ORAL ARGUMENT NOT YET SCHEDULED
No. 17-1024

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

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

HONEYWELL INTERNATIONAL, INC., ET AL.,

Intervenors.

CORRECTED BRIEF OF INTERVENORS HONEYWELL INTERNATIONAL INC., THE CHEMOURS COMPANY FC, LLC, AND NATURAL RESOURCES DEFENSE COUNCIL

On Petition for Review from the United States Environmental Protection Agency

Consolidated with No. 17-1030

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenor-Respondents The Chemours Company FC, LLC, Honeywell International Inc., and Natural Resources Defense Council state:

A. Parties, Intervenors, and Amici Curiae

The parties in these consolidated cases, Nos. 17-1024 and 17-1030, are as follows:

Petitioners are Mexichem Fluor, Inc. (No. 17-1024) and Arkema Inc. (No. 17-1030).

Respondent is the United States Environmental Protection Agency ("EPA").

Intervenor-Respondents are The Chemours Company FC, LLC, Honeywell International Inc., Natural Resources Defense Council, and The Boeing Company.

There are no amici.

B. Rulings Under Review

The petitions for review purport to challenge EPA's final rule "Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," published at 81 Fed. Reg. 86,778 (Dec. 1, 2016) ("the 2016 Rule"). In point of fact, the petitions challenge a much older final

rule, "Protection of Stratospheric Ozone," published at 59 Fed. Reg. 13044 (Mar. 18, 1994) ("the 1994 Rule").

C. Related Cases

Intervenor-Respondents The Chemours Company FC, LLC, Honeywell International Inc., Natural Resources Defense Council are unaware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenor-Respondents The Chemours Company FC, LLC, Honeywell International Inc., and Natural Resources Defense Council (hereafter "Intervenor-Respondents") state as follows:

The Chemours Company FC, LLC is a wholly owned subsidiary of The Chemours Company, which is a publicly traded company. No publicly held company other than The Chemours Company owns 10 percent or more of The Chemours Company FC, LLC's stock.

Honeywell International Inc. is a publicly traded, multinational corporation. Honeywell has no parent corporations and there are no publicly held corporations known to Honeywell that own 10 percent or more of the outstanding shares of Honeywell's common stock as of November 9, 2018.

The Natural Resources Defense Council ("NRDC") is a not-for-profit non-governmental organization whose mission includes protection of public health and the environment and conservation of natural resources. NRDC has no outstanding shares or debt securities in the hands of the public, and no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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GLOSSARY

CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
GWP	Global Warming Potential
HFC	Hydrofluorocarbon
HFO	Hydrofluoro-olefin

INTRODUCTION

These petitions were filed nearly a quarter century too late, and the Court lacks jurisdiction to review them. The Clean Air Act, under which the petitions were filed, "directs that any petition for review must be filed within sixty days from the date that notice of the challenged action appears in the Federal Register." *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (citing 42 U.S.C. § 7607(b)(1)). That provision "is jurisdictional in nature." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998).

Petitioners purportedly challenge a rule EPA promulgated in 2016 ("the 2016 Rule") that moves certain hydrofluorocarbons ("HFCs") from the "acceptable" to the "unacceptable" list for certain end uses pursuant to Section 612(c) of the Clean Air Act, 42 U.S.C. § 7671k(c), based on the availability of safer alternatives. But Petitioners' real complaint is about the consequence of that listing change. That consequence was established not in the 2016 Rule, but in regulations EPA promulgated in 1994, which provide that no person may continue to use a chemical substitute (such as HFCs) for an ozone-depleting substance once that substitute has been placed on the "unacceptable" list for that end use. *See* Protection of Stratospheric Ozone, 59 Fed. Reg. 13044 (Mar. 18, 1994) ("the 1994 Rule"). Petitioners' current challenge, which is really to that 1994 regulation, is untimely and must be dismissed.

Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017) ("*Mexichem I*"), which reviewed a challenge to a related 2015 rule, is not to the contrary. The petitions for review in that case suffered from the same jurisdictional defect as the petitions here — they sought belated review of the consequence of moving a substitute to the "unacceptable" list, which consequence was established in the 1994 Rule. The panel in *Mexichem I*, however, did not address or announce a holding regarding its jurisdiction to consider the challenges the petitioners actually raised in that case. *Mexichem I* thus is not binding on the question of the Court's jurisdiction to review Petitioners' current challenge.

STATEMENT REGARDING ORAL ARGUMENT

Respondent-Intervenors request that the Court hear oral argument. This case presents an important jurisdictional question essential to the functioning of EPA's Significant New Alternatives Policy program under the Clean Air Act.

STATEMENT REGARDING JURISDICTION

This Court lacks subject matter jurisdiction to consider the arguments raised by Petitioners in these consolidated petitions for review. Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), requires that

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

As explained in this brief, Petitioners' challenges here come nearly a quarter-century too late, as they are in fact challenges to regulations promulgated by EPA in 1994 and consistently applied since that time.

STATEMENT OF THE ISSUES

1. Given that Petitioners' challenges are actually to regulations promulgated in 1994, must the petitions be dismissed as untimely under the strict, 60-day limitations period set forth in 42 U.S.C. § 7607(b)(1)?

2. Does this Court's opinion in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), which reviewed a related EPA rule but did not announce a holding on the above-described jurisdictional issue, have any binding effect in this case?

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Petitioners' Brief and Addendum of Statutes and Regulations.

