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.

On Petitions for Review from the United States Environmental Protection Agency

JOINT MOTION OF ARKEMA INC., SOLVAY FLUORIDES LLC, AND SOLVAY SOLEXIS, INC. TO DISMISS PETITIONS FOR LACK OF JURISDICTION

David M. Williamson
Gia V. Cribbs
ANDREWS KURTH LLP
1350 I Street, N.W., Suite 1100
Washington, DC 20005
(202) 662-2700

Of Counsel:
Carlos R. Escobar
SOLVAY NORTH AMERICA, LLC
3333 Richmond Avenue
Houston, TX 77098

Counsel for Solvay Fluorides, LLC and Solvay Solexis, Inc.

Dan Himmelfarb
John S. Hahn
Roger W. Patrick
Stephen E. Sachs
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Of Counsel:
William J. Hamel
ARKEMA INC.
2000 Market Street
Philadelphia, PA 19103

Counsel for Arkema Inc.

CERTIFICATE OF PARTIES AND *AMICI CURIAE* PURSUANT TO CIRCUIT RULES 27(a)(4) AND 28(a)(1)(A)

The parties to this proceeding are:

- Petitioners Honeywell International Inc. ("Honeywell") and E. I. du Pont de Nemours and Company ("DuPont");
- Respondents United States Environmental Protection Agency ("EPA" or "the Agency") and Lisa P. Jackson, Administrator; and
- Arkema Inc. ("Arkema"), Solvay Fluorides, LLC, and Solvay Solexis, Inc. (collectively, "Solvay"), which have been granted leave to intervene as respondents in this proceeding.

There are no *amici*.

Arkema and Solvay have previously filed with the Court their Corporate Disclosure Statements pursuant to Circuit Rule 26.1.

Pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rule 27(g), Intervenors Arkema and Solvay move to dismiss the consolidated petitions for lack of jurisdiction. In support of their motion, Intervenors state as follows:

INTRODUCTION

In Spring 2008, EPA approved Arkema and Solvay's applications to transfer some of their allowances to produce and consume hydrochlorofluorocarbons ("HCFCs") from one chemical to another. Honeywell and DuPont received notice of these transfers in December 2008, when EPA published a related notice of proposed rulemaking in the Federal Register. They argued in comments to EPA that the transfers were unlawful under the Clean Air Act. In response, EPA attempted to undo these completed transactions, but this Court vacated its action as impermissibly retroactive. *Arkema Inc. v. EPA*, 618 F.3d 1, 8-10 (D.C. Cir. 2010).

Honeywell and DuPont disagree with the *Arkema* decision. They believe that EPA's action was authorized, and they tried (and failed) to intervene in *Arkema* out-of-time. But in an attempted collateral attack on that decision, Honeywell and DuPont now seek review of the underlying transfers themselves—challenging, in the instant petitions, EPA's approvals of the transfers more than two and a half years ago.

This Court lacks jurisdiction to consider the petitions. Challenges to final EPA action under the Clean Air Act must be brought within 60 days after notice of

the action is published in the Federal Register. 42 U.S.C. § 7607(b)(1). This limitation is jurisdictional and cannot be extended by the Court. *See Am. Rd. & Transp. Builders Ass'n v. EPA* (*ARTBA*), 588 F.3d 1109, 1112 (D.C. Cir. 2009), *cert. denied*, 131 U.S. 388 (2010); *Natural Res. Defense Council v. EPA* (*NRDC*), 571 F.3d 1245, 1265 (D.C. Cir. 2009) (*per curiam*); *see also* Fed. R. App. P. 26(b)(2). As Honeywell and DuPont have conceded elsewhere, notice of the factual basis of their claim was published in the Federal Register on December 23, 2008. Accordingly, the petitions are 612 days late.

