No. 09-1318 (consolidated with No. 09-1335)

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

ARKEMA INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review from the United States Environmental Protection Agency

PETITIONERS' JOINT RESPONSE TO RESPONDENT'S PETITION FOR REHEARING EN BANC

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Pursuant to this Court's Order of November 29, 2010, Petitioners Arkema Inc. ("Arkema"), Solvay Fluorides, LLC, and Solvay Solexis, Inc. (collectively, "Solvay"), hereby respond to and oppose the petition for rehearing en banc of Respondent U.S. Environmental Protection Agency ("EPA" or "Agency").

INTRODUCTION

In Spring 2008, EPA approved Petitioners' applications to transfer their allowances to produce and consume hydrochlorofluorocarbons ("HCFCs") from one chemical to another. In December 2009, based on a new interpretation of an ambiguous statute, EPA announced that those past transfers were, and always had been, invalid. The panel found that about-face to be impermissibly retroactive.

EPA seeks rehearing on the grounds that the panel's decision (1) conflicts with this Court's prior decisions and (2) raises questions of exceptional importance. *Cf.* Fed. R. App. P. 35(a). The Agency is mistaken on both points.

First, the panel relied on precisely the same retroactivity principles as the prior cases with which its decision supposedly conflicts (such as *DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997)). EPA argues that the panel erred in *applying* those principles to a different regulatory regime and different circumstances. That fact-bound argument does not merit en banc rehearing; in any case, it is incorrect.

Second, EPA's claim of exceptional importance is belied by its own submissions. The Agency obtained an extension of time for filing its petition so that it could "conduct[] a time-consuming process of surveying other government

programs to assess the full potential breadth of the Court's decision." EPA's Mot. for a 30-Day Extension 3. Having completed that process, the Agency is unable to identify a *single* other program affected by the decision. That tacit concession, by itself, would be sufficient reason to deny the petition.

EPA does argue that *this* program has been adversely affected, because Arkema's and Solvay's competitors (which were allocated extra HCFC allowances in Petitioners' place) are now claiming that *their* allowances cannot be reduced. But en banc review cannot be warranted just because the companies that benefited from EPA's error want to protect their windfall. In any event, those claims—like much of EPA's petition for rehearing—are based on an aggressive and implausible overreading of the panel's opinion. The panel did not grant Petitioners the right to consume a certain amount of HCFCs for all time. It concluded only that EPA, having chosen to continue in force the existing HCFC allowance system, could not retroactively undo transfers the Agency previously had approved.

EPA offers no other reason to find exceptional importance here. There is no circuit conflict (*see* Fed. R. App. 35(b)(1)(B))—nor could there be, as this Court has exclusive jurisdiction over national emission rules under the Clean Air Act (*see* 42 U.S.C § 7607(b)(1)). There is also no public interest at stake, as the panel's decision leaves the *total* amount of ozone-depleting substances unchanged (and under EPA's control); redistributing the allowances has no environmental impact. The panel decision affects, on a one-time basis, only the relative market shares of

companies within a regulated industry. That kind of intramural dispute raises no issue of exceptional importance, and the petition should be rejected.

STATEMENT

A. Statutory and Regulatory Framework

The Clean Air Act ("Act") creates a cap-and-trade program to limit total U.S. output of HCFCs. 42 U.S.C. §§ 7671c(d), 7671f. Under the Act, EPA must issue allowances for HCFC production and consumption, and it must recognize transfers of allowances between different companies or pollutants. § 7671f(a)-(c).

EPA issued implementing regulations in 2003. Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export, 68 Fed. Reg. 2820 (Jan. 21, 2003) ("2003 Rule"). To avoid "uncertainty in the industry," the 2003 Rule assigned various companies "baseline" allowances "on a one-time basis" representing their shares of the then-existing market. *Id*. at 2823-24; *see also* 40 C.F.R. §§ 82.17, .19. To determine a company's allowance for a specific calendar year, EPA would multiply that company's baseline allowance by a fixed percentage stated in the Rule. § 82.16. Thus, EPA could reduce the total output of HCFCs—and each company's allocation *pro rata*—simply by decreasing the percentages over time. EPA explained that each company's allocation would "remain the same from * * * one calendar year to the next," unless "the percentage of baseline allowances [were] reduced to ensure compliance with the [Montreal]

Protocol cap," or the baselines themselves were changed "through permanent transfers of allowances." 68 Fed. Reg. at 2823.

