

May 5, 2014

VIA CERTIFIED MAIL (Return Receipt)

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: 60-Day Notice of Citizen Suit

Dear Ms. McCarthy:

By this letter, our client, New Era Group, Inc., gives the Environmental Protection Agency (EPA) notice of its intent to sue EPA under § 304(a)(2) of the Clean Air Act ("CAA"). We give you this notice in your official capacity as EPA's Administrator pursuant to § 304(b)(2), 42 U.S.C. § 7604(b)(2). New Era Group intends to bring this suit on its behalf and on behalf of the following companies: 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 (Plaintiffs).

New Era Group intends to sue EPA for its failure to collect reliable data and to perform a reliable assessment of the existing inventory of and the need for virgin hydrochlorofluorocarbon (HCFC)-22, an ozone-depleting chemical EPA is tasked with phasing out under Title VI of the CAA. Despite continued requests and demands from the Plaintiffs, EPA has consistently refused to conduct any reasonable investigation or inquiry in order to obtain, collect and analyze reliable data on HCFC-22 inventories, the fate of HCFCs that have been produced, or the capacity of existing companies to reclaim and recycle used chemicals.

The Honorable Gina McCarthy

May 5, 2014

Page 2

The failure to conduct such a clearly necessary and mandatory investigation has deprived both the Agency and the public of the critical foundational information that was required in order to properly consider the issues involved in the 2003, 2009, and 2013 rulemakings respectively. As a result of EPA's failure to collect reliable data, the rules promulgated by EPA have not been and are unlikely in the future to be based on reality. By allocating more HCFC-22 consumption allowances than necessary, EPA has caused and is continuing to cause damage to the environment and adversely affected HCFC-22 reclaimers and producers of alternative refrigerants.

The Agency's continued failure to conduct a meaningful investigation and publish the results thereof is also likely to cause fatal defects in the Agency's current proceeding to develop rules for the remainder of the phaseout period. As EPA is promulgating the final rule in the HCFC-22 phaseout, EPA must reliably and credibly account for the existing HCFC-22 inventory and make every reasonable effort to assure that existing reclamation capability will be fully utilized and, at the end of the phase out period, no excess inventory will remain. The purpose of New Era Group's action will be to ensure EPA does that.

Stratospheric ozone protection is addressed in Title VI of the Clean Air Act. Congress enacted Title VI in 1990 to implement as domestic law the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Title VI established a framework for phasing out the production and consumption of ozone-depleting substances through an annual reduction of quantities of chlorofluorocarbons (class I substances) and HCFCs (class II substances). 42 U.S.C. §§ 7671-7671q .

Under § 7671d, EPA is required to "promulgate regulations phasing out the production, and restricting the use, of class II substances . . ." The consumption of class II substances in the United States must be "phased out and terminated in accordance with the same schedule . . . as is applicable to the phaseout and termination of production of class II substances under this title." *Id.* With regard to production of class II substances, § 7671d provides:

- (1) Effective January 1, 2015, it shall be unlawful for any person to produce any class II substance in an annual quantity greater than the quantity of such substance produced by such person during the baseline year.
- (2) Effective January 1, 2030, it shall be unlawful for any person to produce any class II substance.

Thus, EPA is required to promulgate rules under which (1) class II consumption allowances on January 1, 2015 and going forward are not greater than the allowance holders' baselines; and (2) class II consumption is completely phased out by January 1, 2030. *Id.*

The Honorable Gina McCarthy
May 5, 2014
Page 3

To carry out this Congressional mandate, EPA has thus far promulgated three rules. EPA issued the first rule in this series in 2003, covering the phaseout period from 2004 to 2010. *Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export*, 68 Fed. Reg. 2820 (Jan. 21, 2003). The second rule was published in 2009 and covered the 2010 through 2014 regulatory period. 74 Fed. Reg. 66412 (Dec. 15, 2009). A portion of the 2009, however, was vacated by the U.S. Circuit Court of Appeals for the D.C. Circuit in *Arkema v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), triggering promulgation of an additional rule during the same regulatory period. This third rule was published on April 3, 2013. 78 Fed. Reg. 20004 (Apr. 3, 2013).

In each of these rulemakings, EPA has made little or no effort to investigate the actual facts and determine the levels of inventories actually existing. Instead, it has attempted to guess or estimate how much virgin HCFC-22 gas allocation holders and companies in related industries have accumulated over the years and how much additional HCFC-22 was really needed. Guesses and estimates are not facts and, when facts are reasonably ascertainable, guesses and estimates are not an acceptable basis for regulatory decisions. As a result of EPA's failure to accurately determine the key facts, the oversupply of virgin HCFC-22 continued to grow uncontrollably. The April 3 rule reached the tipping point, crashing HCFC-22 market, when it announced that an additional 100 million pounds of HCFC-22 could be produced over the following two years. As EPA is well aware, this had a devastating effect on the reclamation and alternative-refrigerant industries, which could not compete with cheap virgin gas that was available in excessive quantities.

The reason there has long been a mismatch between what the market needs and what EPA allocates is EPA's persistent unwillingness to collect reliable HCFC-22 data inventory. In promulgating the April 3 rule, EPA relied on "anecdotal information" and "industry feedback" to determine how much of the need for HCFC-22 could be met through the existing inventory, reclamation, and alternative refrigerants. See 78 Fed. Reg. at 20013; *Analysis of HCFC-22 Servicing Needs in the U.S. Air Conditioning and Refrigeration Sector: Additional Considerations for Estimating Virgin Demand* (Adjustment Memo), 2, 5.

