6, 8; Austin Decl. ¶ 6. None of these assertions amounts to a denial that the 2010-

(footnote continued)

Given all this, petitioners' grumbling (at 19) that the 2010-2014 Proposed Rule did not "specify how many transfers EPA approved, when it did so, or under what terms" rings hollow. For similar reasons, EPA's insistence (at 41 n.6) that the Rule did not mention the "specific" transfers challenged here is also beside the point. Like all timeliness requirements, § 7607(b)(1)'s 60-day window "serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees." *NRDC v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981) (interpreting similar provision). That purpose would be disserved by petitioners' inordinately stringent "notice" standard, which would permit jurisdictional time limitations to be evaded merely by pointing to picayune bits of information that were omitted from the Federal Register. "How many" discrete transfers EPA approved, and "when it did so," are irrelevant to the challenges that petitioners raise now.[4]

2014 Proposed Rule provided petitioners with notice of every relevant fact about the 2008 Approvals that they now rely upon.

[4] Petitioners' reliance (at 19) on *Union Oil Co. v. EPA*, 821 F.2d 678 (D.C. Cir. 1987), is perplexing. That case involved the "much more detailed" requirements for a "notice of proposed *rulemaking*" under Section 307(d)(3) of the CAA, and has no bearing on what constitutes "no-

(footnote continued)

2. If Federal Register publication did not occur at the time of the 2010-2014 Proposed Rule, it occurred at the time of the Interim Final Rule, and so the petitions were filed too early

The petitions would be untimely even if petitioners and EPA were correct that there is some talismanic significance to publication of the specific timing of the 2008 Approvals. As EPA recognizes, under this definition of notice, "publication in the Federal Register of notice of the 2008 [A]pprovals * * * occurred in the context of publishing the Interim Final Rule," which took place on August 5, 2011. EPA Br. 41. That rule included the earliest Federal Register reference to the dates of intervenors' baseline transfers and EPA's approval of them via non-objection notices. 76 Fed. Reg. at 47,455. Thus, if publication of notice of the 2008 Approvals did not occur with the 2010-2014 Proposed Rule, it occurred with the Interim Final Rule. Because the petitions for review were filed almost a year *before* publication of the latter rule, they are incurably premature and therefore untimely.

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tice" of the 2008 Approvals for purposes of the judicial-review provision. *Id.* at 682 (emphasis added). As EPA explains (at 30), § 7607(d)(3) applies only to specified types of rulemaking proceedings, of which the 2008 Approvals are not one.

Section 307(b)(1)'s "within sixty days from the date" language creates a filing "window," not a filing deadline, which means that the Court lacks jurisdiction to hear petitions filed *before* publication in the Federal Register, even if there is a *subsequent* publication there. *E.g.*, *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1092 (D.C. Cir. 1997); *Waterway Commc'ns Sys., Inc. v. FCC*, 851 F.2d 401, 405-06 (D.C. Cir. 1988); *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985) (Scalia, J.). As this Court has explained, "premature suits for review of agency decisions must be dismissed even when the passage of time supplies the item missing at the time of filing." *Pub. Citizen v. NRC*, 845 F.2d 1105, 1107 (D.C. Cir. 1988). Accordingly, even if the petitions were not too *late*, they necessarily were too *early*. Either way, they are untimely.

3. *Arkema* is not an "arising after" ground that renders the petitions timely

Petitioners contend (at 19) that this Court's decision in *Arkema* "reset the filing clock" by creating new, after-arising grounds for review. That misapprehends both what judicial decisions in general do and what *Arkema* in particular held. Furthermore, the specific challenges that petitioners raise do not depend on *Arkema*; they were, to borrow

EPA's turn of phrase in another proceeding, "equally available, albeit equally unavailing," when the 2008 Approvals first were made known to them. EPA Br., *American Chemistry Council v. EPA*, Doc. No. 1322352, at 37 (No. 10-1167) (filed Aug. 3, 2011) (*ACC* EPA Br.).[5]

a. "[T]he decision of an Article III court * * * announces the law as though [it] were finding it—discerning what the law *is*, rather than decreeing what it is . . . *changed* to." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (emphasis added; internal quotation marks omitted); *see Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 & n.12 (1994) (explaining that judicial decisions set forth an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"). Thus, "when a court delivers a ruling, even if it is unforeseen, the law has not changed. Rather, the court is explaining what the law always was." *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 688 (9th Cir.