EPA permitted transfers of allowances between companies and between HCFCs. § 82.23(a)-(c). (Because these transfers cannot increase total ozone depletion, the relative distribution of allowances among companies has no environmental consequence.) A company could transfer an allowance for a specific calendar year, or a portion of its baseline allowance (*e.g.*, the right to produce 1 kg of HCFC-22 per year, as diminished by the percentages in § 82.16). *See* § 82.23(d). While a company could not trade calendar-year allowances from one year to another, EPA allowed "trades of annual *and* permanent allowances between HCFCs *and* between companies" (Ex. 1, at 1 (emphasis added)), so as to achieve "maximum flexibility" in the marketplace (68 Fed. Reg. at 2833). What distinguished these baseline trades from calendar-year trades was "[t]he *permanent* nature of the [baseline] transfer." *Id*. at 2835 (emphasis added).

B. Petitioners' Baseline Transfers

Petitioners hold substantial baseline allowances to produce and consume HCFC-22 and HCFC-142b. In April 2008, Arkema applied to convert baseline production and consumption allowances from HCFC-142b to HCFC-22. JA 26. EPA responded with "non objection notices" approving Arkema's "baseline" transfers. Exs. 2-3. In two subsequent letters, EPA explicitly confirmed that Arkema's baseline (not just calendar-year) allocations reflected the 2008 transfers.

Exs. 4-5. Solvay, too, chose to convert HCFC-142b baseline allowances to HCFC-22; EPA approved those transfers in February and March 2008. JA 3, 11; Exs. 6-7.

C. The Proposed Rule and the Final Rule

On December 23, 2008, EPA initiated a rulemaking to reduce HCFC output. Rather than abandon the existing baseline system (and distribute allowances by auction or other means), EPA preferred to "apportion company-specific baselines * * * equivalent to those currently published * * *, adjusted as necessary to reflect permanent transfers of baseline allowances." Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export, 73 Fed. Reg. 78,680, 78,686 (Dec. 23, 2008) ("Proposed Rule"). The Agency then would "grant[] a certain percent of [each] baseline as necessary to achieve compliance with the cap." *Id*. EPA noted that "[b]oth inter-pollutant *and* inter-company transfers of allowances are possible, either on a calendar-year *or* permanent basis" (*id*. at 78,701 (emphasis added)); it therefore listed current baseline figures "reflect[ing] adjustments resulting from approved inter-pollutant and/or inter-company transfers of baseline allowances (i.e., permanent rather than calendar-year allowances)" (*id*. at 78,693). The figures printed in the Federal Register reflected Petitioners' baseline transfers. *Id*. at 78,694.

Some of Petitioners' competitors objected to the recognition of these transfers. They raised a novel argument: that the Clean Air Act prohibited inter-pollutant baseline transfers. *See* Ex. 8. On December 15, 2009, EPA reversed its

prior stance and adopted this new interpretation of the Act. Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 74 Fed. Reg. 66,412, 66,421 (Dec. 15, 2009) ("Final Rule"). Rather than acknowledge the change, EPA claimed that its past statements were all "consistent with this interpretation." *Id*. at 66,422. Interpreting the Act to require "that all inter-pollutant transfers * * * be conducted on a yearly—and thus temporary—basis," the Agency applied that interpretation to Petitioners' prior baseline transfers, effectively recharacterizing them as calendar-year transfers. *Id*. It prescribed a baseline allowance allocation "reflect[ing] the changes * * * from inter-company transfers" only (*id.*), with fewer HCFC-22 allowances allocated to Petitioners and more given to their competitors.

D. The Panel's Decision

Petitioners sought review, and the panel vacated the Final Rule in part.

First, construing the 2003 Rule and EPA's statements, the panel concluded that the Agency had permitted inter-pollutant baseline transfers before disallowing them in the Final Rule. The panel found that EPA repeatedly had confirmed that Petitioners' allowance transfers were "baseline" transfers, both in the non-objection notices and in two letters to Arkema. *Arkema Inc. v. EPA*, 618 F.3d 1, 7-8 (D.C. Cir. 2010). EPA's counsel's interpretation, that the letters concerned mere proposals, was "not an accurate reading of the letters, which purported to represent the EPA's assessment of the current status of Arkema's allowances." *Id*. at 8.