In this final rulemaking process, EPA's inventory estimates for 2015-19, as stated in the proposed rule published on December 23, 2013, were based on the responses of nine companies to EPA's 2013 request for information as of year-end 2012 under § 114 of the Clean Air Act. *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import and Export*, 78 Fed. Reg. 78072 (Dec. 23, 2013). EPA has explained it surveyed only nine companies because (i) it believes the inventories of those companies represent approximately 80 % of the market and (ii) it could not conduct a larger survey without obtaining clearance from the Office of Management and Budget (OMB), which would have taken a long time.

The Honorable Gina McCarthy
May 5, 2014
Page 4

New Era Group has continuously argued that (i) the nine companies do not represent anywhere near 80% of the market, and (ii) year-end 2012 responses were outdated. In response to our clients' requests, at the end of February 2014 EPA sent another round of § 114 letters. This effort, however commendable, fell short of addressing the concern that EPA lacks accurate data on the HCFC-22 inventory. As New Era Group and other entities pointed out in their comments on the December 23 proposed rule, recipients of these nine letters do not hold 80 % of the HCFC-22 inventory. There are nineteen holders of HCFC-22 allocation allowances. EPA has not sent letters to even half of those allocation holders. Moreover, EPA did not send § 114 letters to 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 (48,637,642 kg),
- (2) Dupont (38,814,862 kg),
- (3) Honeywell (35,392,492 kg),
- (4) National Refrigerants (5,528,316 kg),
- (5) Solvay Fluorides (3,781,691 kg),
- (6) Mexichem Fluor Inc. (2,546,305 kg),
- (7) MDA Manufacturing (2,541,545 kg),
- (8) Kivlan & Company (2,081,018 kg),
- (9) Coolgas Investment Property (1,040,458 kg),
- (10) Refricenter of Miami (381,293 kg),
- (11) Atair Partners (302,011 kg),
- (12) Mondy Global (281,824 kg),
- (13) ABCO Refrigeration Supply (279,366 kg),
- (14) R-Lines (63,172 kg),
- (15) Carrier (54,088 kg),
- (16) Refricentro (45,979 kg);
- (17) H.G. Refrigeration Supply (40,068 kg),
- (18) Saez Distributors (37,936 kg), and
- (19) USA Refrigerants (14,865 kg).

Apportionment of Baseline Consumption Allowances for Class II Controlled Substances, 40 C.F.R. 82.19. Although this is a concrete and manageable list, EPA has sent § 114 letters to only nine of the companies on the list.

EPA's selection of the nine companies is also questionable. Considering EPA's argument that its survey is sufficient because it covers 80 % of the market, if EPA was set on only surveying nine companies, it would have made sense for it to target the nine companies

The Honorable Gina McCarthy
May 5, 2014
Page 5

with the largest HCFC-22 allocations. Yet, EPA has not done that. For example, USA Refrigerants received a § 114 letter, but it is not among the nine companies with the highest HCFC-22 allocations. On the contrary, it is the nineteenth company on the list. 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. If instead of starting at the top of the list, EPA started at the bottom, then the data EPA is collecting at best represents some 5% of the entire HCFC-22 inventory, not 80%.

Courtesy of USA Refrigerants, we have also had an opportunity to review one of the § 114 letters. They appear to be inadequate in scope. For example, EPA appropriately surveys respective inventories on December 31, 2013, but fails to inquire as to what companies, if any, bought HCFC-22 from the allocation holders in the preceding year. As a result, if an allocation holder sold its entire HCFC-22 inventory to a non-allocation holder on December 30, 2013, that inventory would be completely under EPA's radar.

Even if § 114 letters had targeted the nine companies with the largest HCFC-22 allocations or if they covered all information relevant to HCFC-22 inventory, they would still be incapable of capturing the entire HCFC-22 inventory. 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 seeking inventory data from additional companies. The Small Business Administration Office of Advocacy volunteered to assist EPA in this regard. Our clients have provided EPA and SBA with a list of companies most likely to hold this inventory. EPA should conduct additional surveys and take into consideration the information that will become available through these additional surveys.

New Era Group and its counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA coming into compliance within 60 days. If you do not do so, however, we will have to file a complaint.

As required by 40 C.F.R. § 54.3, the person providing this notice is:

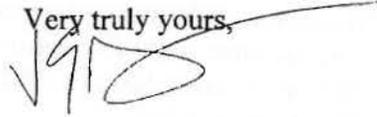
New Era Group, Inc.,
17 Grey Moss Road,
Murrells Inlet, South Carolina 29576.

PATTON BOGGS LLP

The Honorable Gina McCarthy
May 5, 2014
Page 6

While EPA regulations require this information, please direct all correspondence and communications regarding this matter to the undersigned counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read 'J. Gordon Arbuckle', with a long horizontal flourish extending to the right.

J. Gordon Arbuckle

cc: Ms. Sarah Dunham
Director
Office of Atmospheric Programs

Ms. Drusilla Hufford
Director
Stratospheric Protection Division

Diane E. McConkey, Esq.
Office of General Counsel