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Air and Radiation Docket and Information Center
Environmental Protection Agency
Mail Code: 6102T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket # EPA-HQ-OAR-2013-0263

Dear Sirs and Madams:

We submit these comments in response to EPA's Notice of Data Availability in relation to the proposed rule entitled Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import and Export, 78 Fed. Reg. 78072 (December 23, 2013) (the "Proposed Rule"). We offer these comments on behalf of several parties, including New Era Group, Inc.; Altair Partners, LP; American Refrigerants, Inc.; Combs Investment Property; Consolidated Refrigerants Reclaim; Diversified Pure Chem; Dynatemp International; ICOR International; North Lakes Distributing, Inc.; Refrigerants Inc.; Refrigerants Salvage, Inc., RMS of Georgia; Safe Disposal Systems, Inc.; Summit Refrigerants; and USA Refrigerants. Certain of those parties may have submitted comments directly. These comments should be considered additional and supplemental to such comments.

Throughout this rulemaking, we have urged EPA not to allocate a pound more of HCFC-22 consumption allowances than is necessary for servicing equipment after the existing inventory, reclamation capacity, and availability of alternative refrigerants are accounted for. The crucial element in this calculation, however—the existing HCFC-22 inventory—has remained a mystery throughout this rulemaking process.

At the time EPA published the Proposed Rule in December 2013, it did not reveal to the public the HCFC-22 inventory data on which it based its calculations. All that the public knew at that time was that EPA had surveyed nine companies, and the combined inventory of those companies, as of a year earlier, on December 31, 2012, was higher than EPA's earlier estimates of 45,400 MT. As such, the information EPA revealed to the public was lacking in a number of respects. First, EPA's inventory estimates were based on data that was at least a year old, and second, EPA failed to provide the public with the actual inventory data. Additionally, the data made public did not reflect a statistically significant sample, and the data sources and the analytical analyses used to develop conclusions based on the data provided were undisclosed.

EPA's information was outdated because EPA itself did not know how large the inventory was at the time it drafted and published the Proposed Rule. In promulgating a rule published in December 2013, EPA relied on data from December 2012. It was only upon the insistence of our clients and other stakeholders that EPA finally conducted another inventory survey in February 2014, seeking inventory data as of December 2013.

The reason for EPA's failure to reveal the actual inventory data was that two of the nine companies surveyed claimed that even their aggregate inventory data was confidential business information. This claim should have been immediately rejected, and the aggregate data released in

response to a Freedom of Information Act request submitted in October 2013 by the Natural Resources Defense Council. Instead, it took EPA six months to evaluate this baseless claim and to conclude that the aggregate data could not constitute confidential business information. These six months, and especially the public comment period for the Proposed Rule, were crucial for this rulemaking. But from December 23, 2013, when the Proposed Rule was published until March 10, 2014, the deadline for written comments on the Proposed Rule, the public had no benefit of the aggregate inventory data.¹

EPA has now revealed the 2012 data, as well as the aggregate inventory data for nine companies as of December 2013.² According to this newly-revealed information, the aggregate HCFC-22 inventory of nine companies surveyed at the end of 2012 was 51,124 MT and 53,925 MT at the end of 2013.

¹ EPA indicates in the Notice of Availability that it concluded that the aggregate inventory data was not entitled to confidential treatment on February 18, 2014. However, it did not post the data on its website or notify stakeholders until March 10, 2014. It is not clear what took so long to make the data available. The public could have relied on this critical data in drafting the comments.

² EPA has also updated the 2013 Servicing Tail Report, but has failed to highlight the changes it made in this 58-page document, making it impossible for the public to comment on these revisions.

That EPA has revealed the aggregate data from 2012 and that it updated the aggregate data for 2013 is commendable, but these efforts fall far too short of what is necessary. EPA has failed to address the root of the problem in its inventory calculations by continuing to limit its survey to a fraction of the HCFC-22 inventory holders. EPA insists that the nine companies surveyed represent 80% of the market but, despite numerous requests, has refused to explain the basis for this conclusion. It is hard to believe that nine companies represent 80% of the HCFC-22 inventory in the entire United States. Fairness and due process demand that the analysis upon which the conclusion is based, and the facts and opinions underlying it, be fully disclosed and subjected to public comment in accord with the Administrative Procedure Act and other applicable laws.

Our clients have continuously argued for a wider survey and demanded disclosure of the analytical conclusions drawn from it. The only reason EPA has given for its refusal to survey more than nine companies is its desire to avoid an allegedly lengthy and cumbersome OMB process. But reluctance to deal with a bureaucracy can hardly be justification for inaction when it comes to EPA's duty to collect reliable data that form the very basis for its rules. In this instance, inaccurate data will result in an inadequate rule that will be damaging to everyone involved: HCFC-22 reclaimers, the alternative-refrigerant producers, and the environment.

EPA's poor record in estimating HCFC-22 inventory suggests that this latest set of data is most likely inaccurate as well. Year after year, EPA has acknowledged that its earlier HCFC-22 inventory estimates were too low. Yet, EPA continues to rely on the same methodology. It insists that it has the correct numbers now, but it is difficult to see how that could be so. There are nineteen holders of HCFC-22 allocation allowances. By EPA's logic, nine of these companies hold 80% of the inventory, and the other 20% belongs to the other eleven HCFC-22 allocation holders (and presumably the many other companies that do not receive HCFC-22 allocation allowances but nevertheless stock HCFC-22 in their inventories). Using actual amounts, by EPA's estimates, the entire HCFC-22 inventory in the United States is approximately 67,406 MT, with nine companies holding 53,925 MT, and everyone else sharing the remaining 13,481 MT.