Moreover, the Proposed Rule had explicitly "include[d] the inter-pollutant transfers" to describe the *existing* baseline-allowance system. *Id*. "[E]ven affording the EPA the deference it is due," the panel concluded that "Petitioners have clearly demonstrated from the record that the EPA's interpretation of [the Act] did change between the 2003 Rule and the Final Rule." *Id*. at 9.

Second, the panel found that the Final Rule was impermissibly retroactive because it applied this changed interpretation to past transactions. The panel agreed that, to be retroactive, a regulation must not merely "unsettle[] Petitioners' expectations" (*id.* at 10), but must "attach[] new legal consequences to events completed before its enactment" and "'alter[] the *past* legal consequences of past actions'" (*id*. at 7 (second alteration in original; quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006))). It also agreed with EPA's new position that the Act was ambiguous and that "'Congress [had] left it to the broad discretion of EPA to determine how transfers of baselines are to be treated.'" *Id*. (quoting Resp's Br. 48). But the panel held that the Agency, having used its discretion to "approve[] permanent changes to the baselines," could not then "use its new statutory interpretation to undo these completed transactions." *Id*. at 9. The Agency's various policy rationales for the change might "shield the Agency's *prospective* application of the Final rule from an arbitrary and capricious challenge"; but EPA's "fundamental justification" for recharacterizing *past* transactions was its revised interpretation of the Clean Air Act. *Id.* While the

Agency could decide "to adjust its distribution of allowances" in the future, that ability to change course "did not give the EPA an opportunity to revisit the baseline transactions it previously approved." *Id*. at 10.

ARGUMENT

The panel's decision has two parts. It concluded that EPA initially approved Petitioners' inter-pollutant baseline transfers and that EPA's later decision to *dis*approve those transfers was impermissibly retroactive. The government challenges both conclusions. But both are correct, and neither warrants rehearing.

First, whether the panel correctly read the record to find that EPA changed its interpretation of the Act is a fact-bound question that cannot affect any other case. The panel properly extended deference to EPA, but, based on the totality of the record, found the Agency's theory too implausible to credit. There is no error in that holding.

Second, whether the panel correctly found that *this* agency action was impermissibly retroactive is equally fact-bound and unsuitable for rehearing en banc. The panel stated the traditional standards of retroactivity, applied them to the facts of this case, and made no new law on the topic. Its decision has no prospective significance, because, as the panel emphasized, EPA may change course *prospectively* and adopt another lawful method of distributing allowances for the future. The decision, moreover, does not affect any other government program. Nor does it affect the public interest: the total output of HCFCs remains

under EPA's control, and the decision has no environmental impact on its own. The only parties affected by the decision are the other companies in the allowance system, whose complaints about losing a windfall do not raise any issue of exceptional importance. Finally, the panel's holding is not only consistent with the decisions of this Court, narrowly limited, and without prospective significance to the HCFC program or to any other regulatory regime; it is also correct.

A. The Panel's Reading of the Record Does Not Merit En Banc Rehearing

The panel found that EPA had approved Petitioners' permanent inter-pollutant transfers before disapproving them later. That finding is entirely fact-bound, turning on the interpretation of forms, letters, and other documents in the record. The only broader issue involved is whether EPA receives deference in interpreting its own regulations; the panel agreed that it does. 618 F.3d at 9. But "deference" does not mean that EPA must always prevail, particularly if a document's "meaning is clear on its face." *Howmet Corp. v. EPA*, 614 F.3d 544, 549 (D.C. Cir. 2010) (internal quotation marks omitted). The panel found that EPA's statements in the 2003 Rule, the Proposed Rule, and its letters to Petitioners "clearly demonstrated" that its position had changed. 618 F.3d at 9. There is no need to convene the en banc Court to confirm whether that assessment is correct.

In any case, the panel got it right. As of the time of the Proposed Rule, EPA still understood 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. That is why it had approved and confirmed Petitioners' permanent inter-pollutant transfers, before recharacterizing them later. *See* Exs. 2-7.

B. The Panel's Retroactivity Holding Does Not Merit En Banc Rehearing

1. The holding is fact-bound

In invalidating the Final Rule, the panel applied settled retroactivity principles to a unique regulatory regime and administrative record. It is telling, in that connection, that the panel majority and the panel dissent relied on the very same legal principles, disagreeing only on how they should be applied in this case. Both the majority and the dissent agreed, for example, that a change in law is not retroactive simply because it upsets prior expectations (*see* 618 F.3d at 10 (opinion of the Court); *id*. at 12 (Randolph, J., dissenting)); rather, the change must impair "rights acquired under existing laws" (*Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal quotation marks omitted); *see Arkema*, 618 F.3d at 7 (majority); *id*. at 12 (dissent)), or "attach[] new legal consequences to events completed before its enactment" (*id*. at 7 (majority); *see also id*. at 12 (dissent)).