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[5] Petitioners' other arguments on this point—that they could not have challenged the 2010-2014 Proposed Rule because it was only a proposed rule and that they did not challenge the 2010-2014 Final Rule because it was favorable to them, Pet'rs' Br. 20-21—are red herrings. Petitioners could, assuming for present purposes that they had standing, have challenged the *2008 Approvals* themselves.

1997). This Court therefore must treat *Arkema* as "if it had always been the law." *Nat'l Fuel*, 59 F.3d at 1289.

Arkema in particular changed neither the law nor EPA's policy regarding the effect of the 2008 Approvals. *See* Intervenors' MTD at 17-19. Nor did it "establish[]," as petitioners assert, any new "aspect of the 2008 Approvals." Pet'rs' Br. 19. Quite the contrary: *Arkema* authoritatively declared what the 2008 Approvals always meant.

The Court found that EPA approved intervenors' interpollutant baseline transfers in 2008 as "permanent changes to the baseline" under the 2003 Rule. *Arkema*, 618 F.3d at 7-9. The Court then concluded that the 2010-2014 Final Rule was impermissibly retroactive because EPA tried to "use its new statutory interpretation to undo these completed [2008] transactions" and "revisit the baseline transactions it previously approved." *Id.* at 9-10. EPA's "fundamental justification" for its decision to ignore past interpollutant baseline transfers in the 2010-2014 Final Rule, the Court said, was its view that, *at the time they were approved*, intervenors' baseline transfers had not really been baseline transfers at all. *Id.* at 9. But the Court determined that EPA could not treat the 2008 Approvals as something other than what they *always*

had been—permanent interpollutant transfers—without impermissibly "'alter[ing] the *past* legal consequences of past actions.'" *Id.* at 7 (quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006)).

EPA is still reluctant to accept this feature of the *Arkema* decision, asserting that it never had a policy about the persistence of baseline transfers when it made the 2008 Approvals, *e.g.*, EPA Br. 34, 49, 57, and that the *Arkema* decision compelled EPA to "change" its policy, *e.g.*, *id.* at 50, 58. But *Arkema* did nothing of the sort. The Court's decision must be understood to have accurately described the legal regime pursuant to which the 2008 Approvals occurred—*i.e.*, the 2003 Rule and EPA's then-current interpretation of the CAA—as well as their legal effect. *See Rivers*, 511 U.S. at 312-13; *Nat'l Fuel*, 59 F.3d at 1289. What EPA says it *believes* it meant to do is beside the point; this Court has spoken about what EPA *did*, and that determination is the law of the Circuit.

A judicial decision like *Arkema* that declares the past legal consequences of past actions (*i.e.*, the 2008 Approvals) cannot have created any *new* or *changed* grounds for reviewing those actions. By suggesting that *Arkema* affords "new grounds" for review, petitioners necessarily

suppose that *Arkema* did something other than apply existing law to existing facts. But that is not what this Court said it did. It asked whether the 2010-2014 Final Rule violated traditional standards of retroactivity by trying to alter the meaning of the 2008 Approvals after the fact and answered that question yes. There is no daylight between petitioners' assertion that *Arkema* changed the law and the conclusion that the Court was wrong. That argument, which amounts to a collateral attack on *Arkema*, is not cognizable here.[6]

b. In any event, petitioners' claims do not in fact turn on *Arkema*. Even assuming that this Court's decision changed the law, there-

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[6] *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), and *Environmental Defense v. EPA*, 467 F.3d 1329 (D.C. Cir. 2006), are inapposite. *See* Pet'rs' Br. 21-22. Both involve the "reopener" doctrine, under which the "'period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection" on an aspect of a previously promulgated rule. *Envtl. Defense*, 467 F.3d at 1333 (quoting *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988)). But even if a "regulation may be constructively reopened when an agency or court *changes* the regulatory context," *id.* at 1334 (emphasis added), and the agency then "adhere[s] to its resolution of certain issues" without expressly reopening them, *Kennecott*, 88 F.3d at 1214, that principle—which expands the scope of an otherwise timely challenge to agency action—cannot help petitioners. There is no underlying timely petition for review; EPA has never "reopened" the 2008 Approvals; and, in any event, *Arkema* declared what the 2008 Approvals always meant and so did not effect a "change" in the regulatory regime.

fore, the petitions are not "based solely" on such after-arising grounds. § 7607(b)(1); *see* Intervenors' MTD at 11-15.