STATUTORY AND REGULATORY BACKGROUND

A. Section 612: The "Safe Alternatives Policy"

In 1990, Congress enacted Title VI of the Clean Air Act to phase out the production of ozone-depleting substances (called "class I and class II substances"), to replace them with safer alternatives, and to incentivize development of those alternatives. To those ends, Congress enacted Section 612 — titled the "safe alternatives policy" — which mandates that ozone-depleting substances be replaced

with alternatives that EPA has determined will "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a); *see id.* § 7671k(b) & (c).

To spur development and use of these safer alternatives, Congress required EPA to maintain and update lists of permissible and prohibited alternatives for specific end uses. *Id.* § 7671k(c). Congress also authorized any person to petition EPA at any time to move substances from one list to the other as new and safer substitutes are developed. *Id.* § 7671k(d). Finally, Congress also required that developers of substitutes (such as the HFCs at issue here) for certain ozone-depleting substances submit information on "unpublished health and safety studies" at least 90 days before introducing those substitutes into commerce. *Id.* § 7671k(e).

B. The 1994 SNAP Regulations

EPA adopted regulations implementing Section 612 of the Clean Air Act in the 1994 Rule, which established the Significant New Alternatives Policy ("SNAP") program. *See* 59 Fed. Reg. at 13,044. The program's stated objective is:

> to promote the use of those substitutes believed to present lower overall risks to human health and the environment relative to the [ozone-depleting] compounds being replaced, as well as to other substances for the same end-use, *and to prohibit the use of those substitutes found, based on the same comparisons, to increase overall risks.*

40 C.F.R. § 82.170(a) (emphasis added).

The 1994 Rule also established the initial lists of prohibited and safe substitutes required under Section 612(c). The rule designated various substitutes as "acceptable" (safe) for dozens of end uses, sometimes with use conditions or limitations. *See* 40

C.F.R. § 82.180; 59 Fed. Reg. at 13,122–46 (initial lists). The rule also listed various substitutes as "unacceptable" (prohibited) for particular end uses in light of their high risks and the availability of safer alternatives. *Id.* And, crucially for this case, the 1994 Rule established the consequence of an "unacceptable" listing, providing that "No person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." 40 C.F.R. § 82.174(d).

Under these longstanding regulations, EPA makes its "acceptable" and "unacceptable" listing decisions through a seven-factor comparative risk analysis that includes consideration of atmospheric effects and health and environmental impacts, toxicity, flammability, occupational and consumer risks, ecosystem risks, and the availability of other substitutes. 40 C.F.R. § 82.180(a)(7). From the outset, EPA has considered a substitute's contribution to climate change as one factor in listing decisions, using an index called "global warming potential" ("GWP"), which measures a chemical's heat-trapping potency. *Id.* § 82.178(6); *see* 59 Fed. Reg. at 13,055.

In the 1994 rulemaking, EPA expressly considered the key issues Petitioners attempt to raise in this case: (1) whether a decision listing HFCs or any other substitute as "acceptable" would be permanent or whether that listing could later be changed to "unacceptable" based on the emergence of safer alternatives, and (2) whether an entity that had begun using such a substitute could thereafter be required to cease using it if that substitute were later reclassified from "acceptable" to "unacceptable" based on the emergence of a safer alternative. Some commenters in

that rulemaking — including the current Petitioners' corporate predecessors — argued that the "acceptable" status of a non-ozone-depleting substitute could never be revoked and that a person using that substitute could never be required to switch to use of safer alternatives. *See, e.g.*, Elf Atochem (now Arkema), Comments on the Proposed Significant New Alternatives Policy Program at 1, EPA Air Docket, No. A-91-42-IV-D-30 (June 18, 1993) (JA__) ("Once a substance has been approved and is in use in a particular application, the Agency's authority ceases."). Unless the substitute itself depletes ozone, they asserted, EPA lacks authority under Section 612 to require someone to cease using it, even if a safer alternative were to become available after the initial "acceptable" listing of the original substitute. *Id.* In the alternative, these commenters asked EPA to guarantee that the "acceptable" listings would last for ten years, a period the commenters said would "allow for an appropriate return on investment" before further use of that substitute could be prohibited. *Id.*

EPA expressly rejected the commenters' argument that ozone-depleting chemicals are "replaced" only once (*i.e.*, the first time that the substitute chemical is used in a particular end use in place of the ozone-depleting substance) and that companies that switch to *non*-ozone-depleting substitutes for an end use are thereafter exempt from any further regulation within that end use under Section 612(c). In the preamble to the 1994 Rule, EPA explained that it "believe[s] that [ozone-depleting] substances are 'replaced' within the meaning of section 612(c) each time a substitute is

used, so that once EPA identifies an unacceptable substitute, any future use of such substitute is prohibited." 59 Fed. Reg. at 13,048. The Agency continued:

> Under any other interpretation, EPA could never effectively prohibit the use of any substitute, as some user could always start to use it prior to EPA's completion of the rulemaking required to list it as unacceptable. EPA believes Congress could not have intended such a result, and must therefore have intended to cover future use of existing substitutes.

Id.

EPA clearly stated in 1994 that this authority to change a substitute's listing and stop its subsequent use extends to any substitute that replaced an ozone-depleting substance, including HFCs. As EPA wrote: "Section 612(c) authorizes EPA to review *all* substitutes to [ozone-depleting] substances …." EPA, Response to Comments on the Significant New Alternatives Policy Rule at 9, EPA Air Docket, No. A-91-42-V-C-1 (Mar. 15, 1994) (JA__) ("1994 RTC").

