

August 9, 2002

The Honorable Jeffrey R. Holmstead
Assistant Administrator for Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: July 20, 2001 HCFC Foam Allocation Rule – Noncompliance with the Regulatory Flexibility Act

Dear Assistant Administrator Holmstead:

The Office of Advocacy of the U.S. Small Business Administration was established by Congress pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. One of the primary functions of the office is to measure the costs and other effects of Government regulation on small businesses and make recommendations for eliminating excessive or unnecessary regulation of small businesses. Pursuant to its statutory authority, the Office of Advocacy is writing regarding the Environmental Protection Agency's (EPA) July 20, 2001 hydrochlorofluorocarbon (HCFC) proposal that did not address needed regulatory relief to the thousands of small business users of HCFC-141b.¹ This proposed rule provides allowances directly to producers/importers and to certain end users of HCFCs, specifically users of HCFC-141b, by a petition process, in a manner calculated to assure compliance with the international treaty obligations under the Montreal Protocol.

As a result of this error, EPA failed to hold a SBREFA (Small Business Regulatory Enforcement and Fairness Act) panel to examine the very significant economic impact on thousands of small business users of HCFC-141b. We are writing because we fear that EPA may not be providing timely relief in the draft final rule for the affected small businesses. A SBREFA panel would have afforded the opportunity to examine less burdensome alternatives that would achieve compliance with the Montreal Protocol requirements and meet small business needs. One alternative would be to defer the effective date of the final rule for the spray and pour HCFC-141b sectors until January 1, 2004, and to initiate a supplemental rulemaking to address the post-2003 period. Relief for additional users would be addressed by a petition process for those who can demonstrate need. Another alternative would be to publish an interim final rule, with a

¹66 Fed. Reg. 38,063 (July 20, 2001).

one year delay for the spray and pour sector, combined with a petition process. We would be very pleased to discuss action on these and other options with EPA.

As discussed above, the Office of Advocacy disagrees with EPA's certification under the Regulatory Flexibility Act (RFA) that this proposed rule would not impose a significant economic impact on a substantial number of small businesses.² Without relief, hundreds of small businesses may go out of business, and thousands may be adversely affected. EPA has provided appropriate relief in similar circumstances. For instance, we were pleased to learn that in response to a widespread small business outcry EPA no longer intends to ban HCFC-22 in 2005.³ However, despite similar overwhelming evidence that the spray and pour polyurethane users of HCFC-141b also need an extension of the HCFC-141b production ban beyond 2002, EPA has not acted to date despite the fact that the U.S. will be well below the Montreal Protocol requirements for HCFC usage in the next few years.⁴

A. Relief for the HCFC-141b Spray and Pour Polyurethane Sectors Is Justified

We are pleased that EPA now recognizes that it overlooked the enormous impact on small business users of HCFC-141b when its proposal failed to provide any allocations of HCFC-141b past December 31, 2002 to the spray and pour polyurethane sector.⁵ EPA had mistakenly relied on a 1993 final rule that ended use of HCFC-141b in 2003, and as a result, erroneously assumed that alternative products were available in the spray and pour polyurethane sectors to meet market needs. However, by the time this proposal was issued in July of last year, a contractor had already been working for another EPA office exploring industry claims, raised in comments on a related rule that was proposed in July

² We believe EPA incorrectly certified this rule for two reasons. First, we disagree with EPA's assertion that the failure to provide user allowances to small business users (prohibiting use of 141b) is not covered by the RFA because EPA doesn't consider parties subject to a general "ban" to be "regulated" by that rule. Second, EPA did already propose to provide allowances, by a petition process, for some users: space and defense contractors and government agencies that use 141b, which EPA would readily admit are directly "regulated" by this rule. Users that are similarly affected adversely (other users of 141b) who received zero allocations, we believe, are similarly directly regulated by this rule.

³ Significant New Alternatives Policy (SNAP) final rule, July 22, 2002, 67 Fed. Reg. 47703.

⁴ HCFC-141b is a critical blowing agent used in the production of polyurethane foam for energy efficient construction applications. Spray polyurethane foam applications include roofing for schools, commercial buildings, military installations and homes, insulated tanks, insulated truck and rail cars, pipe insulation, and interior insulation, as well as insulation for the space shuttle. Spray foam systems are manufactured by a relatively few polyurethane foam systems formulators in the U.S., most of which are small businesses. Approximately 1,000-1,500 independent spray foam contractors in the U.S apply spray polyurethane foam on site, however. Virtually all spray foam contractors are small businesses. Pour foam applications include: refrigerated panels and transport, doors, picnic coolers, and water heater insulation. Some marine flotation foam is made using HCFC-141b as well, although the bulk of the marine flotation industry uses HCFC-22. Many of these pour applications involve compliance with thermal performance requirements. About 5,000 firms (mostly small) are involved in pour foam applications.

⁵ In contrast, EPA did propose 141b allowances through a petition process to the space and defense industries including government agencies, such as NASA and the Department of Defense, and their contractor 141b users. No such relief was proposed for any other 141b users.

2000,⁶ that no substitutes would be available in the near future. In fact, Caleb Management Systems had already determined in a report months earlier that no workable alternatives had been developed for the spray and pour polyurethane sectors, and that no such alternatives would be commercially available for three to five years, well past December 2002.⁷ In addition, in a separate action, Polythane Systems filed petitions in December 2000 and June 2001 for relief extending the deadline for HCFC-141b, explaining the lack of alternatives for this industry. EPA has yet to act on either petition. Furthermore, EPA has been involved in research on alternatives for the spray polyurethane sector, and as the agency is aware this research has recently just begun. Commercial availability requires the completion of field testing and code authority approval, which does not appear to be on the horizon.

