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VIA ELECTRONIC AND OVERNIGHT MAIL

February 4, 2011

Drusilla Hufford
Director
Stratospheric Protection Division (6205J)
U.S. Environmental Protection Agency
1310 L Street, N.W.
Washington, D.C. 20005

Re: HCFC Allowance Allocation Following *Arkema Inc. v. EPA*

Dear Ms. Hufford:

I am writing to summarize Arkema's views on how the Agency should proceed in light of *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010). As you know, on August 27, 2010, the Court found EPA's HCFC allocation rule at 74 Fed. Reg. 66,412 (Dec. 15, 2009) (the "Final Rule") to be unlawfully retroactive in refusing to give effect to Arkema's and Solvay's previously approved baseline allowance transfers. The Court accordingly vacated the Final Rule insofar as it operates retroactively and remanded the matter for "prompt" action by EPA. *Arkema*, 618 F.3d at 10. On January 21, 2011, the Court denied EPA's petition for rehearing.

Now that the case is complete, Arkema believes that the Agency should act immediately to revise the existing baseline allowance levels for HCFC-22 and 142b in 40 C.F.R. § 82.17 and § 82.19, and the corresponding percentage allocations in 40 C.F.R. § 82.16(a). As explained below, the enforcement policy announced on January 28, 2011, inexplicably fails to comply with the Court's holding with respect to restoring Arkema's and Solvay's allowances. EPA should issue a revised enforcement policy assuring that Arkema and Solvay immediately are permitted to use the allowances to which the Court's ruling entitles them. Under longstanding D.C. Circuit precedent, EPA then should revise the unlawful allocations of the Final Rule through an interim final rule. At the same time, the Agency should initiate a rulemaking to restore the allowances of which Arkema and Solvay were deprived unlawfully in 2010.

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Prompt Action Is Necessary To Restore Market Confidence.

As the Court recognized, EPA must act "prompt[ly]" once the mandate issues. Otherwise, the future operation of the Final Rule will be uncertain and stakeholders will lose confidence in the HCFC market. Indeed, EPA already has recognized the risk of stakeholders arguing that the Court's decision nullifies *all* HCFC allowances until the Agency re-establishes them, which would cause chaos in the market.

As relevant here, the Final Rule did three things. First, it limited the yearly total allocations of HCFC-22 and 142b from 2010 through 2014, based on the needs of the environment, the aftermarket, and the reclamation market. Second, the Final Rule re-calculated Arkema's and Solvay's baseline allowance levels for HCFC-22 and 142b. Third, by dividing each total annual allocation for HCFC-22 and for 142b by its total baseline level, the Final Rule set the percentage of every allowance holder's baseline available for use during each calendar year.

The first decision, limiting the total amounts of HCFC-22 and 142b on the market, was not at issue in *Arkema* and is unaffected by the Court's holding. The second decision, establishing baseline allowances, has been vacated as unlawful. That means the status of the third decision, the calculation of percentages based on unlawful baseline allocations, also is in doubt. Until EPA acts definitively, there will be questions about what the baseline allowances are, what percentages (if any) may properly be applied to baseline allocations, and thus what amounts of HCFC-22 and 142b companies may lawfully produce or consume. Both the Court's decision and the needs of the market require EPA to take prompt steps to adjust HCFC allowances.

EPA's Enforcement Policy Would Deprive Arkema and Solvay of Prompt Relief.

Since last September, EPA has been "proceeding to plan and determine how to implement the Court's directive in the most efficient and expeditious manner possible." EPA Mot. 30-Day Extension for Filing Petn. for Panel Reh'g or Reh'g En Banc at 5, *Arkema*, 618 F.3d 1 (No. 09-1318). Arkema appreciates the Agency's efforts. But the enforcement policy announced on January 28, 2011, makes no sense in light of the Court's ruling. Among other things, the policy would limit allowance holders—except Arkema and Solvay—to 32% of the HCFC-22 baseline levels set out in the proposed rule at 73 Fed. Reg. 78,680 (December 23, 2008) (the "Proposed Rule"). Yet the Agency inexplicably would provide a "no action assurance" to Arkema and Solvay only if they abide by lower HCFC-22 baseline levels in the Final Rule that the D.C. Circuit has vacated. As to Arkema and Solvay, therefore, the enforcement policy should be countermanded, and EPA should immediately issue a revised enforcement policy allowing Arkema and Solvay to use the allowances to which they are entitled.

Arkema and Solvay need their 2011 allowances restored now to be able to compete effectively in the market. With its May 31, 2011, expiry date, the enforcement policy appears to contemplate re-adjusting allowance levels in the middle of the year, after most refrigerant contracts already will have been let and when it will be difficult to arrange shipments to meet the needs of the summer refrigerant season. By waiting until mid-year to re-arrange allowance levels, EPA would fail to provide prompt relief to Arkema and Solvay as required by the Court.

An Interim Final Rule Would Provide
Market Certainty *and* Protect the Environment.

