

**UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT**

)	
HEATING, AIR-CONDITIONING, &)	
REFRIGERATION DISTRIBUTORS)	
INTERNATIONAL, et al.,)	
)	
Petitioners,)	
)	No. 21-1251
v.)	(and consolidated cases)
)	
ENVIRONMENTAL PROTECTION)	
AGENCY, et al.,)	
)	
Respondents.)	
)	

**RESPONDENTS’ MOTION TO SEVER CHALLENGE TO
 SEPARATE AGENCY ACTION**

Petitioner RMS of Georgia, LLC, d/b/a Choice Refrigerants (“Choice”) filed a single petition for review challenging two separate actions by the U.S. Environmental Protection Agency. The first EPA action is a rulemaking that established various framework regulations related to a phasedown of the production and consumption of hydrofluorocarbons, which are highly potent greenhouse gases. The rule is also being challenged by the other petitioners in these three consolidated cases. The second EPA action is the allocation of hydrofluorocarbon production and consumption allowances for 2022.

Choice is the sole party challenging the allocation. Choice frames its petition for review of the allocation as protective in nature, as Choice is also pursuing judicial review of the allocation in the Eleventh Circuit.

EPA took the two separate and distinct actions on different days based on different administrative records, and the actions should be reviewed independently. To ensure that each action is afforded independent consideration based on its separate supporting record and to avoid any confusion about which arguments are being directed at which EPA action, the Court should sever Choice's challenge to the allocation from the remainder of these consolidated cases. The Court should then direct the parties to confer and propose two separate briefing formats.

Undersigned counsel conferred with counsel for Choice, who indicated that Choice opposes this motion.

BACKGROUND

I. The AIM Act

Congress enacted the American Innovation and Manufacturing Act ("AIM Act") on December 27, 2020. Pub. L. No. 116-260, Div. S, § 103, 134 Stat. 1182, 2255–71 (2020) (codified at 42 U.S.C. § 7675). The

AIM Act mandates the phasedown of the production and consumption of hydrofluorocarbons, which are highly potent greenhouse gases, to 15 percent of baseline levels by 2036. 42 U.S.C. § 7675(e)(2).

To accomplish the phasedown, the AIM Act directs EPA to issue a fixed quantity of production and consumption allowances for each calendar year. *Id.* § 7675(e)(2)(D)(i). An allowance is a limited authorization for the production or consumption of a regulated substance.¹ *Id.* § 7675(e)(2)(D)(ii). The total quantity of allowances decreases over the years based on a statutory phasedown schedule, *id.* § 7675(e)(2)(C), relative to baseline levels calculated by EPA, *id.* § 7675(e)(1). No person may produce or consume a regulated substance without a corresponding allowance. *Id.* § 7675(e)(2)(A).

The AIM Act further directs EPA to promulgate regulations establishing “an allowance allocation and trading program,” *id.* § 7675(e)(3); regulations governing the transfer of allowances, *id.*

¹ The AIM Act identifies eighteen hydrofluorocarbons and their isomers as “regulated substances.” 42 U.S.C. § 7675(b)(11), (c)(1). EPA may also designate other hydrofluorocarbons as regulated substances if certain criteria are met, *id.* § 7675(c)(3), but no other substances have been so designated.

§ 7675(g); and regulations governing international transfers of production allowances, *id.* § 7675(j)(4).

The AIM Act provides that certain sections of the Clean Air Act “shall apply to” the AIM Act and “any rule, rulemaking, or regulation promulgated by the Administrator [of EPA] pursuant to [the AIM Act] as though [the AIM Act] were expressly included in title VI of [the Clean Air Act].” *Id.* § 7675(k)(1)(C). Among the applicable sections of the Clean Air Act is section 307, *id.* § 7607, which includes provisions on judicial review.

II. EPA’s Actions Under the AIM Act’s Phasedown Provisions

EPA took two separate and distinct actions in fall 2021 to begin implementing the phasedown. The two actions were based on separate and distinct records.

First, EPA issued a final rule entitled “Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act,” 86 Fed. Reg. 55,116 (Oct. 5, 2021) (“Framework Rule”). All petitioners in these consolidated cases challenge the Framework Rule.

Second, EPA allocated and issued 2022 allowances under the AIM Act. Choice is the only petitioner that challenges this EPA action.