Last winter, my office proposed informally to the agency that it issue a supplemental proposal to provide relief to these sectors. The rulemaking record is replete with supporting information from small business foam suppliers and users that alternatives would not be available post-2002. The agency had verbally agreed to issue a supplemental proposal, prompting the Office of Advocacy to compliment EPA's plan of action at the January roundtable sponsored by my office.

However, we were disappointed to learn subsequently that the agency is postponing providing such relief to the small business users of HCFC-141b until it acquires additional information from the affected parties, and that the Federal Register notice is still being drafted in August. There is insufficient time for the agency to be considering relief to be granted late in this year, or later. Small (and large) businesses cannot wait until later this year to make critical firm plans for next year. Businesses cannot be expected to wind down the business, and sell out for a fraction of today's value because the needed product will not be available. We regret that the agency did not act before now, considering the substantial adverse small business consequences, with no adverse effect expected on the environment. While government agencies, and large companies in the space and defense industries can petition for their HCFC-141b use allowances, small firms with substantially less resources to research and field test alternatives are left without any post-December 2002 relief.

Further, we do not believe that alternative products would be commercially viable for these uses within the next two years. Stockpiling the HCFC-141b, the suggestion from Honeywell, Inc. (the manufacturer of the HCFC-141b substitute, HCFC-245a) is not a viable option for small business users and suppliers. This point has been extensively addressed by others.⁸ Furthermore, if stockpiling were acceptable to EPA, then the only effect of the ban would be to artificially inflate the cost of HCFC-141b to users, and thereby to consumers, without any benefit to the environment. We are aware of no

⁶ Protection of Stratospheric Ozone; Listing of Substitutes for Ozone Depleting Substances, 65 Fed. Reg. 42,653 (July 11, 2000).

⁷ EPA requested comments on this report in a notice of data availability in the Federal Register. 66 Fed. Reg. 28,408 (May 23, 2001).

⁸ The Office of Advocacy disagrees with the claim that industry can stockpile adequately to satisfy small business needs. The attached November 2, 2000 and July 24, 2002 letters from Polythane Systems explain why this is not an option for small businesses.

significant evidence in the record that would lead to the conclusion that an extension of the HCFC-141b deadline for this sector is not warranted.

B. Proposed Solution: Promulgate Interim Final Rule for 2003 to Minimize Small Business Impact

The Office of Advocacy concludes that relief for these sectors, without jeopardizing compliance with the Montreal Protocol, is the only appropriate course. EPA appears to be reluctant to act because it believes that a new proposal would be required since, unlike the space and defense industry sectors, it did not propose relief for these sectors in the July 2001 proposal. We agree that this is a legitimate legal issue, but instead suggest an approach that effectively addresses both the small business and legal problems.

The Office of Advocacy suggests that EPA propose relief for the years 2003-2005, and impose an interim final rule to be effective through 2003, because of the imminent and substantial threat to small business viability. In the meantime, EPA would be able to consider the comments and finalize relief for the spray and pour polyurethane sectors in early 2003, without inflicting unnecessary economic hardship to this important small business sector, or any harm to the environment. Furthermore, such an action also would not trigger the need for a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel, which would otherwise be required by the July 2001 proposal.⁹

The Office of Advocacy agrees with EPA's current intent to solicit petition requests regarding other HCFC applications, for HCFC-141b and other chemicals that warrant similar relief, if such relief would not jeopardize compliance with the Montreal Protocol. Given the large shortfall in recent HCFC usage, relief may be warranted for other sectors and other chemicals.¹⁰ We understand that EPA is prepared to include such a request in its next Federal Register notice on this issue.

One last alternative may be for EPA to consider the expedited issuance of a proposed rule in the near term and a final rule by September 30th outlining a petition process for seeking additional allocations. The petitions would be granted or denied within fourteen days of submission. Under such an approach, the petition process should be streamlined to ensure timely relief for the small firms. Further, the criteria should be flexible enough to provide the necessary relief, and the final rule should be promulgated in compliance with the relevant administrative law procedural requirements. We welcome the

⁹ The SBREFA requires that a panel of Federal officials be held to address small business issues pre-proposal for all proposals that could pose a significant economic impact on a substantial number of small entities. The July 2001 proposal clearly triggers this requirement, but a new replacement proposal which would eliminate these impacts could eliminate this requirement.

¹⁰ We note in particular the de minimis use by the small business, American Pacific Corp. of HCFC-123 in the HCFC Blend B/Halotron I substitute for halon 1211 (ODP 3.0-4.0) in the fire protection sector. HCFC Blend B/Halotron I is more than 200 times less ozone depleting than halon 1211 (ODP of 3.0 for 1211 and 0.014 for Halotron I), making it, on that basis, the most environmentally advantageous use of any HCFC replacing a CFC in any sector (comments submitted by American Pacific Corporation dated October 10, 2001, and supplemented by an April 19, 2002 presentation to EPA).

opportunity to explore this option and others in this letter further with your staff and affected parties.

It is critical that EPA take action as soon as possible on this important small business issue. Thank you for your consideration and please do not hesitate to contact me or Kevin Bromberg of my staff at 202-205-653 or kevin.bromberg@sba.gov.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Kevin Bromberg
Assistant Chief Counsel for Environmental Policy

cc: John Graham, Administrator, OIRA

Enclosures