Accordingly, EPA affirmed its authority to change the listing status of a substitute for an ozone-depleting substance from "acceptable" to "unacceptable" based on new risk information about that substitute or on the emergence of safer alternatives: "[T]he Agency may revise these [listing] decisions in the future as it reviews additional substitutes and receives more data on substitutes already covered by the program." 59 Fed. Reg. at 13,047. EPA promised to take such actions through rulemaking: "[O]nce a substitute has been placed on either the acceptable or the unacceptable list, EPA will conduct notice-and-comment rulemaking to subsequently remove a substitute from either list." *Id.*

The 1994 Rule codified this understanding. Implementing Section 612(d), the regulations provide for the filing of petitions, at any time, "to delete a substitute from the acceptable list and add it to the unacceptable list." 40 C.F.R. § 82.184(b)(3). And the regulations provide that "No person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." *Id.* § 82.174(d).

Nothing in the 1994 regulatory language, preamble, or listing decisions distinguished between an entity that is still using an ozone-depleting substance in an end use and an entity that has already switched to a non-ozone-depleting substitute. On the contrary, the regulations specified that if EPA changes the status of *any* substitute from "acceptable" to "unacceptable" for a particular end use, then "no person" may use that substitute for that end use thereafter, regardless what chemical substance that person is currently using. 40 C.F.R. § 82.174(d).

C. Industry's Petition for Review of the 1994 SNAP Regulations

Industry commenters, including the HFC producers now operating as Petitioners Mexichem and Arkema, clearly understood all of this in 1994, because they petitioned for review of the 1994 Rule through their trade association, specifically contesting the "criteria for SNAP Program listings" and contending that EPA must allow "grandfathering [*i.e.*, continued use of an already-in-use substitute] in the event of a change in … listing" of that substitute. *See Alliance for Responsible CFC Policy, Inc. v. EPA*, No. 94-1396 (D.C. Cir. Filed June 16, 1994); *see also* Joint Status Report at 3,

Alliance, No. 94-1396 (D.C. Cir. Sept. 24, 1997) (identifying issues, including "criteria for SNAP Program [] listings" and "grandfathering"). The association later dropped its petition, obtaining no relief on the SNAP Program listing criteria, grandfathering, or any other issue. *See* Order, *Alliance*, No. 94-1396 (D.C. Cir. Feb. 5, 2002), EFC No. 656132 (terminating case).

D. Subsequent Applications of EPA's 1994 SNAP Regulations

In succeeding years, EPA implemented the safe alternatives policy consistent with its 1994 Rule. The Agency regularly added newly-developed substitutes to the "acceptable" list after completing EPA's 90-day pre-introduction review of them under Section 612(e). EPA also added existing substitutes — both ozone-depleting and non-ozone-depleting substances — to the "unacceptable" list pursuant to Section 612(c) based on the emergence of new information revealing serious health and environmental risks associated with those substitutes and the availability of safer alternatives. For example, in 1996, EPA prohibited continued use of sulfur hexafluoride as a substitute propellant in aerosol products, because that chemical has a global warming potential 24,900 times that of carbon dioxide, and because safer alternative propellants were by then available. 61 Fed. Reg. 54,030, 54,038 (Oct. 16, 1996). And, in 1999, EPA banned use of hexafluoropropylene as a substitute refrigerant because it was shown to cause kidney damage in exposed workers. 64 Fed. Reg. 3,865 (Jan. 26, 1999). Both of these substitutes for ozone-depleting substances are highly dangerous, yet neither one depletes the ozone layer. In both cases, the bans

on further use apply to *anyone* using or contemplating use of these substitutes, including people already using them. *See* 40 C.F.R. § 82.174(d).

E. EPA's Regulation of Hydrofluorocarbons and Petitioners' Challenges to It

The 1994 Rule listed certain HFCs as acceptable "near term" substitutes for ozone-depleting substances for designated uses. 59 Fed. Reg. at 13,072. The reason for the "near term" caveat, EPA explained, was that, while HFCs are not ozone-depleting, they are nonetheless potent greenhouse gases, with thousands of times the heat-trapping power of carbon dioxide. *See id.* at 13,071. The preamble to the 1994 Rule stated that "rapid expansion of the use of some HFCs could contribute to global warming." *Id.* EPA also concluded, however, that HFCs posed "lower overall risk than continued use of" chlorofluorocarbons ("CFCs"), which not only deplete the ozone layer, but have even higher GWPs than HFCs. *Id.* Based on this comparison, EPA determined that, given the absence of available lower-risk alternatives *at that time*, HFCs could serve as a "*near-term* option for moving away from CFCs." *Id.* at 13,071–72 (emphasis added). Accordingly, EPA listed HFCs as acceptable substitutes for certain end uses of CFCs. *See id.* at 13,074–81 (refrigeration and air conditioning), 13,085–89 (foams), 13,116 (aerosols).

In keeping with the policy enunciated and codified in the 1994 Rule, EPA expressly stated in that same rulemaking that it could revise the initial "acceptable" listings for HFCs in the future, through additional rulemaking, based on new health or

environmental risk information about HFCs or based on the emergence of safer alternatives to HFCs for the same end uses. *Id.* at 13,047. Thus, from the 1994 Rule's inception, EPA made clear that it had authority under Section 612(c) to later move specific uses of HFCs from the "acceptable" to the "unacceptable" list if and when safer alternatives became available, and without regard to whether a person was still using CFCs or had already switched to HFCs.