Petitioners' complaint, at bottom, is that the 2008 Approvals were illegal *when they occurred*. They challenge EPA's "legal authority for granting" the 2008 Approvals, Pet'rs' Br. 25; *see id.* at 25-29, and raise a variety of procedural challenges to the "manner" of their approval, *see id.* at 29-44, all of which are based on historical facts of record. A "claim that the [agency action] is *ultra vires*" is a "ground[] clearly available within 60 days of [its] promulgation." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995). Accordingly, "all the arguments [petitioners] make * * * were available to them" before *Arkema*, and for that reason as well, *Arkema* does not resurrect their time-barred petitions. *Id.*; *see Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 437 n.4 (D.C. Cir. 1989).

Perhaps petitioners will say that they did not fully appreciate the consequences of the 2008 Approvals before the *Arkema* decision, notwithstanding the fact that they protested these very transfers to EPA during the rulemaking process. *Cf.* Intervenors' MTD Ex. 11 at 2; *id.* Ex. 12 at 3. But that does not matter. No agency action would be safe

from challenge if a judicial decision construing it reopened the period for review. *See* Intervenors' MTD at 15-17. The "essence of judicial decisionmaking * * * necessarily involves some peril to individual expectations," *see Rivers*, 511 U.S. at 312, and confusion about the law will not toll a deadline, especially a jurisdictional one. *E.g.*, *U.S. ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2236 n.4 (2009); *Commc'ns Vending Corp. v. FCC*, 365 F.3d 1064, 1074 (D.C. Cir. 2004).

As EPA has cogently explained in another case pending before this Court, the "grounds arising after" exception is a narrow one and applies only when the challenge is based on "substantive legal arguments that were not available during the initial review period." *ACC* EPA Br. 37-38. Petitioners' challenges to the 2008 Approvals were available, and so the exception does not apply.

II. IF THE COURT HAS JURISDICTION, THE PETITIONS SHOULD BE DENIED

The petitions for review also fail on the merits. As EPA observes, petitioners in large part are trying to "repackage[e] EPA's arguments" in *Arkema*—which were rejected by this Court. EPA Br. 44. What little that is new is patently without merit.

A. The CAA Permits Interpollutant Baseline Transfers

Petitioners first assert that the CAA "clearly" forbids interpollutant baseline transfers. Pet'rs' Br. 27. Intervenors agree with EPA that the CAA "simply is not clear on its face" and certainly does not unambiguously prohibit such transfers. EPA Br. 29; *see id.* at 44-47; *see also* Interim Final Rule, 76 Fed. Reg. at 47,460; Post-*Arkema* Proposed Rule, 77 Fed. Reg. at 255.

As an initial matter, petitioners' argument is foreclosed by *Arkema*, which concluded that the CAA gave EPA the interpretive discretion to permit interpollutant baseline transfers and that EPA used that discretion in 2008 to allow them. *See* 618 F.3d at 7 ("The Agency asserts Congress left it to the broad discretion of EPA to determine how transfers of baselines are to be treated. *This is true*, and that fact entitles the Agency to *Chevron* deference * * * .") (emphasis added; internal citations and quotation marks omitted). This was not mere *dictum*, but a necessary part of this Court's holding. For if the 2008 Approvals always had been unlawful under the CAA, then EPA could not have acted retroactively by trying to recharacterize them in the 2010-2014 Final

Rule. It is only because the transfers were valid when approved that *Arkema* came out the way it did.[7]