To evade the time bar, Honeywell and DuPont assert that this Court's decision in *Arkema* provides "new grounds for petitioning for review." Pet. for Review 1. That argument is meritless. *Arkema* invalidated EPA's attempted reversal of these transfers, but did not in any way modify the underlying transfers or their legal consequences. The decision therefore cannot provide "new grounds * * * for review" of the transfers themselves.

Honeywell and DuPont's objections to *Arkema* cannot be pursued through this collateral proceeding. The petitions must be dismissed.

BACKGROUND

A. Statutory and Regulatory Framework

The Clean Air Act ("Act") protects the ozone layer by limiting total U.S. output of HCFCs. 42 U.S.C. §§ 7671c(d), 7671f. Under the Act's cap-and-trade

program, EPA issues allowances for HCFC production and consumption, which can be transferred among different companies or chemicals. § 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"). The 2003 Rule assigns various companies "baseline" allowances representing their shares of the then-existing market. *Id*. at 2823; *see also* 40 C.F.R. §§ 82.17, 82.19. To determine a company's allowance for a specific calendar year, EPA multiplies that company's baseline allowance by a fixed percentage stated in the Rule. § 82.16. EPA can reduce the total output of HCFCs—and each company's allocation *pro rata*—simply by decreasing the percentages over time. Thus, each company's allocation "remain[s] the same from * * * one calendar year to the next," unless "the percentage of baseline allowances is reduced to ensure compliance with the [Montreal] Protocol cap" or the baselines themselves are changed "through permanent transfers of allowances." 68 Fed. Reg. at 2823.

The 2003 Rule also permits transfers of allowances between companies and between HCFCs. § 82.23(a)-(c). (These transfers must be structured so that they do not increase total ozone depletion, meaning that the relative distribution of allowances has no environmental consequence.) A company may apply to 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). EPA reviews applications and either allows or disallows them, notifying the parties to the transfer and giving the transferor 10 days to appeal. § 82.23(a)(ii), (b)(4)(ii). While calendar-year allowances cannot be traded from one year to another, EPA decided to allow "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 is "[t]he *permanent* nature of the [baseline] transfer." *Id*. at 2835 (emphasis added).

B. The Interpollutant Baseline Transfers

Arkema and Solvay hold substantial baseline allowances to produce and consume HCFC-22 and HCFC-142b. So do Honeywell and DuPont, their major competitors. In April 2008, Arkema applied to convert baseline allowances from HCFC-142b to HCFC-22. Ex. 2. EPA issued "non objection notices" approving Arkema's "baseline" transfers. Exs. 3-4. In subsequent letters, EPA re-confirmed that Arkema's baseline allocations reflected the 2008 transfers. Exs. 5-6. Solvay, too, chose to convert HCFC-142b baseline allowances to HCFC-22. Exs. 7-8. EPA approved those transfers in February and March 2008. Exs. 9-10. These approvals entitled Arkema and Solvay to produce or consume greater amounts of

HCFC-22, in exchange for giving up the right to produce a certain amount of HCFC-142b.

C. The Proposed Rule and the Final Rule

On December 23, 2008, EPA initiated a rulemaking to reduce HCFC output. EPA's "preferred" option was "to apportion company-specific baselines * * * equivalent to those currently published * * *, adjusted as necessary to reflect permanent transfers of baseline allowances." Protection of Stratospheric Ozone: Adjustments to the 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 that baseline as necessary to achieve compliance with the cap." *Id*. Because "[b]oth inter-pollutant and inter-company transfers of allowances are possible, either on a calendar-year or permanent basis" (*id*. at 78,701), EPA listed company-specific baselines "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 Arkema's and Solvay's 2008 baseline transfers. *Id*. at 78,694.