In 2010 and 2012, the Natural Resources Defense Council and other organizations petitioned EPA to remove HFCs from the list of "acceptable" substitutes for ozone-depleting substances for various end uses, citing new evidence of danger and the advent of safer substitutes. *See* 80 Fed. Reg. 42,870, 42,879–80 (July 20, 2015). Scientific evidence supporting such changes continued to mount as researchers reported in 2013 that unrestrained growth in HFC use could add significantly to global average temperatures in this century, seriously amplifying the dangers of climate change. Yangyang Xu et al., *The Role of HFCs in Mitigating 21st Century Climate Change*, 13 Atmos. Chem. Phys. 6087 (2013), goo.gl/e99Uod (JA__).

In 2015, after notice-and-comment rulemaking, EPA added HFCs to the "unacceptable" list for certain end uses, including in aerosol propellants, motor vehicle air conditioners, various supermarket cooling systems, vending machines, and some insulating foams, based on the availability of non-ozone-depleting alternatives (such as hydrofluoro-olefins, or "HFOs") with dramatically lower GWPs than HFCs. 80 Fed. Reg. at 42,870 ("the 2015 Rule"). EPA observed:

- "HFC emissions are projected to increase substantially and at an increasing rate over the next several decades if left unregulated";
- HFC emissions in the United States are increasing "more quickly than those of any other [greenhouse gases], and globally they are increasing 10–15% annually," driven in part by the rapid growth of air conditioning;
- HFC emissions would "double by 2020 and triple by 2030";
- Once in the air, HFCs "rapidly accumulate[e] in the atmosphere";
- Atmospheric concentrations of specific HFCs were rising by 10–16% per year; and
- If this growth remained unchecked, the contribution to global warming from HFC emissions in 2050 could reach 27 to 69 percent of the warming from that year's carbon dioxide emissions.

Id. at 42,879.

In comments, Mexichem and Arkema repeated the arguments their predecessors had raised in the 1994 rulemaking and that EPA had resolved against them in the 1994 Rule, including their contention that "replacement" of an ozone-depleting substance is a one-time-only event that terminates EPA's authority over a user under Section 612. *See id.* at 42,936–37. EPA responded that it had resolved those issues in 1994. *See id.* The Agency did not reopen those issues in the 2015 rulemaking.

Rather, EPA made clear that it was simply applying the decision-making criteria established in the 1994 Rule to an expanded body of information on the risks posed by HFCs and on safer alternatives that had since been developed:

> It has now been over twenty years since the initial [safe alternatives] rule was promulgated. In that period, the menu of available alternatives has expanded greatly and now includes many substitutes with diverse characteristics and varying effects on human health and the environment.… In addition to an expanding menu of substitutes, developments over the past 20 years have improved our understanding of global environmental issues.… GWPs and climate effects are not new elements in our evaluation framework, but … the amount and quality of information has expanded.

Id. at 42,878. Petitioners Mexichem and Arkema subsequently filed petitions for review.

In 2016, while those petitions were pending before this Court, EPA promulgated the rule at issue in this case. *See* 81 Fed. Reg. 86,778 (Dec. 1, 2016). The 2016 Rule changed the listing of additional HFCs to "unacceptable" for additional end uses, based again on EPA's determination that safer alternatives were now available for those end uses. *See id.* at 86,778. As with the 2015 Rule, several companies filed comments objecting to the 2016 Rule on the ground that replacement of an ozone-depleting substance is a one-time-only event. *Id.* at 86,867. As in the 2015 Rule, EPA responded by explaining that it had resolved that issue in the 1994 Rule, where it rejected the same argument. *Id.* After EPA promulgated the 2016 Rule, Petitioners Mexichem and Arkema filed the instant petitions challenging it.

On August 8, 2017, in *Mexichem I*, a divided panel of this Court partially granted Petitioners' petitions challenging the 2015 Rule. Ruling against Petitioners, the panel unanimously upheld EPA's authority under Section 612(c) to move HFCs from the "acceptable" list to the "unacceptable" list where safer alternatives were available. *Mexichem I*, 866 F.3d at 457. The panel also rejected Petitioners' claims that changing the HFC listings from "acceptable" to "unacceptable" was arbitrary and capricious. *Id.* at 462–64. And the panel specifically affirmed that adverse climate impacts are a valid basis for prohibiting use of a substitute under Section 612(c). *Id.* at 463. The panel also agreed that no person currently using an ozone-depleting substance could replace it with an HFC in uses now listed as "unacceptable." *Id.* at 457. But over Judge Wilkins's dissent, Judges Kavanaugh and Brown held that EPA lacked authority under Section 612 to require product manufacturers that already use HFCs to cease using them even though safer alternatives are available. *Id.* at 458–59. The panel majority held that "Section 612 does not require (or give EPA authority to require) manufacturers to replace non-ozone depleting substances such as HFCs." *Id.* at 454. The *Mexichem I* majority did not address its jurisdiction to decide this last question, which EPA had said was resolved in the 1994 rulemaking and which EPA had expressly declined to reopen in the 2015 Rule. *See, e.g.*, 80 Fed. Reg. at 42,935–37.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the petitions because they challenge a regulation adopted in 1994 and thus are untimely. The Clean Air Act requires that a

petition for review be filed within 60 days of the date that notice of the challenged action appears in the Federal Register. While Petitioners claim to be challenging the 2016 Rule, the substance of their challenge is to the 1994 Rule, which was promulgated almost a quarter-century ago. Because their challenge to the 1994 Rule is almost 25 years late, this Court lacks the authority to review it.