Even if petitioners' "plain language" argument, Pet'rs' Br. 26, were not foreclosed by *Arkema*, it would be unpersuasive. Petitioners rely on Section 607(b) of the CAA, and similar language in its accompanying legislative history, which provides that EPA's rules "shall permit a production allowance for a substance for any year to be transferred for a production allowance for another substance for the *same year* on an ozone depletion weighted basis." § 7671f(b)(1) (emphasis added). They contend that the "same year" language means that only calendar-year, not baseline, *interpollutant* transfers are permitted. But in context, that language means the same thing as the limitation of *intercompany* transfers to "annual" production or consumption. § 7671f(c). It simply en-

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[7] Petitioners assert (at 26) that *Arkema* does not "expressly examine[]" the statutory language, but a court may decide a question either expressly or by necessary implication. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1394-95 (D.C. Cir. 1996) (en banc). And the proper construction of the CAA was not a question that merely lurked in the record; the parties as well as the 2010-2014 Final Rule itself discussed it at length. *See* 74 Fed. Reg. 66,421-66,422; *Arkema* Pet'rs' Br. 56-58; *Arkema* EPA Br. 48; *Arkema* Reply Br. 17-19.

sures that EPA will not authorize transfers from the present into the future, or vice versa.

Such a requirement tracks the Montreal Protocol, which imposes year-by-year limits on total ODP. If companies were allowed to transfer allowances between years, then the United States could exceed its maximum allocation in years to which allowances were transferred. Interpollutant baseline transfers, which are conducted on an ODP-weighted basis, 40 C.F.R. § 82.23(b)(3)(vi), do not implicate this concern. All they do is change the relative *mix* of HCFCs in a given year. They do not alter the total impact of that year's production on the ozone layer.

Moreover, even if one were to assume that § 7671f(b)(1) refers only to calendar-year transfers, there would be no reason to read it as exclusive. That subsection provides that EPA's rules "shall permit" certain types of interpollutant transfers; it does not say that all others are forbidden. Indeed, a different subsection, § 7671f(a), gives EPA a "single, clear directive concerning transfers of allowances," *Arkema*, 618 F.3d at 3: that it "promulgate rules" to ensure that transfers "will result in greater total reductions [of HCFCs] in each year * * * than would occur in that year in the absence of such transactions." § 7671f(a). Interpollu-

tant baseline transfers satisfy § 7671f(a)'s broader requirement, because they are ODP-weighted and a 0.1% discount is taken on all transfers. 40 C.F.R. § 82.23(b)(3)(v)-(vi). Thus, however one reads § 7671f(b)(1), § 7671f(a) affirmatively confers authority on EPA to approve interpollutant baseline transfers.

B. The 2008 Approvals Did Not Effect A Change In Policy That Required Notice-And-Comment Rulemaking

Petitioners next contend that the "2008 Approvals themselves" represented an "impermissible change" in EPA's policy on interpollutant baseline transfers. Pet'rs' Br. 30. But the administrative materials that petitioners cite—*e.g.*, statements in the materials leading up to the 2003 Rule—do not reflect a different policy. As EPA explains, they address a separate topic entirely: the complete phase-*out* of HCFCs not at issue in this case. EPA Br. 47-49.[8]

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[8] Echoing arguments that EPA presented to this Court in *Arkema*, *Arkema* EPA Br. 30-31, 52, petitioners contend (at 31-34) that interpollutant baseline transfers would allow evasion of the worst-first regime, under which HCFCs with the greatest potential to harm the ozone layer are phased out first. That is flatly untrue. Interpollutant transfers have no bearing on which *HCFCs* remain in the marketplace; they bear only on which *companies* have the right to produce and consume the remaining refrigerants. Nothing about the system could be manipulated to bring back HCFCs that EPA had already phased out. Moreover, subject to the usual arbitrary-and-capricious standard and other statutory con-

(footnote continued)

Beyond this, petitioners would have the Court ignore EPA's clear statements of policy approving interpollutant transfers in later regulatory materials from the same 2003 rulemaking. EPA explicitly stated in the 2003 Rule that "inter-pollutant transfers of * * * baseline allowances would * * * be permitted." 68 Fed. Reg. at 2835. And EPA emphasized that "[t]he permanent nature of the transfer is what makes [a baseline transfer] different from the transfer of current-year allowances." *Id.*; *see also id.* at 2823 ("Only through permanent transfers of allowances would a company's baseline allocation be changed.").