While an enforcement policy may be helpful in the near term, it will not dispel all questions about HCFC allocations. EPA also must correct the unlawful allocations of the Final Rule without delay. Fortunately, a practical, timely path forward is open to the Agency. As to process, EPA need not follow full notice-and-comment procedures. The Clean Air Act authorizes EPA to dispense with notice and comment "when the agency for good cause finds * * * that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." *See* 42 U.S.C. § 7607(d)(1) (referencing 5 U.S.C. § 553(b)(B)). The D.C. Circuit often has found the "good cause" requirement satisfied when an agency promulgates an interim rule to implement a judicial mandate and then follows up with another proceeding. *See, e.g., Purepac Pharm. Co. v. Friedman*, 162 F.3d 1201, 1204-05 (D.C. Cir. 1998); *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 152-53 (D.C. Cir. 1989); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545-46 (D.C. Cir. 1983). This approach especially makes sense here, where stakeholders had an opportunity to comment and the issues to be addressed in the interim rule already have been vetted, making additional prior comment unnecessary. *See Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994).

As to substance, EPA should eliminate the unlawful aspects of the Final Rule while retaining its environmental benefits. In particular, EPA should: (i) revise Arkema's and Solvay's baseline allowance levels to reflect their previously approved baseline allowance transfers (keeping other parties' baseline allowance levels the same); and (ii) allocate for each HCFC the percentage of total baseline allowances that will yield the same *total* number of calendar year consumption and production allowances that otherwise would have been available to the market pursuant to the Final Rule. This calculation is purely mechanical and does not require the exercise of discretion. I note in this regard that EPA's January 28, 2011, enforcement policy allows allowance holders (other than Arkema and Solvay) to use 32% of the Proposed Rule's baseline allowance levels for HCFC-22, a percentage that appears to have been selected to keep the total number of HCFC-22 allowances at the level in the Final Rule.

In this way, EPA immediately can remove the retroactive aspects of the Final Rule, at least on a going-forward basis. At the same time, the Agency would maintain the total supply of HCFC-22 and 142b allowances at the levels already required by the Final Rule, thus preserving the reductions in the use of HCFCs (and in their emissions) that were not at issue in *Arkema*. The Agency has described such reductions as "one of the most significant remaining actions the

United States can take to . . . decrease impacts on children's health from stratospheric ozone depletion." *See* 74 Fed. Reg. at 66,444. And EPA would be providing the same incentives for HCFC recovery and reclamation that it found to be necessary in promulgating the Final Rule, measures that everyone agrees are essential to prevent shortages under the 2015 step-down.

We believe an interim final rule as outlined above would be the best way to begin complying with the Court's decision, while promoting EPA's goals and insulating EPA from further legal challenges. Such an approach would be representative as required by the Clean Air Act, putting the baselines for all the players back where they should have been. It also would seem to require a minimal commitment of government resources.

Some might advocate following an alternative path—releasing a greater quantity of HCFC allowances into the market such that Arkema and Solvay would have more, while leaving all other allowance holders where they were under the Final Rule. That would be a mistake for multiple reasons. The existing quantity of calendar-year allowances was the result of full Agency deliberation after notice and comment. No change could be made without following required procedures. As to the merits, increasing the quantity of allowances on a going-forward basis would place significant extra slugs of HCFCs into the market. Health risks would increase, reclaimers would be injured, and the Agency would find itself back in court. Rather than restoring things to where they should be, such an approach would entail a drastic re-working of the Final Rule, which should be rejected out of hand.

EPA Also Must Address Recoupment
of Arkema's and Solvay's Allowances.

Besides re-setting the baselines and available calendar-year allowance levels, EPA promptly must address the further adjustments necessary to make Arkema and Solvay whole. As the D.C. Circuit repeatedly has held, when an agency "commits legal error, the proper remedy is one that puts 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). This means making a correction that goes back to the time the agency error occurred. *See Exxon Co. v. FERC*, 182 F.3d 30, 48 (D.C. Cir. 1999).

Putting Arkema and Solvay in the position where they would have been but for the error in the Final Rule necessarily will entail re-distribution of future allowances to correct the imbalance arising out of the improper allocation that occurred in 2010. Otherwise, other allowance holders would enjoy a windfall from the unlawful portions of the Final Rule at Arkema's and Solvay's expense, leaving Arkema and Solvay less than whole. As EPA acknowledged to the Court, this problem is "easily remediable" by shifting "additional allowances to those allocated [to Arkema and Solvay] in future years." EPA Reply Mem. Supp. Mot. 30-Day Extension at 2, *Arkema*, 618 F.3d 1 (No. 09-1318). Because other stakeholders might have concerns about re-distribution, or about the interim final rule, EPA should consider providing notice and an opportunity for comment before finalizing the complete remedy here.

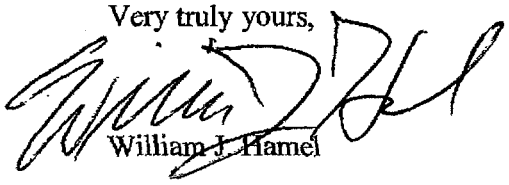
Ideally, we believe that recoupment should happen sooner rather than later so that everyone in the market promptly can get back to where they should have been. The longer EPA delays, the greater the disruption to the market in future years.

* * *

In sum, by promptly issuing a revised enforcement policy and an interim final rule adjusting Arkema's and Solvay's baseline allowance levels, while keeping the total supply of allowances equal to what the Final Rule provided, the Agency can eliminate retroactivity, maintain the environmental benefits of the Final Rule, preserve EPA's carefully crafted HCFC recycling incentives, avoid disruptive legal challenges, and provide certainty to the HCFC market. Follow-on rulemaking then can fine-tune the allocations by including the necessary recoupment for Arkema and Solvay.

Arkema looks forward to discussing these issues with the Agency on Monday. In the meantime, please let me know if you need any further information about Arkema's position.

Very truly yours,



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cc: Diane E. McConkey