A. Framework Rule

Following public notice and comment, EPA signed the Framework Rule on September 23, 2021. 86 Fed. Reg. at 55,117. In the Framework Rule, EPA established the baseline levels of hydrofluorocarbon production and consumption according to statutory formulas. *Id.* at 55,118. Based on those baseline levels, EPA codified the statutory phasedown schedule, which EPA uses to determine the amount of production and consumption allowances that are available nationwide for each calendar year. *Id.* EPA also established the approach to allocating this set amount of allowances between entities for calendar years 2022 and 2023.² *Id.* In addition, EPA established provisions relating to the transfer of those allowances; recordkeeping and reporting; and implementation, compliance, and enforcement. *Id.*

The Framework Rule established the following approach to calculating the 2022 and 2023 allowance allocations. First, EPA would

² EPA stated that it would establish the allowance allocation framework for calendar year 2024 and beyond in a future rulemaking. Framework Rule at 55,118.

set aside a certain amount of allowances for allocation at a later time. *Id.* at 55,155–60. Second, EPA would determine appropriate allocation levels for entities that use regulated substances for certain specified end uses identified by the AIM Act. *Id.* at 55,148–53. The Framework Rule refers to these allowances as “application-specific” allowances. Third, EPA would allocate all remaining allowances to entities that had reported historic production or import of a regulated substance and were active in the market in 2020. *Id.* at 55,144–45. For each eligible entity, EPA would calculate the average of that entity’s three highest years (not necessarily consecutive) of production and consumption between 2011 and 2019. *Id.* at 55,145–47. EPA would then divide each entity’s average by the sum of all entities’ averages to determine the relative percentages. *Id.* at 55,147. Finally, EPA would multiply those percentages by the total amount of production or consumption allowances available for that year to determine the entity-specific production and consumption allowances. *Id.* This approach was codified at 40 C.F.R. §§ 84.9 and 84.11.

The Framework Rule did not itself allocate allowances for 2022. Instead, EPA stated its intent to allocate 2022 allowances in a separate

action no later than October 1, 2021, “using the procedure established through this rulemaking.” Framework Rule at 55,118; *see also id.* at 55,143–44.

B. Allocation of 2022 Allowances

On October 1, 2021, about a week after signature of the Framework Rule, EPA allocated the 2022 allowances. EPA posted to its website the allocation and a pre-publication version of the Federal Register notice announcing the allocation. *See* <https://www.epa.gov/climate-hfcs-reduction/phasedown-hydrofluorocarbons-hfcs-issuing-allowance-allocations>. EPA notified all companies receiving allowances, along with trade groups, of that posting by email.

On October 7, 2021, EPA published a notice in the Federal Register of the allocation that it had determined on October 1. “Phasedown of Hydrofluorocarbons: Notice of 2022 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020,” 86 Fed. Reg. 55,841 (Oct. 7, 2021).

After setting aside some allowances for later allocation and determining “application-specific” allowances, EPA allocated the

remaining available 2022 production allowances among five entities and the 2022 consumption allowances among forty entities. 86 Fed. Reg. at 55,841–43.

III. Petitions for Review

The Court sua sponte consolidated these three petitions for review. Nos. 21-1251, 21-1252, 21-1253; *see* Order (Dec. 8, 2021), Doc. No. 1925989; Order (Dec. 9, 2021), Doc. No. 1926124. All three petitions challenge the Framework Rule. No party has sought review of the Framework Rule outside of the D.C. Circuit.

In addition to challenging the Framework Rule, Choice’s petition challenges EPA’s separate October 7, 2021 notice of the allocation of 2022 allowances. Pet. for Review, No. 21-1253 (Dec. 6, 2021), Doc. No. 1926118.³ Choice states that with respect to the allocation of 2022

³ The petition is better understood as challenging EPA’s allocation of the 2022 allowances on October 1, 2021, not the notice that was published in the Federal Register on October 7, 2021. The former is the actual agency action; the latter is merely the publication of notice of the action taken several days earlier. The petition is nonetheless timely because the time period for judicial review of the former is governed by the publication date of the latter. *See* 42 U.S.C. § 7607(b)(1) (requiring petitions for review to be filed within sixty days of the date of notice of the challenged action in the Federal Register).

allowances, its petition is intended to be protective in nature because Choice believes that venue is proper in the Eleventh Circuit. *Id.* at 1 n.1. None of the other petitioners in these consolidated cases challenges the allocation.