Having made the decision to allow permanent interpollutant transfers with the 2003 Rule, EPA then promulgated Form 2014.03 in 2006 to facilitate such transfers. 2006 Reporting and Recordkeeping Rule, 71 Fed. Reg. at 30,676. That form required transferors to select whether they would transfer "Baseline Year Allowances" or "Current Year Allowances." *USEPA Stratospheric Ozone Protection Program Class II Controlled Substance Transfer of Production Allowances, Ar-*

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straints, *e.g.*, § 7671e(a), EPA may control the total quantity of any HCFC produced or consumed in a given calendar year, by adjusting the calendar-year percentage multiplier for that HCFC. *See Arkema* Reply Br. 6, 20-25.

ticle 5 Allowances, or Export Allowances Forms (posted May 30, 2006), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2003-0039-0014. And EPA's official guidance accompanying the form explained that a "transfer of baseline allowances *permanently* reduces the number of allowances that the transferor will receive in future allocations." EPA, *Guidance Document for the Stratospheric Ozone Protection Program After January 1, 2005*, pt. 4, § 2.2. at 19, *available at* http://www.docstoc.com/docs/7832523/Guidance-Document-for-the-Stratospheric-Ozone-Protection-Program. The "policy" that petitioners challenge thus was in place before the 2008 Approvals.

Petitioners' assertion that the 2008 Approvals "themselves" changed EPA's policy, Pet'rs' Br. 30, is, in addition, fundamentally inconsistent with *Arkema*. As explained above (at 24-27), *Arkema* declared the legal effect of, and EPA's policy regarding, the 2008 Approvals. The procedures that EPA followed in making those approvals were established in the 2003 Rule and the 2006 Reporting and Recordkeeping Rule. Analyzing the relevant materials—*e.g.*, the 2003 Rule; the promulgated regulation, 40 C.F.R. § 82.23; Form 2014.03; and non-objection notices sent in response to the forms—*Arkema* held that EPA's

"practice under the 2003 Rule" was to "approve[] permanent changes to the baseline as a result of inter-pollutant transfers." 618 F.3d at 7-9; *see id.* at 7 ("EPA's own transfer allowance form, Form 2014.03, apparently allowed applicants to request inter-pollutant baseline transfers."). Petitioners do not (and cannot) allege that the 2008 Approvals were irregular in any fashion or obtained other than in the usual course of EPA business and in accord with those procedures. *See Lichoulas v. FERC*, 606 F.3d 769, 779 n.8 (D.C. Cir. 2010) (noting "well-settled presumption of administrative regularity").

Thus, even assuming that EPA changed its policy between the issuance of the 2003 Rule and the 2008 Approvals, the change occurred at the *latest* with the 2006 Reporting and Recordkeeping Rule that put into final form the procedures for processing the 2008 Approvals. The time for challenging that rule has, of course, expired.[9]

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[9] *Arkema* also examined materials postdating the 2008 Approvals, such as EPA's correspondence with intervenors reaffirming the transfers and the 2010-2014 Proposed Rule. But the Court did so only to shed light on the meaning of the 2008 Approvals *at the time that EPA issued them*. In any case, even if those subsequent materials did effect a change in EPA's policy, that merely would confirm that petitioners' challenge to the 2008 Approvals is misdirected.

C. Petitioners' Challenge To The Adequacy Of The Record Is Meritless

Petitioners next argue that the 2008 Approvals were made without any evidence that EPA "conducted the analyses required to meet its own regulations or engaged in reasoned decision-making." Pet'rs' Br. 35. But EPA had provided for interpollutant baseline transfers in the 2003 Rule and did not need to reiterate its reasoning. The 2003 Rule described the precise conditions under which such transfers would be denied—namely, if the transferor had insufficient allowances to conduct the transfer or had provided too little information for EPA to make that determination. *See* 40 C.F.R. § 82.23(b)(4)(ii). The non-objection notices issued by EPA indicated Arkema's and Solvay's remaining balances and showed that the requirements of the rule had been satisfied. No further "analysis" or explanation was required.