Honeywell and DuPont did not challenge Arkema's and Solvay's transfers in court within 60 days after the publication of the Proposed Rule. Instead, 76 days later (on March 9, 2009), they submitted comments to EPA arguing that the Act

and EPA regulations forbade inter-pollutant transfers of baseline allowances. Honeywell stated in its comments that under the Act, EPA could "approve inter-pollutant transfers of allowances *only* on a current year basis," not as baseline transfers. Ex. 11 at 2. Likewise, DuPont Fluoroproducts complained that "EPA's authority relating to inter-pollutant transfers is limited to annual adjustments" and that EPA was "inappropriately allowing selected companies to convert allowances from the HCFC-142b baseline into permanent baseline allowances for HCFC-22." Ex. 12 at 3. The companies therefore called on EPA to disregard those transfers and to re-calculate each company's baselines—which, of course, would increase their own market shares in HCFC-22.

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, prescribing a new allocation "reflect[ing] the changes * * * from inter-company

transfers" only. *Id.* As a result, EPA allocated fewer HCFC-22 allowances to Arkema and Solvay and more to Honeywell and DuPont.

D. This Court's Decision

Arkema and Solvay timely sought review of the Final Rule. They argued, in part, that the Final Rule had an impermissibly retroactive effect, rejecting permanent baseline transfers "that took place in 2008 and were approved by the Agency at that time." Petrs' Br. at 61-65, 2010 WL 1535910, *Arkema*, 618 F.3d 1 (No. 09-1318).

On August 27, 2010, this Court held that the Final Rule was impermissibly retroactive and vacated it in part. *Arkema*, 618 F.3d at 10. The Court agreed with the Agency's revised position on appeal, 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*. at 7 (quoting Resp. Br. at 48, 2010 WL 1535912, *Arkema*, 618 F.3d 1 (No. 09-1318)). But it held that the Agency could not adopt a different interpretation of the statute and, at the same time, apply that new interpretation "to undo what the EPA had, in practice, approved under the 2003 Rule." *Id*. at 9. Because EPA already had "approved permanent changes to the baseline as a result of inter-pollutant transfers," it could not, "without Congress' express authorization, use its new statutory interpretation to undo these completed transactions." *Id*.

Honeywell and DuPont were not parties to *Arkema*. In mid-October 2010, they sought leave to intervene out-of-time; those motions were denied. *See* Order of Dec. 7, 2010, *Arkema*, 618 F.3d 1 (No. 09-1318). EPA has sought rehearing of the panel decision, and its petition remains pending.

E. The Instant Petitions for Review

On October 26, 2010, Honeywell and DuPont filed these four petitions, since consolidated, seeking review of EPA's approvals of Arkema's and Solvay's interpollutant baseline transfers. Each petition alleged that it had been "filed within 60 days of new grounds for petitioning for review, which arose no earlier than August 27, 2010." Pet. for Review 1.

The same day, Honeywell and DuPont petitioned EPA to reconsider and rescind all four transfers. Ex. 13. They acknowledged that the Proposed Rule had "publicly disclosed the Solvay and Arkema interpollutant transfers from earlier in 2008" (*id.* at 2), but argued that "new grounds * * * arose no earlier than the date of the Panel's decision" (*id.* at 4). EPA has not yet responded to that petition.

ARGUMENT

The petitions are jurisdictionally out of time. Under 42 U.S.C. § 7607(b)(1), Petitioners cannot obtain review more than 60 days after notice of the challenged actions was published in the Federal Register. Thus, any petition was barred after February 21, 2009.

Petitioners do not seem to dispute this. Instead, they assert that their petitions were filed "within 60 days of new grounds for petitioning for review" (Pet. for Review 1)—presumably the decision in *Arkema*, published on August 27, 2010. Their theory apparently relies on § 7607(b)(1)'s exception for petitions "based solely on grounds arising after such sixtieth day," which must be filed "within sixty days after such grounds arise." Yet Petitioners' claims are not "based solely" (or even partially) on grounds arising after the 60-day period expired, but rather on grounds that have been available since December 2008. This Court's decision in *Arkema* cannot afford "new grounds for * * * review" of transfers it did not alter.