Petitioners contend their challenge is timely because the 2016 Rule reflects a change in the Agency's interpretation of its authority established in the 1994 Rule. The administrative record belies that contention. It shows that the 2016 Rule simply applies the interpretation of EPA's authority under Section 612(c) that EPA promulgated in 1994 and has applied consistently — in regulations, rulemaking preambles, and responses to comments — since then. Language from the *Mexichem I* opinion suggesting otherwise rests on a gross misreading of the relevant parts of the administrative record.

Petitioners also assert that *Mexichem I* forecloses this Court from addressing this jurisdictional flaw. Not so. *Mexichem I* did not address, or state any holding on, the Court's jurisdiction to invalidate the regulatory prohibition on any person's use of a substitute in a use listed as "unacceptable," which was promulgated in the 1994 Rule, not in the 2015 Rule. The panel majority's statements about a purported change in EPA's position between its 1994 Rule and its 2015 Rule are not only wrong but are dicta, not tethered to any holding. Petitioners contend the *Mexichem I* majority *implicitly* held that it had jurisdiction, but that is pure speculation. Because the *Mexichem I* panel

did not decide the jurisdictional question, nothing in that opinion prevents this Court from addressing it in this case. This Court can and should hold that it lacks jurisdiction to review the petitions, as they are untimely challenges to EPA's 1994 Rule.

STANDARD OF REVIEW

The central issue here is whether the *Mexichem I* decision includes a jurisdictional determination that is entitled to preclusive or binding effect. Whether a prior decision has preclusive effect is a question of law that courts review *de novo*. *See Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1100 (10th Cir. 2007); *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1007 (9th Cir. 2007). Whether a prior decision includes a jurisdictional holding that is entitled to binding effect is also a question of law, to be considered *de novo*. *See United States v. Miranda*, 780 F.3d 1185, 1193 (D.C. Cir. 2015) ("[S]ubject matter jurisdiction presents a question of law for resolution by the court …."); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) ("Traditionally, decisions on questions of law are reviewable *de novo* ….") (quotation marks omitted).

ARGUMENT

I. The Petitions Are Untimely and the Court Lacks Jurisdiction to Review Them.

The Court lacks jurisdiction to review Petitioners' untimely challenge to an EPA regulation that has been in place since 1994. The Clean Air Act "directs that any

petition for review must be filed within sixty days from the date that notice of the challenged action appears in the Federal Register." *Med. Waste Inst. & Energy Recovery Council* 645 F.3d at 427 (citing 42 U.S.C. § 7607(b)(1)). That provision "is jurisdictional in nature." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998).

Petitioners purport to challenge the 2016 Rule, but they are really contesting a regulation adopted in the 1994 Rule. Back then, EPA made clear that an "acceptable" listing was not a permanent license to use a given substitute for an ozone-depleting substance, whether or not that substitute was itself ozone-depleting. The 1994 Rule established that permission to continue using that substitute could be withdrawn if EPA determined through further rulemaking that safer alternatives — ones that better "reduce[d] overall risk to human health or the environment," 42 U.S.C. § 7671k(c)(1) — had become available. The 1994 Rule made clear that the listing of HFCs as acceptable "near term" substitutes for CFCs was subject to revision and that EPA could later "revoke[]" their "acceptable listing … based on the availability of a new, lower-risk alternative" with lower global warming potential. 59 Fed. Reg. at 13,063.

The 1994 regulations, which remain in effect, expressly codified EPA's interpretation of its authority under Section 612(c). Those regulations provide for the filing of petitions, at any time, "to delete a substitute from the acceptable list and add it to the unacceptable list." 40 C.F.R. § 82.184(b)(3). And they further provide that *"[n]o person* may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." *Id.* § 82.174(d) (emphasis added).

The 1994 regulations even established a petition process by which manufacturers can apply to "grandfather use of an unacceptable substitute" rather than having to replace it with an acceptable one. 40 C.F.R. § 82.184(b)(5) & (c). That process for obtaining a short-term exemption from the bar on continued use that would otherwise apply could only have been necessary if EPA interpreted Section 612 as authorizing the Agency to prohibit the continued use of substitutes previously deemed acceptable.

EPA made this clear in responding to comments regarding the 1994 Rule. Some of those comments "articulate[d] the fear that SNAP will revisit prior decisions, removing substitutes previously deemed acceptable as newer and more environmentally benign substitutes are developed." 1994 RTC at 9 (JA__). In response, EPA explained that it had "held to a middle course between the two extremes of constant reevaluation of existing substitutes and assuring users of long periods of certainty associated with acceptability determinations under SNAP." *Id.* There would have been no need for EPA to follow a "middle course" if the Agency had foresworn authority to require persons to stop using a substitute that has been moved from the "acceptable" list to the "unacceptable" list.

Over the succeeding years, EPA exercised its authority to prohibit further use of dangerous substitutes for ozone-depleting substances that had already gone into use — without regard to whether the substitute being prohibited from further use was or was not itself an ozone-depleting substance. Some prohibited compounds were ozone-depleting substances. *See, e.g.*, 69 Fed. Reg. 58,269 (Sept. 30, 2004) (banning

continued use of ozone-depleting hydrochlorofluorocarbon-141b in foam-blowing applications); 64 Fed. Reg. 3,861 (Jan. 26, 1999) (banning continued use of ozone-depleting refrigerant blend MT31 as a substitute in refrigeration and air-conditioning because of toxicity concerns). Others were not ozone-depleting substances. *See, e.g.*, 64 Fed. Reg. at 3,865 (banning continued use of hexafluoropropylene as a substitute refrigerant because of health concerns); 61 Fed. Reg. at 54,038 (banning continued use of sulfur hexafluoride as a substitute propellant in aerosol products because of its global warming potential). EPA drew no distinction between the two classes of substances.