Petitioners also claim that EPA lacked the information needed to approve intervenors' transfers for 2010 and beyond, because the 2003 Rule did not provide for baseline allowances after 2009. Pet'rs Br. 36. But as EPA explains (at 52-53), the regulations authorize approval of a transfer as long as the company has "allowances sufficient to cover the transfer claim *on the date the transfer claim is processed*." 40 C.F.R.

§ 82.23(b)(4) (emphasis added). Intervenors had baseline allowances in 2008, when the approvals were issued, and that is enough.

What petitioners are really challenging is not the approvals as such, but the fact that intervenors' baseline transfers were carried forward in the 2010-2014 baselines. In this vein, they assert that the "interpollutant transfer regulations" did not permit EPA to approve the transfers as permanent. Pet'rs Br. 38. That, however, is just another way of saying that *Arkema* was wrong.

Arkema squarely held that the 2003 Rule authorized interpollutant baseline transfers, the distinguishing feature of which was their "permanent" nature, and that EPA validly approved intervenors' transfers pursuant to that rule. 618 F.3d at 9. Any claim that the 2008 Approvals or their perpetuation was contrary to EPA regulations runs straight into the holding of *Arkema*, as EPA appropriately recognizes. EPA Br. 52 n.7. Having chosen to retain the baseline system, EPA could not retroactively invalidate intervenors' past transactions that had altered the baselines.

Finally, petitioners assert in a footnote (at 38 n.15) that the 2008 Approvals are invalid because there is no evidence that they were

signed by individuals with the authority to do so. EPA explains (at 54) why this is irrelevant: a transfer is deemed approved by operation of law unless timely *disapproved* by an authorized individual. In any event, "Administrator" is a defined term, which includes his or her "authorized representative." 40 C.F.R. § 82.3. There is no evidence—and certainly none sufficient to overcome the presumption of administrative regularity—that the Chief of EPA's Stratospheric Program Implementation Branch usurped the Administrator's authority. *See United States v. McCallum*, 970 F.2d 66, 69 (5th Cir. 1992) (proper authorization and delegation "may be presumed"); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 462 (D.C. Cir. 1967); *Perlmutter v. CIR*, 373 F.2d 45, 46 (10th Cir. 1967).

D. The 2008 Approvals Did Not Deprive Petitioners Of Property Without Due Process

Petitioners' final challenge to the 2008 Approvals is based on the Due Process Clause. This claim fails because petitioners cannot demonstrate a cognizable property interest, a deprivation of property, or a lack of due process.

1. To begin with, nobody—neither petitioners nor intervenors—has a property interest in the particular quantity of HCFCs that it may

consume or produce. Regardless of changes to the baselines, EPA indisputably can alter the calendar-year percentage multipliers to manage the number of calendar-year allowances available, and thus the amount of HCFCs produced or consumed in any year. *See* 68 Fed. Reg. at 2823 ("percentage of baseline allowances" can be "reduced to ensure compliance with the Protocol cap"); *see also* 40 C.F.R. § 82.16.

Petitioners try to make hay out of *Arkema*'s reference to "vested rights." Pet'rs Br. 39. Read in context, however, that phrase means only that EPA could not change the *past* legal consequences of the 2008 Approvals and pretend that intervenors' baseline transfers had in fact been calendar-year transfers all along. 618 F.3d at 7. *Arkema* makes clear that EPA could have implemented other rules that "thwart[]" a company's "unilateral business expectations" or otherwise "adjust[ed] its distribution of allowances" without running afoul of retroactivity principles. *Id.* at 8, 10. What EPA could *not* do was undo intervenors' baseline transfers after they already had been approved. *Id.* at 10.

In short, nothing in *Arkema* gives any company a "vested right" in being able to produce or consume a particular *quantity* of HCFC-22 or in a particular *share* of that market. And to the extent that a company

might have a property interest in its *baseline* allowances, the 2008 Approvals did not decrease the baseline allowances of DuPont or Honeywell. *See supra* pp. 5, 16.