A. The Petitions Were Filed Outside the Statutory Period for Review

A petition for review of "any * * * nationally applicable * * * final action taken" by EPA under the Clean Air Act must be filed in this Court "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." § 7607(b)(1). The "action[s]" challenged here are EPA's approvals, in early 2008, of Arkema's and Solvay's inter-pollutant baseline allowance transfers. *See* Pet. for Review 1 & Ex. 1. Notice of these actions appeared in the Federal Register on December 23, 2008, when the Proposed Rule referenced the effect of the Arkema and Solvay inter-pollutant baseline trades that had been previously approved and reported increased HCFC-22 baselines (and

diminished HCFC-142b baselines) for Arkema and Solvay. *See* 73 Fed. Reg. at 78,693-94. At that point, the factual basis of Honeywell and DuPont's claim was, as Petitioners themselves have conceded, "publicly disclosed" in the Federal Register. Ex. 13 at 2. But Honeywell and DuPont did not file their petitions by February 21, 2009, when the 60-day judicial-review period under the Clean Air Act ended. Because this time limit is jurisdictional (*see NRDC*, 571 F.3d at 1265), the petitions must be dismissed.

B. The Petitions Are Not Based Solely on Grounds Arising After the Statutory Period for Review

The only exception from the 60-day limitation is for petitions "based solely on grounds arising after" the limitations period had closed. § 7607(b)(1). As this Court has held, § 7607(b)(1) "amount[s] to an explicit decision to preclude review" of claims "that could have been brought to our attention" earlier. *ARTBA*, 588 F.3d at 1113; *cf. Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 913 (D.C. Cir. 1985) (permitting review where new events "essentially create a challenge that did not previously exist").

Petitioners suggest that *Arkema* created "new grounds" for invalidating the challenged transfers. Pet. for Review 1. That suggestion is both implausible and irrelevant: Petitioners' claims rest entirely on old grounds. A judicial decision that merely declares existing law can hardly provide "new grounds" for challenge, and to the extent Petitioners argue that *Arkema* changed the law, entertaining such a

suggestion would require this Court to question a prior panel's opinion. In any case, whatever "new grounds" Petitioners identify must be presented in the first instance to EPA, not to this Court. Petitioners' collateral attack on *Arkema* is not cognizable here.

1. Petitioners' claims do not rely on "new grounds * * * for review"

a. The holding in *Arkema* cannot provide "new grounds" for review when that decision did not alter, or even purport to alter, the transfers challenged here. *Arkema* addressed a challenge to the Final Rule, which applied a new interpretation of the Clean Air Act—one that forbade inter-pollutant baseline transfers—to transactions the Agency had approved under a previous, contrary interpretation of the text. The Court recognized that Congress, by writing an ambiguous statute, had "left it to the broad discretion of EPA to determine how transfers of baselines are to be treated.'" 618 F.3d at 7 (internal quotation marks omitted). But it held that the Final Rule, by "revisit[ing] the baseline transactions [EPA] previously approved," violated traditional principles of retroactivity. *Id.* at 10. This holding addresses the lawfulness of the Final Rule, and it does not in any way modify the underlying transfers themselves. Nothing in the *Arkema* decision suggests that EPA's 2008 approvals of the transfers could be unlawful today if they were not unlawful at the time.

b. As one would expect, Petitioners' claims do not depend on *Arkema*. The gravamen of Petitioners' complaint is that EPA's approvals of the transfers were illegal *at the time they occurred*. For example, Petitioners raise a variety of procedural challenges to EPA's actions, arguing that EPA approved the transfers without "a written record of evidence" or "a reasoned explanation"; that EPA did so in contravention of miscellaneous executive orders and statutes (such as the Congressional Review Act) imposing procedural requirements on agency action; and that EPA "fail[ed] to provide notice" of its approvals to Petitioners, violating their rights under the Due Process Clause. Petrs' Statement of Issues 2. All of these claims are, of course, no more valid today than they were two years ago: the procedures that EPA followed are part of the historical record, and the facts have not changed.[1]