Further, nothing in the 1994 regulatory language, preamble, or subsequent listing decisions distinguished, for purposes of the prohibition on continued use of an "unacceptable" substitute, between an entity that is still using an ozone-depleting substance and an entity that had already switched to a non-depleting substitute. Rather, 40 C.F.R. § 82.174(d) specifies that "no person" may use a substitute in an application once that use is listed as "unacceptable," without regard to what chemical that person is currently using.

Industry members, including Petitioners' corporate predecessors, were well aware that EPA's 1994 Rule authorized EPA to revise the listing of a substitute initially listed as "acceptable" — including a non-ozone-depleting substitute such as HFCs — and to require entities to switch to a safer or more environmentally friendly alternative once it became available. That is why, in 1994, through their trade

association, industry commenters petitioned for review of the 1994 Rule, specifically raising the issue of "grandfathering [of existing users of the substitute] in the event of a change in … listing." *See Alliance for Responsible CFC Policy, Inc. v. EPA*, No. 94-1396 (D.C. Cir. Filed June 16, 1994); *see also* Joint Status Report at 3, *Alliance*, No. 94-1396 (D.C. Cir. Sept. 24, 1997) (JA__) (listing issues). The association (of which Petitioners' predecessors were members) dropped their case, however, without obtaining relief on this or any other issue. *See* Order, *Alliance*, No. 94-1396 (D.C. Cir. Feb. 5, 2002), ECF No. 656132 (terminating case).

Despite having switched sides in this litigation, EPA continues to maintain that its legal interpretation of Section 612 was consistent and unchanged from 1994 through the 2015 and 2016 Rules. EPA notes in its brief here that public comments on the 1994 Rule "express[ed] concern that EPA 'might remov[e] substitutes previously deemed acceptable as newer and more environmentally benign substitutes are developed.'" EPA Br. 6. EPA goes on to note that "EPA responded that it understood Congress to 'have intended to cover future uses of existing substitutes,'" *id.*, and that, according to the 1994 Rule, "ozone-depleting substances 'are "replaced" within the meaning of Section 612(c) each time a substitute is used, so that once EPA identifies an unacceptable substitute, any future use of such substitute is prohibited,'" *id.* (quoting 59 Fed. Reg. at 13,048), even by those who have already switched from use of the ozone-depleting substance to use of the now-unacceptable non-ozone-depleting substitute.

There is thus ample record evidence that the issue at the heart of Petitioners' challenge here — whether EPA may compel entities to stop using a substitute once it has been validly added to the "unacceptable" list, regardless whether that substitute depletes ozone — was decided in 1994, not in the 2015 or 2016 Rules. Petitioners' challenge is therefore untimely. *See* 42 U.S.C. § 7607(b)(1).

II. Nothing in *Mexichem I* Requires This Court to Hold That It Has Jurisdiction Over the Petitions for Review.

Mexichem I does not preclude this Court from considering its jurisdiction here and determining that such jurisdiction is lacking. This panel is bound only by the *holdings* from prior cases. *See Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) ("binding circuit law comes only from the holdings of a prior panel, not from its dicta"). A holding exists only where "the court, in stating its opinion on the point, believed it necessary to decide the question," rather than "simply using [the point] by way of illustration of the case at hand." *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969); *see also* BLACK'S LAW DICTIONARY, *Holding* (10th ed. 2014) (defined as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision"). Holdings are distinct from *dicta*, which do not bind anyone. *See Doe*, 851 F.3d at 10; *United States v. Crawley*, 837 F.2d 291, 292–93 (7th Cir. 1988) (Posner, J.) ("A dictum is … a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication.") (internal quotations omitted). The *Mexichem I* majority

never issued a holding regarding its jurisdiction to review the petitions in that case. The statements from *Mexichem I* on which Petitioners rely are dicta.

Nothing in *Mexichem I* indicates that the panel there addressed the timeliness of Petitioners' challenge in that case — which was nominally to the 2015 Rule but in fact challenged interpretations enunciated in EPA's 1994 rulemaking. The panel never acknowledged that the 2015 Rule did no more than change the listing status of HFCs from "acceptable" to "unacceptable" for certain end uses and contained no regulatory text pertaining to the legal *consequence* of that listing change — which was established in the 1994 Rule. The panel never grappled with the arguments and evidence discussed above that EPA's legal interpretation was consistently held from 1994 through 2016 and that the petitions were therefore untimely. The word "jurisdiction" does not appear anywhere in the decision, nor does the decision otherwise mention the jurisdictional provision of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the 60-day limitations period for filing petitions for review that is the core of that provision, or the single exception — for petitions that are based solely on "after-arising grounds" — to that limitations period. Had the panel addressed its jurisdiction, one would expect it to have mentioned at least one of these things. *Cf. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 340 (2007) ("It is hard to suppose that the [] majority definitively rejected these arguments without explaining why.").