2. To be sure, Honeywell and DuPont face additional competition in the HCFC-22 market now that EPA has given effect to the 2008 Approvals in the retained baseline system via a separate rulemaking—the Interim Final Rule. But the Interim Final Rule is not before this Court.

Moreover, the possibility of shifts in market share without the opportunity for competitors to comment has always been inherent in the 2003 Rule, under which notice of EPA's allowance of *any* interpollutant transfer—whether calendar-year or baseline—is directly communicated only to parties to the transfer. 40 C.F.R. § 82.23(b)(4); 68 Fed. Reg. at 2833. Petitioners' due process argument thus attacks the validity of the entire HCFC transfer regime, not the 2008 Approvals. Yet petitioners—which are sophisticated participants in a highly regulated industry and who accepted their baseline allowances subject to this regulatory scheme—could not possibly have had a "legitimate claim of entitlement," *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), to constant

market share in perpetuity. The 2008 Approvals therefore did not deprive petitioners of any right that EPA had ever granted them.

In addition, as EPA notes (at 57), the 2003 Rule made clear that notice of EPA's transfer decisions is not provided to other industry participants. If petitioners believed that these procedures—the same ones used for the 2008 Approvals, *see supra* pp. 34-36—were inadequate, they were required to bring their challenge then. Neither courts nor agencies are obligated to "review [a] late-filed due process claim because it raises a constitutional issue." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003). "[T]he nature of the claim itself does not determine whether [a] jurisdictional bar applies," and even a "constitutional challenge" may be forfeited. *Daniels v. Union Pac. R.R.*, 530 F.3d 936, 943 (D.C. Cir. 2008). That is the case here.[10]

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[10] Contrary to petitioners' suggestion (at 43), *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997), does not hold that a constitutional challenge to a regulation is always timely. Instead, it stands for the unexceptional proposition that a party may pursue as-applied challenges to a rule when the rule is enforced against it. *See Indep. Cmty. Bankers v. Bd. of Governors*, 195 F.3d 28, 34 (D.C. Cir. 1999). Furthermore, the Court's subsequent cases interpreting *Graceba* have limited it to the narrow circumstance in which (1) the petitioner timely sought reconsideration before the agency; (2) the petitioner sought to "supplement" that reconsideration petition, *Graceba*, 115 F.3d at 1041, with a new constitutional claim based on an "intervening Su-

(footnote continued)

3. In any event, petitioners received ample process. They filed comments with EPA on the 2003 Rule and the 2010-2014 Proposed Rule. They could have participated in *Arkema*, and in fact tried to intervene out of time.[11] And they submitted comments on, as well as a petition for reconsideration of, the Interim Final Rule with EPA, and then an untimely petition for review in this Court. Amidst this embarrassment of riches, petitioners can hardly complain that they lacked the opportunity to be heard.

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preme Court decision[,] rather than an argument based on the same record," *Am. Ass'n of Paging Carriers v. FCC*, 442 F.3d 751, 756 n.11 (D.C. Cir. 2006); (3) the agency's "dismissal of the [constitutional] argument as untimely was improper," *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003); (4) the agency reopened the proceeding by also rejecting the claim on the merits, *id.*; and (5) the petitioner timely petitioned the Court for review of the agency's denial of reconsideration. It is therefore obvious that *Graceba* does not apply here.

[11] Having successfully convinced EPA to deprive intervenors of their allowances in the 2010-2014 Final Rule, petitioners could not have believed that intervenors would not challenge that rule in this Court. And as frequent litigants themselves, petitioners surely knew that "in cases involving informal agency rulemaking * * * , a petitioner or appellant need serve copies only on the respondent agency," not on every participant in the rulemaking. D.C. Cir. R. 15(a).

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction or, in the alternative, denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Cir. R. 32(a)(2)(C) because it contains 8,747 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1). I further certify that 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 14-point Century Schoolbook font using Microsoft Word.

Dated: April 6, 2012

/s/ Dan Himmelfarb
Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on April 6, 2012, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: April 6, 2012

/s/ Dan Himmelfarb
Dan Himmelfarb