These same principles are expressed in the prior decisions on which EPA relies. In *DirecTV*, the FCC adopted a new method of allocating available satellite channels, auctioning off the channels rather than distributing them *pro rata* to existing licensees. The Court recognized that the change had upset expectations (110 F.3d at 825), but found that it was not retroactive, because it did not alter the

status of "'transactions already completed'" (*id.* at 825-26 (quoting *Landgraf*, 511 U.S. at 280)). The same is true of (*i*) the station ownership limits at issue in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), which "alter[ed] the future effect" but not "the past legality" of local marketing agreements (*id*. at 166); (*ii*) the restrictions on exclusivity contracts in *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009), which "alter[ed] only the present situation, not the past legal consequences of past actions" (*id.* at 670 (internal quotation marks omitted)); and (*iii*) the rules for spectrum use in *Mobile Relay Associates*, which addressed a spectrum owner's "present range of options," not his "past actions" (457 F.3d at 11 (internal quotation marks omitted)). All of these decisions, like the panel decision, applied similar standards phrased in similar ways. The different outcome here results only from the fact that this case involves a different record and regulatory regime, in which the past legality of previously approved action is at issue.

A retroactivity inquiry is not "a simple or mechanical task." *Landgraf*, 511 U.S. at 268. Rather, it requires a "commonsense, functional judgment," tightly bound up with the facts of each case, "about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). The panel here was compelled to make that judgment based on its reading of the administrative record. It found that the Final Rule did more than upset

expectations; the Rule altered the transfers' *past* legal consequences, changing the Agency's position on what kind of transactions (baseline or calendar-year) the transfers *had been* when they were approved. Even if the panel, in reaching that judgment, mischaracterized the operation of the Final Rule (which it did not), that kind of error would not create any lasting conflict in authority or otherwise merit reconsideration en banc.

2. The holding lacks prospective significance

Apart from being fact-bound, the panel's retroactivity holding is narrowly limited. As the panel emphasized, the finding of retroactivity resulted "quite simply" from EPA's "attempt to undo" transfers it had "previously approved." 618 F.3d at 10. That situation is unlikely to arise frequently. Indeed, because the panel made clear that EPA "is certainly entitled" to "forbid[] baseline inter-pollutant transfers in the future" (*id*. at 9)—as the Final Rule has done—it is nearly impossible for another case of this sort to arise. So long as EPA does not try to declare that previously approved transfers never occurred, it is free to manage the HCFC program in any manner consistent with the Act.

EPA tries to make hay out of the panel's reference to "vested rights." *E.g.*, EPA Reh'g Pet. 1. That term must be read in the context of a "successive iteration in a long-running regulatory regime." *Arkema*, 618 F.3d at 9. The panel did *not* say that Petitioners have an inalienable right to use the same amount of HCFCs in perpetuity. To meet its environmental goals, EPA can change total HCFC output

simply by distributing a different industry-wide percentage of baseline allowances in any given year (or no allowances at all, *see* 40 C.F.R. § 82.16 (HCFC-141b)). EPA thus can "adjust its distribution of allowances" (*Arkema*, 618 F.3d at 10), or even propose to adopt an alternative method such as *DirecTV*'s auction system, without running afoul of the panel's retroactivity holding—though such methods well may be prohibited by Congress's *other* directives in the Clean Air Act.

The Agency admits that under the panel decision, it is "entitled to revise its plan for distributing allowances." EPA Reh'g Pet. 11. But EPA persists in characterizing the decision as unduly restricting the Agency's freedom of action. It does not: EPA retains all the authority that Congress gave it. The panel merely determined that Congress, in mandating the use of a transfer program, did not authorize EPA to rewrite the history of that program, "prescrib[ing] what the law *was* at an earlier time." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995).

3. The holding does not adversely affect the public interest

The panel's decision does not handicap EPA's management of the HCFC allowance program. Nor does it affect other cap-and-trade programs operated by other agencies. Despite a presumably exhaustive search, EPA has failed to identify *any* other government program that might someday be affected. That alone proves that the issues here are not of exceptional importance.