Petitioners nevertheless contend that, by stating that the 2015 Rule reflected a change in EPA's position, the *Mexichem I* panel implicitly addressed the timeliness issue underlying the jurisdictional problem. *See* Pet'rs Br. 30. But there is no evidence that the *Mexichem I* panel referred to the purported change in EPA's position for purposes of addressing the court's subject matter jurisdiction. Indeed, it is likely the *Mexichem I* majority was doing nothing more than pointing out what it (erroneously) perceived as inconsistencies in EPA's interpretations of Section 612.[1] The panel's initial reference to the purported change of position, for example, appears in the regulatory background section of the opinion. *See Mexichem I*, 866 F.3d at 455. The next reference appears in the part of the panel's analysis addressing the proper interpretation of Section 612(c). *See id.* at 458. That discussion deals with the merits. Nowhere does the panel suggest it is analyzing jurisdiction.[2]

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[1] The panel made similar rhetorical statements regarding EPA's authority to regulate to address climate change concerns, *see, e.g.*, 866 F.3d at 460 ("EPA's well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate"), but those statements too were not connected to any holding in the opinion. Indeed, the majority later upheld, as neither arbitrary nor capricious, EPA's authority under Section 612(c) to consider global warming potential as a factor in comparing a substitute to an available alternative. *Id.* at 463.

[2] It bears mention that the references to EPA's purported change of position also could not have been made in support of the *Mexichem I* majority's conclusion that EPA's interpretation of Section 612(c) was unlawful. The panel expressly rested that conclusion on a *Chevron* Step One analysis of the text of Section 612(c), *see Mexichem I*, 866 F.3d at 459–60, to which analysis the Agency's interpretation of the provision is irrelevant, *see SBC Commc'ns, Inc. v. FCC*, 138 F.3d 410, 418–19 (D.C. Cir. 1998). The panel's alternative, *Chevron* Step Two holding relied on congressional purpose and (Continued...)

To prop up their argument that the *Mexichem I* panel must have resolved the jurisdictional issue, Petitioners note that the parties addressed the issue in a few pages in their briefs in *Mexichem I*. *See* Pet'rs Br. 24. But the fact that the jurisdictional argument was raised in briefs, or even mentioned at oral argument, does not mean the court actually addressed it in resolving the case. Petitioners are relying on conjecture in the face of an opinion that never once mentions jurisdiction or the Clean Air Act's jurisdictional provision.

Petitioners also suggest that, because Intervenor-Respondents raised lack of jurisdiction in their petitions for rehearing in *Mexichem I*, and because the Court summarily denied rehearing, the Court must have rejected the jurisdictional argument. But a summary denial of rehearing is not a merits decision and does not have preclusive effect. *See Estate of Parsons v. Palestinian Auth.*, 952 F Supp. 2d 61, 69 n.6 (D.D.C. 2013) (citing appellate decisions from around the country).

Because the *Mexichem I* panel never ruled on the timeliness of Petitioners' challenge in that case, Petitioners are wrong that *stare decisis* compels this Court to hold that it has jurisdiction over the petitions in this case. *See* Pet'rs Br. 24–26. *Stare decisis* is a doctrine of precedential effect, and it is a well-settled rule that "jurisdictional issues that were assumed but never expressly decided in prior opinions do not thereby become precedents." *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 776 (D.C. Cir.

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legislative history, not EPA's past interpretations, to reject EPA's interpretation of Section 612(c). *See Mexichem I*, 866 F.3d at 460.

1996); *see Arizona Christian Sch. Tuition Org. v. Winn*, 564 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.").

Petitioners' collateral estoppel argument fares no better. Petitioners contend that *Mexichem I* collaterally estops Intervenor-Respondents from contending that this Court lacks jurisdiction. *See* Pet'rs Br. 26-28. But collateral estoppel only applies if, among other things, an issue was "actually and necessarily determined by a court of competent jurisdiction in [a] prior case." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015). As explained, the *Mexichem I* panel's statements that EPA had changed its position were pure dicta. Because, by definition, dictum is not necessary to any judicial determination, it cannot have collateral estoppel effect. *See Ass'n of Bituminous Coal Contractors, Inc. v. Andrus*, 581 F.2d 853, 860 (D.C. Cir. 1978) (no collateral estoppel effect given to language in opinion that "was broader than necessary for the outcome reached"); *Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983) (citing *Andrus* for the proposition that "mere dictum … does not trigger application of collateral estoppel"); *In re Bean*, 262 F.3d 113, 118 (2d Cir. 2001) (finding of abuse of discretion "was pure *dicta*" and, "[a]s such … cannot have any collateral estoppel effect"). Therefore, there is no basis for applying collateral estoppel to Intervenor-Respondents' jurisdictional arguments here.

III. Arguments that the 2016 Rule Reflects a Change in EPA's Position Rest on a Misreading of the Administrative Record.

Independent of their arguments about *stare decisis* and collateral estoppel, Petitioners' rely heavily on *Mexichem I* for the proposition that the 2015 and 2016 Rules really do reflect a changed interpretation of EPA's authority under Section 612(c) — an interpretation that, according to Petitioners, in 2015 for the first time allowed EPA to prohibit any person from using an alternative after it is listed as "unacceptable." *See* Pet'rs Br. 30–31 (citing *Mexichem I*). This is one reason why Petitioners make so much of the *Mexichem I* majority's *dictum* that, "For many years, EPA itself stated that it did not possess authority under Section 612(c) to require the replacement of non-ozone depleting substances." *Mexichem I*, 866 F.3d at 458. Of course, EPA affirms even now that it never took (and still does not take) that position. *See* EPA Br. 6.