Petitioners also raise a substantive claim, that EPA "improperly approv[ed] the interpollutant transfers in a manner that perpetuated those transfers beyond 2009"—namely as transfers of baseline allowances rather than calendar-year allowances. Petrs' Statement of Issues 2. Petitioners' argument that the transfers were unlawful, under the Clean Air Act or then-current EPA regulations, neither emerged for the first time with *Arkema* nor rested on that decision for its

[1] Nor were those procedures a surprise: as the 2003 Rule made clear, EPA provides notice of its transfer decisions only to those privy to the transfer. *See* 40 C.F.R. § 82.23(a)(ii), (b)(4). The time for challenging that Rule has expired also.

foundation. As it happens, *Arkema* held that the Act could be read either way, and in fact that EPA had read the Act to permit inter-pollutant baseline transfers before the Agency changed course in the Final Rule. 618 F.3d at 7-8. But as this Court has made clear, 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). The "manner" in which EPA approved the transfers, just like the procedures it followed in doing so, was a matter of record as of 2008, and the requirements of the Clean Air Act have not changed. Thus, "all the arguments [Petitioners] make * * * were available to them at the time" each transfer was approved. *Id.*

c. Petitioners in fact *made* these very arguments in their comments to EPA in March 2009. *See* Ex. 11 at 2; Ex. 12 at 3. They could have made the same argument in timely petitions for review to this Court. On Petitioners' theory of standing, "EPA's approval of these transfers" entitled Arkema and Solvay to produce a greater amount of HCFC-22, thereby "dilut[ing]" the value of allowances held by Honeywell and DuPont. Petrs' Docketing Statement, Attach. at 3. That was as true in 2008 as it is today. The approvals immediately increased the number of HCFC-22 allowances on the market (and decreased the number of HCFC-142b allowances). Through the normal functioning of the HCFC allocation system, this change necessarily "dilut[ed]" the value of HCFC-22 allowances

owned by Honeywell and DuPont. Those alleged injuries could have equally well supported a suit to challenge the approvals *within* the 60-day period. The issue presented was "purely legal"; the agency's action in approving the transfers was "sufficiently final"; and no "more concrete setting" would have improved consideration of the issue: either the transfers were unlawful or they were not. *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1137 (D.C. Cir. 2010) (internal quotation marks omitted). The exception for after-arising grounds simply "does not apply * * * [when] the substantive grounds for the petitions arose, if at all, before the time limit expired." *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 437 n.4 (D.C. Cir. 1989).

d. The only ground Petitioners have advanced that *is* founded on *Arkema* has nothing whatsoever to do with the agency actions under review. According to the motion to hold this case in abeyance, filed jointly by Petitioners and EPA, "Petitioners in this action assert, *inter alia*, that in order to restore baseline allowances for HCFCs to Arkema [and Solvay], EPA will necessarily have to take allowances from Petitioners and other HCFC suppliers or take other action that will have a similar effect." Joint Mot. to Hold Case in Abeyance 2-3. Petitioners claim that this "cannot be done because the decision in *Arkema* * * * created vested rights in the HCFC allowances held by those companies." *Id*. at 3.

This argument was not raised in Petitioners' Statement of Issues. Assuming that it has not been abandoned, the claim is entirely unrelated to the underlying transfers. Once EPA takes remedial action in response to *Arkema*, Petitioners will have 60 days to challenge that action, and to raise any argument not foreclosed by previous agency decisions or already decided by *Arkema*. *Cf. ARTBA*, 588 F.3d at 1113. But they cannot argue that *Arkema* should have ordered a different remedy (or none at all) in a petition to review EPA actions taken long before the Court's decision issued.

