HONEYWELL INTERNATIONAL, INC. and E.I. DuPont de Nemours and Company, Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, Respondent

Arkema Inc., et al., Intervenors.

Nos. 10–1347, 10–1348, 10–1349, 10–1350.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 7, 2012.

Decided Jan. 22, 2013.

Background: Environmental Protection Agency (EPA) incorporated competitors prior hydrochlorofluorocarbon (HCFC) transfers into subsequent baseline allowances which reduced petitioning manufacturers' HCFC market share and allowances under cap-and-trade program. Manufacturers petitioned for judicial review.

Holdings: The Court of Appeals, Kavanaugh, Circuit Judge, held that:

(1) manufacturers suffered injury in fact that was concrete and particularized and fairly traceable;

(2) prior decision by Court of Appeals constituted after-arising ground to file challenge to EPA action; and

(3) permanent interpollutant transfers are permissible under the Clean Air Act cap-and-trade program.

Petition denied.

Brown, Circuit Judge, filed dissenting opinion.

1. Environmental Law ⚿656

Manufacturers suffered injury in fact that was concrete and particularized and fairly traceable, as required to have standing for petition to judicially review decision by Environmental Protection Agency (EPA) to incorporate competitors' prior hydrochlorofluorocarbon (HCFC) transfers into subsequent baseline allowances under Clean Air Act cap-and-trade program, since decision decreased manufacturers' market share and allowances of HCFC. Clean Air Act, §§ 605–607, 42 U.S.C.A. §§ 7671d, 7671f.

2. Environmental Law ⚿671

Prior decision by Court of Appeals, holding that Environmental Protection Agency (EPA) had to honor transactions that it previously had approved under Clean Air Act cap-and-trade program and had to recognize prior transfers in setting baseline allowances for hydrochlorofluorocarbons (HCFCs), constituted after-arising grounds for other manufacturers to file challenge to EPA action honoring those prior transfers, and thus petition for judicial review filed within 60 days of that decision was timely, since EPA previously had viewed transfers as lasting only for limited time, but after decision prior interpollutant transfers were permanent. Clean Air Act, § 307(b)(1), 42 U.S.C.A. § 7607(b)(1).

3. Environmental Law ⚿287

Permanent interpollutant transfers are permissible under the Clean Air Act cap-and-trade program so long as the Environmental Protection Agency (EPA) continues to set baselines by considering the historical usage of HCFCs by participating companies. Clean Air Act, § 607(b)(1), 42 U.S.C.A. § 7671f(b)(1).

On Petitions for Review of Rules of the Environmental Protection Agency.

Timothy K. Webster argued the cause for petitioners. With him on the briefs were James R. Wedeking, Richard Ayres, Jessica Olson, Chet M. Thompson, Robert J. Meyers, and David Y. Chung.

Perry M. Rosen, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief was Diane E. McConkey, Attorney. Matthew R. Oakes, Trial Attorney, entered an appearance.

Dan Himmelfarb argued the cause for intervenors. With him on the brief were John S. Hahn, Roger W. Patrick, Brian J. Wong, William J. Hamel, Roscoe C. Howard Jr., and Gia V. Cribbs.

Before: ROGERS, BROWN, and KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Circuit Judge KAVANAUGH, with whom Circuit Judge ROGERS joins.

Dissenting opinion filed by Circuit Judge BROWN.

KAVANAUGH, Circuit Judge:

Under the Clean Air Act, the Environmental Protection Agency administers a cap-and-trade program regulating the production and consumption of hydrochlorofluorocarbons, a class of ozone-depleting pollutants. (We frown on excessive use of acronyms, but in a case involving a 24–letter word, we think it appropriate to use HCFCs for hydrochlorofluorocarbons.) This cap-and-trade program entails overall caps on production and consumption of various HCFCs for each year, as well as EPA-administered baseline allowances of HCFCs for each participating company. Companies are then permitted to transfer their allowances, subject to certain statutory and regulatory restrictions.

Honeywell and DuPont, whom we refer to collectively as Honeywell, complain that certain 2008 transfers made by their competitors Arkema and Solvay were deemed to permanently increase those competitors' future baseline allowances of HCFC–22. Because there is an overall cap on HCFC–22 production, this is a zero-sum system: The increased allowances to Arkema and Solvay in turn reduced Honeywell's market share and allowances of HCFC–22. The problem for Honeywell here is that this Court concluded in *Arkema Inc. v. EPA* that those permanent transfers were valid under the Clean Air Act. 618 F.3d 1, 6–9 (D.C.Cir.2010). Honeywell believes that *Arkema* was incorrectly decided. Absent en banc review, we must adhere to circuit precedent. And because Honeywell's other challenges to the 2008 transfers are meritless, we deny the petitions for review.