EPA has failed to explain to the public how it arrived at the conclusion that nine companies hold 80% of the HCFC-22 inventory or to indicate what companies contribute to the remaining 20%. It is not clear whether EPA believes that the nineteen HCFC-22 allocation holders represent the entire 100% of the market or whether other entities add to the universe of HCFC-22 inventory. Even if in its calculations EPA limits the entire HCFC-22 market to the nineteen allocation holders, it seems unlikely that the remaining eleven entities possess only 13,487 MT of HCFC-22. After all, the nine companies that possess 53,925 MT are not even the companies with the highest HCFC-22 allocations.

To illustrate, listed in the descending order of the size of their apportioned baseline consumption allowances for HCFC-22, the nineteen HCFC-22 allocation holders include:

- (1) Arkema (~ 48,637 MT),
- (2) Dupont (~ 38,814 MT),
- (3) Honeywell (~ 35,392 MT),
- (4) National Refrigerants (~ 5,528 MT),
- (5) Solvay Fluorides (~ 3,781 MT),
- (6) Mexichem Fluor Inc. (~ 2,546 MT),
- (7) MDA Manufacturing (~ 2,541 MT),
- (8) Kivlan & Company (~ 2,081 MT),
- (9) Coolgas Investment Property (~ 1,040 MT),
- (10) Refricenter of Miami (~ 381 MT),
- (11) Atair Partners (~ 302 MT),
- (12) Mondy Global (~ 281 MT),
- (13) ABCO Refrigeration Supply (~ 279 MT),
- (14) R-Lines (~ 63 MT),
- (15) Carrier (~ 54 MT),
- (16) Refricentro (~ 46 MT);
- (17) H.G. Refrigeration Supply (~ 40 MT),
- (18) Saez Distributors (~ 37 MT), and
- (19) USA Refrigerants (~14 MT).

Apportionment of Baseline Consumption Allowances for Class II Controlled Substances, 40 C.F.R. 82.19.

Out of the nineteen entities, USA Refrigerants has the lowest baseline. Yet, it was one of the nine companies EPA surveyed and is one of the nine companies the inventory of which comprises 80% of the HCFC-22 market, according to EPA. Because the names of the allocation holders who received the letters are not public, we can only guess at the identity of the other eight recipients and have no ability to assess the accuracy of EPA's estimate. To solve some of the mystery surrounding HCFC-22, EPA could have at least surveyed all nineteen allocation holders.

Even with a survey of all nineteen allocation holders, however, much of HCFC-22 inventory would likely remain under EPA's radar. Our clients have noted repeatedly that EPA's attempt to survey nine companies is insufficient to address the state of HCFC-22 inventory. In response to those arguments, in January 2014 EPA indicated a willingness to consider inventory data from additional companies. The SBA Office of Advocacy volunteered to assist EPA in this regard. In accordance with that understanding, our clients promptly provided EPA and SBA with a list of fifty-four companies most likely to hold this inventory. Along with the original nineteen companies that possess allocation allowances, the expanded list provided to the EPA and SBA included companies that are known to maintain large inventories of HCFC-22, i.e. wholesale distributors, service contractors, original equipment manufacturers, and refrigerant reclamation companies.

But after having requested these names and having received them, EPA decided to do nothing, continuing to maintain that the nine companies it has surveyed constitute 80% of the market. The only additional action EPA has taken, according to the documents in the docket to the Proposed Rule, was to hold a number of meetings with various stakeholders from December 6, 2013 to April 4, 2014. The docket is silent on the nature of those meetings or the type of information (if any) that EPA has obtained as a result of those meetings. These consultations have taken place both before and after the publication of the Proposed Rule, and EPA has relied upon information obtained through such consultations to reach conclusions critical to the outcome of these rules. EPA, however, has neither identified the sources or content of such information nor exposed the conclusions or their basis to allow meaningful public comment.

EPA's refusal to survey more than nine companies and its failure to explain to the public the information and opinions underlying or the reasoning behind its conclusion that nine companies possess 80% of the HCFC-22 inventory has deprived the public of the opportunity to provide

meaningful comments on the Proposed Rule. The size of existing HCFC-22 inventory is a critical element in the calculation of the amount of necessary HCFC-22 allocations from 2015 to 2019. Without accurate data on HCFC-22 inventory, EPA is bound to repeat the mistakes of the April 3, 2013 rule. Considering the damaging effect of the EPA's miscalculations in that rule, EPA's refusal to conduct a wider survey in this rulemaking is astounding.

Our clients welcome the gesture in the direction of fairness, openness and transparency which the Notice of Availability provides. While EPA has implicitly acknowledged the fatal defects in prior years' rulemakings, however, it has failed to provide meaningful corrective actions. EPA does not, as our clients have consistently demanded over the last several years:

- Base its determinations regarding existing inventories on a statistically valid sample and valid analytical methods;
- Discuss those determinations in an open, transparent and even-handed process with full disclosure to all affected parties;
- Properly and timely notify the public of the facts, analyses and opinions underlying EPA's critical conclusions so as to permit and facilitate informed public comment; or
- Properly and meaningfully address substantial comments in promulgating any final rules.

For these reasons we are of the view that the Proposed Rule, like the Final Rule which was published in April of 2013, is fatally defective. It needs to be withdrawn and the Notice republished and immediate steps need to be taken to mitigate the serious damage to the small companies we represent and, even more importantly, to human health and the environment, by EPA's longstanding practice of basing its decisions primarily on inputs from producing entities whose interests favor high allocations.

Sincerely,

J. Gordon Arbuckle