Choice also filed a petition for review in the Eleventh Circuit challenging EPA's allocation of 2022 allowances. *RMS of Georgia, LLC v. EPA*, No. 21-14213 (11th Cir.).⁴ Choice's petition in the Eleventh Circuit does not challenge the Framework Rule.

ARGUMENT

Choice's challenge to EPA's allocation of 2022 allowances should be severed from the remainder of these consolidated cases and briefed separately. The Framework Rule and the allocation of 2022 allowances are two separate EPA actions taken on different days based on different administrative records, and they should be reviewed independently.

Separate briefing of the challenges to the two EPA actions will ensure

⁴ The Eleventh Circuit has directed the parties to address the question of whether the petition properly belongs in the D.C. Circuit. Jurisdictional Question, *RMS of Georgia*, No. 21-14213 (11th Cir. Dec. 22, 2021). In response, EPA has stated its position that the proper forum for Choice's challenge is the D.C. Circuit. Respondents' Response to Jurisdictional Question, *RMS of Georgia*, No. 21-14213 (11th Cir. Jan. 18, 2021). The Eleventh Circuit has not yet resolved the issue.

that each action is afforded independent consideration on its distinct support record, while also avoiding any confusion about which arguments are being directed at which action.

The Framework Rule, which EPA signed on September 23, 2021, contains a number of regulations that provide for the implementation of the phasedown provisions of the AIM Act. The regulations establish the baseline levels of hydrofluorocarbon production and consumption; the amount of production and consumption allowances that are available each calendar year; the methodology for allocating this set amount of allowances between entities in 2022 and 2023; and rules governing the transfer of allowances, recordkeeping and reporting, and implementation, compliance, and enforcement. Framework Rule at 55,118.

The Framework Rule did not itself apply the methodology for allocating allowances for 2022. *Id.*; *see also id.* at 55,143–44. EPA instead did so in a separate action on October 1, 2021, about a week after signature of the Framework Rule. In that action, EPA determined “application-specific” allowances and allocated the remaining 2022

production and consumption allowances among eligible entities. *See* 86 Fed. Reg. at 55,841–43.

The two separate and distinct actions, taken on different days, are supported by separate and distinct administrative records. In fact, the two actions could have been the subject of two separate petitions for review by Choice. Accordingly, the two actions should be reviewed separately. Severing the challenges to these distinct actions is necessary to ensure that each action is afforded independent review and consideration based on its particular record.

In addition, certain challenges are properly directed at one action and not the other. For instance, if Choice were to challenge the methodology that EPA established for allocating the 2022 allowances among eligible entities, then that challenge should be directed to the Framework Rule. If Choice were to challenge the way that EPA applied that methodology to calculate Choice's allocated share of the 2022 allowances, then that challenge should be directed to EPA's later separate action allocating the allowances.

To avoid any confusion about which arguments are being directed at which EPA action, the Court should order that the challenges to the

two EPA actions be severed and briefed separately. Specifically, the Court should sever Choice's challenge to the allocation of 2022 allowances from Choice's and the other petitioners' challenges to the Framework Rule. The Court should then direct the parties to confer and propose two separate proposed briefing formats: one for the consolidated challenges to the Framework Rule⁵ and another for Choice's challenge to the allocation.⁶

At that time, all of the parties in these consolidated actions can confer on the appropriate dates and format for briefing the challenges to the Framework Rule. And if at that time the Eleventh Circuit has not yet weighed in on the proper forum for Choice's challenge, *see supra* n.4,

⁵ Choice's challenge to the Framework Rule should remain consolidated with the other petitions challenging the Framework Rule. D.C. Cir. Handbook at 24 (explaining Court's usual practice of consolidating "all petitions for review of agency orders entered in the same administrative proceeding" and issuing "a single briefing schedule" "[i]n order to achieve the most efficient use of the Court's resources, as well as to maintain consistency in its decisions").

⁶ Because the same government counsel are currently staffed on both challenges, Respondents anticipate requesting that the deadlines for the two separate Respondents' briefs be offset by some period of time.

then Choice and Respondents could confer on what if any effect that should have on the briefing schedule for the allocation.

CONCLUSION

For the reasons above, the Court should sever Choice's challenge to EPA's allocation of 2022 allowances from the remainder of these consolidated cases and direct the parties to confer and propose two separate briefing formats.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 2,207 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). This filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook fourteen-point font.

/s/ Tsuki Hoshijima

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Tsuki Hoshijima