2. Arkema did not create "new grounds" simply by clarifying existing law

a. In their reconsideration petition before EPA, Petitioners suggest that *Arkema*'s clarification of the law justifies their new challenge. They say that before the decision was issued, "EPA ha[d] never taken the position [presumably adopted in *Arkema*] that the four interpollutant transfers created vested rights that EPA was required to carry forward to the 2010-2014 stepdown period." Ex. 13 at 4.[2] Assuming that it is true that EPA had never taken this position, and assuming further that this is an accurate description of the Court's holding in *Arkema*, the essence of Petitioners' argument is that they did not anticipate, before this Court

[2] Petitioners presumably make such arguments because, under 42 U.S.C. § 7607(d)(7)(B), EPA reconsideration is unavailable once "the time specified for judicial review" has expired.

ruled, what the full legal consequences of EPA's 2008 approval of the Arkema and Solvay baseline transfers might be.

It is well established, however, that "a plaintiff's ignorance of his legal rights" will not toll a statutory time limit. *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Petitioners might not have *thought* of their current arguments before *Arkema* was issued, but that would not make those arguments "new grounds * * * for review." Petitioners "could have investigated" EPA's transfer approval "as soon as they were put on notice of it * * * and filed a timely lawsuit based on the results thereof." *Hardin v. Jackson*, 625 F.3d 739, 744 (D.C. Cir. 2010). "To excuse [them] from promptly doing so by postponing the accrual of [their] claim would undermine the purpose of [§ 7607(b)], which is to require the reasonably diligent presentation" of petitions for review. *Kubrick*, 444 U.S. at 123.

No rule or other agency action would be safe from challenge if a judicial decision construing it reopened the period for review. As EPA successfully argued in *Cement Kiln Recycling Coalition v. EPA*, No. 00-1302, 2000 WL 1946580 (D.C. Cir. Dec. 19, 2000) (*per curiam*), "[a]llowing periods of limitation to be reopened every time a new, possibly precedential opinion was issued would result in a constant revisiting of years-old regulations and * * * an end to the very concept of finality." Reply Supp. Mot. for Order to Show Cause at 5 (filed Oct. 10, 2000), *Cement Kiln* (No. 00-1302) (Ex. 14). Even if *Arkema* had clarified previously

unsettled law, that would not delay the accrual of Petitioners' claim (*see Commc'ns Vending Corp. v. FCC*, 365 F.3d 1064, 1074 (D.C. Cir. 2004))—nor would Petitioners' "legal doubts" toll the deadline (*Atchison, Topeka & Santa Fe Ry. v. ICC*, 851 F.2d 1432, 1439 (D.C. Cir. 1988) (internal quotation marks omitted)), especially given that a jurisdictional time bar may not be equitably tolled (*see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008)).

b. By suggesting that the Court's decision in *Arkema* affords "new grounds * * * for review," Petitioners necessarily allege that *Arkema* in some way altered the previous legal landscape—that it did something *other* than apply existing law to existing facts. But that is not what the opinion said. It asked whether the Final Rule violated traditional standards of retroactivity. 618 F.3d at 7. Petitioners' implicit argument that *Arkema* did change the law, notwithstanding the panel's claims to the contrary, is an argument that the panel got it wrong—that *Arkema* departed from existing law without realizing it. That argument is not cognizable here.

Honeywell and DuPont obviously believe that the panel's analysis was incorrect. Under *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), however, if the Administrator of EPA is barred from relying on particular grounds in reconsidering agency action, a court likewise may not rely on those "new 'grounds'" to establish jurisdiction under the Clean Air Act. *Id.* at 256. Surely EPA could not base a

decision to revisit these transfers on the supposition that this Court's decision in *Arkema* was wrong. For the same reasons, an allegation of error on the part of this Court cannot be the "new grounds" supporting Petitioners' challenge.