I

The Clean Air Act gradually phases out all HCFCs over five regulatory periods spanning to 2030. *See* 42 U.S.C. §§ 7671d(c), 7671e(b). In the meantime, the Act regulates HCFCs through a cap-and-trade program administered by the Environmental Protection Agency. There are overall caps on production and consumption of each HCFC for each year. And for each regulatory period, EPA allots a baseline allowance for each regulated HCFC to each company participating in the cap-and-trade program. EPA has always set baseline allowances by considering historical usage of HCFCs by participating companies.

The Clean Air Act permits companies to transfer their allowances. Two kinds of transfers are permitted—*interpollutant* transfers and *intercompany* transfers. In an interpollutant transfer, a company swaps its allowance of a particular HCFC for a particular year for its allowance of a different HCFC for the same year. *See* 42 U.S.C. § 7671f(b)(1). In an intercompany transfer, two companies swap allowances of the same HCFC. *See* 42 U.S.C. § 7671f(c). Intercompany transfers may permanently affect the trading companies' baseline allowances of that HCFC, with one company having a higher allowance

and one having a lower allowance. 76 Fed.Reg. 47,451, 47,459–60 (Aug. 5, 2011).

In 2008, EPA approved the interpollutant transfers at issue in this case. Arkema made transfers swapping its allowance of HCFC–142b for an increase in its allowance of HCFC–22. Solvay did the same.

In 2009, EPA set baseline allowances for the 2010–2014 regulatory period. EPA did not recognize the 2008 interpollutant transfers by Arkema and Solvay in setting their baseline allowances for HCFC–22. 74 Fed.Reg. 66,412, 66,419 (Dec. 15, 2009). Arkema and Solvay then challenged EPA's rule. In *Arkema Inc. v. EPA,* this Court held that EPA had to honor the transactions EPA previously approved and had to recognize the 2008 transfers in setting Arkema and Solvay's baseline allowances for HCFC–22 for 2010–2014, at least so long as EPA continued to set baselines by considering the historical usage of HCFCs by participating companies. 618 F.3d 1, 6–9 (D.C.Cir.2010).

Following *Arkema,* EPA incorporated the 2008 transfers into the baseline allowances of HCFC–22 for 2010–2014, thereby reducing Honeywell's HCFC–22 market share and allowances. 76 Fed.Reg. at 47,459. Honeywell filed a petition for review in this Court, challenging the 2008 transfers that formed the basis for the new baseline HCFC–22 allowances for 2010–2014. EPA, along with intervenors Arkema and Solvay, respond that Honeywell lacks standing; that Honeywell's petitions are untimely; and that our decision in *Arkema* forecloses Honeywell's claims. We conclude that we have jurisdiction and that the petitions are timely. But based on *Arkema,* we deny the petitions on the merits.

II

[1] The initial question is whether Honeywell has standing to challenge EPA's approval of the 2008 interpollutant transfers by Arkema and Solvay and the transfers' corresponding effect on the baseline allowances for the 2010–2014 period. To establish standing, Honeywell must show a cognizable injury in fact that is concrete and particularized and actual or imminent; that its injuries are fairly traceable to EPA's allegedly unlawful conduct; and that a favorable ruling will likely remedy its injuries. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Honeywell has suffered an injury in fact. The decrease in Honeywell's market share and in allowances of HCFC–22 is a concrete and particularized injury. Honeywell's injury is fairly traceable to the now-permanent 2008 interpollutant transfers by Arkema and Solvay because the injury would not have occurred but for the 2008 transfers. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74–75, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *LaRoque v. Holder,* 650 F.3d 777, 789 (D.C.Cir.2011); *Community Nutrition Institute v. Block,* 698 F.2d 1239, 1247 (D.C.Cir.1983) ("A plaintiff need only make a reasonable showing that 'but for' defendant's action the alleged injury would not have occurred."). And because Honeywell's market share and allowances of HCFC–22 would not have decreased but for the now-permanent 2008 transfers, invalidating the 2008 transfers would remedy Honeywell's injuries. Honeywell has therefore satisfied all of the requirements of standing.

[2] EPA relatedly suggests that Honeywell's challenge is untimely. We disagree. Although many challenges to EPA action under the Clean Air Act must be filed within 60 days from the date that the notice appears in the Federal Register, challenges "based solely on grounds arising after" the expiration of the 60–day period are permitted so long as they are

filed within 60 days of the new grounds. 42 U.S.C. § 7607(b)(1).

Here, this Court's decision in *Arkema* constitutes after-arising grounds, and Honeywell filed within 60 days of that decision. Honeywell could not have raised its merits arguments until our decision in *Arkema.* In particular, several of Honeywell's arguments depend on the premise that the 2008 interpollutant transfers by Arkema and Solvay were permanent. Prior to *Arkema,* however, EPA viewed the transfers as lasting only for a limited time—that is, not permanently. *Arkema* changed the legal landscape on that issue, which suffices to constitute after-arising grounds under the circumstances of this case.