In support of its statements to the contrary, the *Mexichem I* majority cited just two passages from the record. *See Mexichem I*, 866 F.3d at 458. Neither passage, however, actually supports the panel majority's conclusion about EPA's position in the 1994 Rule or since. The majority opinion refers first to EPA's response to commenters who, in 1994, asked for clarification from the Agency about an "exemption for second-generation substitutes." *See id.* (discussing 1994 RTC at 9 (JA__)). EPA responded that "Section 612(c) authorizes EPA to review all substitutes to [ozone-depleting] substances, but does not authorize EPA to review substitutes for

substances that are not themselves [ozone-depleting] substances." 1994 RTC at 9 (JA__). That response is entirely consistent with what EPA did in the 2015 and 2016 Rules. HFCs were designed and marketed as substitutes for ozone-depleting substances. For example, HFC-134a was designed to replace CFC-12 in car air conditioners. This makes it a "first-generation" substitute — that is, a substance intended to directly replace an ozone-depleting substance that is still in use. EPA's 1994 regulations expressly addressed HFCs as first-generation substitutes for ozone-depleting substances.

EPA's response only disclaimed authority under Section 612(c) to review "substitutes for substances that are *not* themselves [ozone-depleting] substances" — that is, to bar the continued use of "second-generation" (and later-generation) substitutes. 1994 RTC at 9 (JA__) (emphasis added). At most, then, EPA's response disclaims authority for the Agency to employ Section 612(c) to prohibit persons from using *a later-developed substitute for HFCs* by placing that later-developed substitute on the "unacceptable" list for an end use. In sum, EPA's response to comments says nothing to limit the Agency's continuing authority to review and, when appropriate, bar continued use of HFCs pursuant to Section 612(c), because HFCs were designed to replace ozone-depleting substances, not to replace *non*-ozone-depleting substances.

The second passage relied on by the *Mexichem I* majority comes from an EPA ruling in 1996 regarding OZ Technology's 1995 petition to have EPA list both HFC-134a and HC-12a as acceptable substitutes for certain in-use refrigerants. *See Mexichem*

I, 866 F.3d at 458 (citing EPA, Response to OZ Technology Petition, Att. at 1 (Aug. 30, 1996) (JA__)). In response to the petition, EPA stated (consistent with the response to comment discussed just above) that: (1) "under the March 18, 1994 SNAP rule, EPA does not review substitutes for non-ozone-depleting refrigerants like HFC-134a"; and (2) "the SNAP rule does not regulate the legitimate substitution of HC-12a for first generation non-ozone-depleting substances." Response to OZ Technology Petition, Att. at 1 (JA__). In other words, to the extent OZ Technology marketed HC-12a as a substitute for CFC-12 (an ozone-depleting substance), HC-12a was a first-generation substitute over which EPA retained full regulatory authority under Section 612. *Id.* But to the extent HC-12a was marketed as a substitute for HFC-134a, EPA said it would not have authority under Section 612(c) to prohibit the use of HC-12a in that application, because HFC-134a is not itself an ozone-depleting substance. Critically, nothing in EPA's response to OZ Technology's petition disclaimed continuing authority under Section 612(c) to prohibit the use *of HFCs* — which are first-generation substitutes for ozone-depleting substances like CFCs — if EPA placed HFCs on the "unacceptable" list.

Both of the EPA statements on which Petitioners rely underscore that from 1994 forward, EPA consistently interpreted Section 612(c) to prohibit the use of HFCs — which were and remain first-generation substitutes for ozone-depleting substances — if they were listed as "unacceptable" for an end use. The 2015 and 2016 Rules applied that interpretation without change. Both rules validly moved HFCs to

the "unacceptable" list based on the availability of safer alternatives such as HFOs. The ban on further use of HFCs in those applications then followed automatically as the legal consequence established by the 1994 Rule.

Thus, the language from *Mexichem I* on which Petitioners rely itself rests on passages from the record that reinforce, rather than undermine, the conclusion that EPA has consistently interpreted its Section 612(c) authority from 1994 through the rule here under review, with no change in its position. At all times, EPA has considered HFCs to be first-generation substitutes and thus subject to being placed on the "unacceptable" list for an end use if safer alternatives for that end use became available, and at all times the regulations have prohibited further use *by anyone* of first-generation substitutes like HFCs once they are placed on the "unacceptable" list for an end use. Petitioners' assertion that the 2015 and 2016 Rules reflected a new position by EPA is groundless.

CONCLUSION

Based on a finding that HFCs present serious risks to human health and the environment, and based on the emergence of safer alternatives, EPA's 2016 Rule moved HFCs from the "acceptable" to the "unacceptable" lists for certain end uses. The legal consequence of that move — that no user may continue to use HFCs for the specified end uses — was dictated by EPA's 1994 Rule, not by the 2016 Rule. And it is that consequence which Petitioners challenge here. Petitioners had the opportunity to challenge the 1994 Rule. They took that opportunity by filing a timely

petition for review, but subsequently allowed their challenge to be terminated without obtaining any relief. They should not be permitted to evade the Clean Air Act's strict time limits on seeking judicial review by mischaracterizing their decades-late challenge to the substance of the 1994 Rule as a timely challenge to the 2016 Rule. The jurisdictional question was not decided in *Mexichem I*. It must be decided here. The petitions for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because this brief contains 7,448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Garamond font using Microsoft Word.

November 9, 2018

/s/ Thomas A. Lorenzen
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CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 2018, 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.

November 9, 2018 /s/ Thomas A. Lorenzen
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