Nor does the decision affect the public interest in other ways. Regardless of what happens to the baselines, EPA can alter the percentages to manage the total

number of *calendar-year* allowances released into the market. The decision itself will neither increase the total output of HCFCs, nor damage the environment, nor complicate U.S. efforts to comply with the Montreal Protocol. The panel's opinion is zero-sum: it does not address the size of the pie, but only how it has been sliced.

Indeed, the only consequence of the decision EPA can identify is that two of Petitioners' *competitors*, whose market shares were wrongfully increased by EPA's action, have filed their own petitions for review in an effort to preserve their advantage. A complaint by the losing side in a regulatory dispute does not transform a case into one of exceptional importance. Moreover, the competitors' complaint is meritless. Whatever rights the competitors might assert to their windfall, it is black-letter law that "[a]n agency, like a court, can undo what was wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). On remand, EPA can do whatever is necessary to "put[] the parties in the position they would have been in had the error not been made." *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) (internal quotation marks omitted); *see also Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001).

4. The holding is correct

En banc rehearing is unwarranted for another reason: the panel's decision is correct. As EPA has admitted, the Clean Air Act is ambiguous on whether it permits or forbids permanent inter-pollutant baseline transfers. EPA had discretion

to read the Act either way, and it exercised that discretion when it approved these transfers in 2008. When EPA chose to continue the baseline system, including lawfully made baseline transfers, it could not pretend that Petitioners' permanent baseline transfers had in fact been temporary calendar-year transfers all along—at least not without "alter[ing] the *past* legal consequences of past actions." *Mobile Relay Assocs.*, 457 F.3d at 11 (internal quotation marks omitted).

EPA argues strenuously that its decision in the Final Rule had consequences only for the period after 2010. *See, e.g.*, EPA Reh'g Pet. 8-11. But "[a]t least until we devise time machines, a change can have its effects only in the future." *Bergerco Canada v. U.S. Treasury Dep't*, 129 F.3d 189, 192 (D.C. Cir. 1997). The 2003 Rule allocated baselines "on a one-time basis," unless changed "through permanent transfers of allowances." 68 Fed. Reg. at 2823. EPA's decision to ignore past inter-pollutant transfers when it continued the baseline-allowance system past 2010 rested for its "fundamental justification" on the ground that, *at the time they were approved*, Petitioners' baseline transfers had not really been baseline transfers at all. *Arkema*, 618 F.3d at 9. (As the panel recognized, the other rationales advanced by EPA could support only *prospective* restraints on transfers. *Id*.) Because Congress had not authorized EPA to rewrite history, the Final Rule was partially invalid, and the panel was correct to vacate it in part.

CONCLUSION

The petition for rehearing en banc should be denied.

Dated: December 14, 2010

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 35(g), Petitioners Arkema Inc., Solvay Fluorides, LLC, and Solvay Solexis, Inc., respectively certify as follows:

CORPORATE DISCLOSURE STATEMENT OF ARKEMA INC.

Arkema Inc. 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 ("HCFCs"), 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.

CORPORATE DISCLOSURE STATEMENT OF SOLVAY FLUORIDES, LLC

Solvay Fluorides, LLC, a Delaware limited liability company, is a manufacturer and seller of a variety of fluorochemical products. Its headquarters are located in Houston, Texas. Solvay Fluorides, LLC is a wholly owned subsidiary of Solvay Chemicals, Inc., whose ultimate parent is Solvay S.A., a

publicly traded company in Europe. There is no publicly held corporation that owns ten percent (10%) or more of Solvay Fluorides, LLC membership interests.

CORPORATE DISCLOSURE STATEMENT OF SOLVAY SOLEXIS, INC.

Solvay Solexis, Inc., a Delaware corporation, is a manufacturer and seller of a variety of fluoropolymer and fluoroelastomer products. Its headquarters are located in Thorofare, New Jersey. Solvay Solexis, Inc. is a wholly owned subsidiary of Ausimont Industries, Inc., whose ultimate parent is Solvay S.A., a publicly traded company in Europe. There is no publicly held corporation that owns ten percent (10%) or more of Solvay Solexis, Inc. stock.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), that on December 14, 2010, 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.

I also certify that on December 14, 2010, the foregoing was served by U.S. Mail, first-class delivery, on:

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