Having resolved the various threshold arguments in Honeywell's favor, we turn to the merits of Honeywell's arguments.

III

[3] On the merits, Honeywell's main contention ultimately boils down to a claim that *permanent* interpollutant transfers are prohibited by Section 607 of the Clean Air Act. Honeywell notes that Section 607 permits *interpollutant* transfers of an allowance of one HCFC for an allowance of a different HCFC only "for the same year." 42 U.S.C. § 7671f(b)(1). Honeywell explains, moreover, that there is no similar "for the same year" limitation on *intercompany* transfers. *See id.* at § 7671f(c). Intercompany transfers may permanently affect baseline allowances. Honeywell thus argues that interpollutant transfers are good only for the same year in which the transfers are made and should not be permanent or affect a company's baseline allowance for a new regulatory period.

Put simply, Honeywell's claim is foreclosed by this Court's decision in *Arkema. Arkema* held that EPA, having approved the 2008 interpollutant transfers, had to honor them in the future, at least so long as EPA continued to set baselines by considering the historical usage of HCFCs by participating companies. *Arkema,* 618 F.3d at 6–9. To reach that conclusion, as EPA correctly explains in its brief here, the *Arkema* Court necessarily concluded that permanent interpollutant transfers were permissible under the statute. That conclusion controls in this case.

Honeywell disagrees strongly with this Court's decision in *Arkema.* For that matter, EPA says that it too disagrees with *Arkema.* (Intervenors Arkema and Solvay are of course happy with *Arkema.*) Absent en banc review, we are bound by the *Arkema* decision.

In a roundabout attempt to undermine the now-permanent 2008 transfers, Honeywell also raises longshot procedural challenges to the 2008 transfers themselves. The basic answer to those various arguments is that Honeywell had notice and an opportunity to present its views during EPA's pre-*Arkema* regulatory proceedings, during the *Arkema* litigation, and during EPA's subsequent post-*Arkema* proceedings. Because Honeywell had notice and an opportunity to comment, and EPA's reasonable interpretation of its regulation controls, *see Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), its procedural objections to the 2008 transfers are unavailing. As is apparent from the briefing, Honeywell's real problem here is the *permanence* of the 2008 interpollutant transfers by Arkema and Solvay and the altered HCFC–22 allowances for the 2010–2014 period. In other words, Honeywell's real problem is *Arkema.* But a panel cannot remedy that problem.

* * *

We deny the petitions for review.

So ordered.

BROWN, Circuit Judge, dissenting:

In *Arkema*, this Court held that EPA changed the legal landscape by *not* giving effect to the 2008 transfers in the new regulatory period—in other words, that the 2008 transfers had always been permanent. *See* 618 F.3d at 8–9. Thus, *Arkema* cannot constitute after-arising grounds and the petitions for review are untimely.

TC RAVENSWOOD, LLC, Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent

AER NY–Gen, LLC, et al., Intervenors.

No. 11–1258.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 7, 2012.

Decided Jan. 22, 2013.

Background: Energy supplier petitioned for review of an order of the Federal Energy Regulatory Commission (FERC), 2010 WL 3986561, that allowed certain rates to be reduced as a corrective to the exercise of "supply-side" market power, but that declined to protect suppliers from "buy-side" practices that allegedly artificially depressed rates.

Holdings: The Court of Appeals, Williams, Senior Circuit Judge, held that:

(1) supplier suffered injury caused by FERC order, as required for Article III standing to challenge order, but

(2) FERC acted within its discretion in issuing order.

Petition denied.

1. Electricity ⚿11.3(7)

Energy supplier suffered injury caused by order of Federal Energy Regulatory Commission (FERC), as required for Article III standing to challenge order, which declined to protect suppliers from "buy-side" practices that allegedly artificially depressed rates; supplier's single generator was not located in geographical market in which it sought protection from depressed rates, but supplier occasionally made sales into that market, and even if supplier had other avenues for seeking redress, denying judicial review of FERC order would at a minimum expose supplier to some delay. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2. Electricity ⚿11.3(6)

Federal Energy Regulatory Commission (FERC) acted within its discretion in issuing order that allowed certain rates to be reduced as corrective to exercise of "supply-side" market power without also protecting energy suppliers from "buy-side" practices that allegedly artificially depressed rates; there was no evidence that suppliers generally would be unable to recover their costs due to rate reduction, and the state independent system operator (ISO) had already initiated an internal stakeholder procedure in which suppliers could pursue remedies for allegedly artificially depressed rates. Electric Utility Companies Act, § 205, 16 U.S.C.A. § 824d.

3. Administrative Law and Procedure ⚿754.1

An agency abuses its broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and policies, when its manner of proceeding significantly prejudices a party or unreasonably delays a resolution.

On Petition for Review of Orders of the Federal Energy Regulatory Commission.