To the extent that these petitions address a consequence of *Arkema* at all, they directly conflict with a necessary predicate of the Court's holding. As *Arkema* noted, Congress had written an ambiguous statute and had "left it to the broad discretion of EPA to determine how transfers of baselines are to be treated." 618 F.3d at 7 (internal quotation marks omitted). This description of EPA's authority was not merely *dicta*: *Arkema*'s core holding was that EPA had lawfully interpreted the Act to permit these transfers, then changed its tune when it adopted the Final Rule. *Id*. at 7-8. By applying the new interpretation to previously approved transactions, the Agency retroactively and unlawfully changed "the *past* legal consequences of past actions." *Id*. at 7 (internal quotation marks omitted). Petitioners here argue that the Act *unambiguously* forbids inter-pollutant baseline transfers, and that EPA never had authority to approve them. But if Petitioners were right, then the Final Rule could not have "change[d] the legal landscape" (*id.*): the transfers *never* would have been lawful in the first place, and EPA's decision to undo them could not have had retroactive effect. It was necessary to the holding in *Arkema* that EPA had a choice about how to apply the statute, and that the Agency's first reading was *not* unambiguously foreclosed.

Petitioners' claim to jurisdiction amounts to a collateral attack on *Arkema*. *Arkema* could not have provided "new grounds" for review in 2010 simply by describing accurately the law as it stood in 2008. Moreover, *Arkema* is the law of the Circuit, and will remain so unless the opinion is vacated or withdrawn. *See Ass'n of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985) ("[W]e are bound by the principle of *stare decisis* to abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court *en banc* has overruled it." (internal quotation marks omitted)). Because *Arkema* remains controlling authority, this Court cannot exercise jurisdiction on the premise that *Arkema* is in error.

3. Any "new grounds" must be presented to EPA in the first instance

Even assuming that the petition were "based solely on grounds arising after" the period for review, § 7607(b)(1), this Court could not address those new grounds in the first instance. Instead, any new developments that might support subsequent review must be presented to the Agency first. *See Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 921 (D.C. Cir. 1998); *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 665-67 (D.C. Cir. 1975). That is because the "'grounds arising after'" exception was "designed to 'assure that standards were revised whenever necessary' on the basis of new information" by the

Administrator of EPA, not by the courts. *Columbia Falls*, 139 F.3d at 921 (quoting *Oljato*, 515 F.2d at 660); *see also Union Elec.*, 427 U.S. at 255-56.

This rule, too, is jurisdictional. *Natural Res. Defense Council, Inc. v. Thomas*, 845 F.2d 1088, 1091-92 (D.C. Cir. 1988); *cf. ARTBA*, 588 F.3d at 1114. Although Honeywell and DuPont have filed a petition before EPA, the Agency has not yet responded to it. Review in this Court is therefore premature. *See Western Union Tel. Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985).

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction.

Dated: January 11, 2011

Respectfully submitted.

/s/ David M. Williamson
(*with permission*)
David M. Williamson
Gia V. Cribbs
ANDREWS KURTH LLP
1350 I Street, N.W., Suite 1100
Washington, DC 20005
(202) 662-2700

Of Counsel:
Carlos R. Escobar
SOLVAY NORTH AMERICA, LLC
3333 Richmond Avenue
Houston, TX 77098

Counsel for Solvay Fluorides, LLC and Solvay Solexis, Inc.

/s/ Dan Himmelfarb
Dan Himmelfarb
John S. Hahn
Roger W. Patrick
Stephen E. Sachs
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Of Counsel:
William J. Hamel
ARKEMA INC.
2000 Market Street
Philadelphia, PA 19103

Counsel for Arkema Inc.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d), that on January 11, 2011, 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 January 11, 2011, the foregoing was served by U.S. Mail, first-class delivery, on:

Richard E. Ayres
Ayres Law Group
1615 L Street, NW
Suite 650
Washington, DC 20036

Dated: January 11, 2011

/s/ Dan Himmelfarb
Dan Himmelfarb