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April 19, 1993

BY HAND

The Honorable John W. Clark
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Tenth Street & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Halon Recycling Corporation -- Request for Expedited Business Review Clearance

Dear Mr. Clark:

On behalf of the Halon Recycling Corporation (in formation) ("HRC"), I hereby request a statement of the present enforcement intentions of the Department of Justice with respect to a proposed information exchange and marketing procedure for recycled halon-1301. This request is made pursuant to the procedure for the issuance of business review letters set forth in 28 C.F.R. § 50.6.

HRC's proposal is to create an information exchange to facilitate and encourage the recovery and transfer of existing supplies of halon-1301 which are presently in use in many fire protection systems and devices. By law, new halons may not be produced in or imported into the United States after January 1, 1994.[1] The proposal is designed and intended to stimulate the transfer of existing halon-1301 stocks from the least to the most critical usages. The facts upon which this request is based and the details of the proposed program, which has been encouraged and is supported by the U.S. Environmental Protection Agency ("EPA"), are set forth below.

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1 A limited exemption is provided for the basic domestic needs of less-developed countries (LDCs), and exemptions may be provided for as yet unspecified essential uses, as discussed below.

Because of the public importance and urgency of implementing HRC's proposed program, I request that the processing of this business review determination be expedited in accordance with the procedure announced by the Department of Justice on December 1, 1992. All of the information and documents called for by the new procedure for expedition, to the extent available and applicable, are being furnished with this letter.

Factual Background

Halons are low-toxicity, chemically stable compounds that have been used extensively for fire and explosion suppression for the past twenty years. They are electrically non-conductive, dissipate quickly and leave no residue. Halons are used in liquid and gaseous forms, and have proven remarkably effective and generally safe for human exposure. Halon-1211 is a liquid streaming agent used mainly in hand-held fire extinguishers. Halon-1301, a gaseous agent used in total flooding systems, is the most effective chemical agent for suppressing and controlling fires and explosions in industrial and military applications where there may be a significant risk to life or the environment. Halon-1301 is used, for example, in aircraft engine nacelles and cargo bays; in closed facilities where oil and gas are being processed and pumped in areas of severe weather and environmental sensitivity, such as the North Slope of Alaska; and in naval ships and military vehicles, such as tanks and armored personnel carriers.

Regulatory Framework

Recent scientific evidence indicates that man-made chemicals, including halons, may be depleting the stratospheric ozone layer, which lies at the edge of the earth's atmosphere and shields the earth and its inhabitants from the sun's ultraviolet radiation. Scientists have become concerned that such ozone depletion could lead to an increase in skin cancer and cataracts, and could damage the human immune system and disrupt crop production. In response to this concern, the United States and approximately 100 other countries have entered into an international treaty, known as the Montreal Protocol,[2] to protect the ozone layer.

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2 Montreal Protocol on Substances That Deplete the Ozone Layer, 26 I.L.M. 1541 (1987), reprinted at 52 Fed. Reg. 47515 (Dec. 14, 1987).

Under the Montreal Protocol as originally adopted, halon-1301 production was to be frozen at 1986 production levels starting in 1992.[3] In 1990, the Parties to the Montreal Protocol met in London and amended the Protocol to require a complete phase-out of halon-1301 by the year 2000.[4] More recently, the Parties met in Copenhagen in November 1992 and adjusted the phase-out schedule for halon-1301 to require a complete cessation of production by January 1, 1994, except for the basic domestic needs of LDCs and where essential use designations, as described below, are made.[5]

U.S. domestic law also requires an accelerated phase-out of halon-1301. Section 604 of the Clean Air Act, as added by the 1990 Amendments, requires that production be halted by the year 2000. 42 U.S.C. § 7671c. EPA must impose an earlier date for termination of production if scientific evidence should indicate the need for faster action, if technological advances permit such acceleration, or if the Montreal Protocol is modified to require an earlier date. 42 U.S.C. § 7671e. On February 11, 1992, President Bush announced that the United States would terminate production of halon-1301 (and most other controlled substances) by December 31, 1995, and asked U.S. producers voluntarily to reduce 1992 output to 50 percent of baseline year (1986) levels (Exhibit C).

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3 In addition to halons-1211, -1301, and -2402, the controlled substances currently listed and regulated under the Protocol include chlorofluorocarbons (CFCs), methyl chloroform, carbon tetrachloride, hydrochlorofluorocarbons (HCFCs), methyl bromide, and hydrobromofluorocarbons (HBFCs).

4 30 I.L.M. 537 (1991). Exhibit A is the unofficial composite text of the Protocol, as adjusted and amended through 1990.

5 No composite text of the Protocol, as adjusted and amended through 1992, is yet available. The amendments and adjustments adopted in Copenhagen are set forth in Annexes I through III of the Report of the Fourth Meeting of the Parties to the Montreal Protocol, UNEP/OzL. Pro. 4/15 (Nov. 25, 1992) (Exhibit B) at 39-56.

EPA has recently proposed regulations implementing the Copenhagen amendments to the Montreal Protocol and President Bush's announcement. 58 Fed. Reg. 15014 (March 18, 1993) (Exhibit D). These regulations propose a complete termination of halon-1301 production in the United States, subject to the exemptions noted above, by December 31, 1993. The notice indicates that EPA intends to publish final regulations in the fall of 1993, with an effective date of January 1, 1994.

Presently, there are no chemical or non-chemical extinguishing agents which are effective substitutes for halon-1301 in some critical applications.

Essential Uses

A production exemption for an essential use can only be authorized if specified criteria in both the Montreal Protocol and the Clean Air Act are met. Under Article 2B of the Protocol, the Parties may allow limited production and consumption exemptions for new halons for uses that they consider to be essential.[6] The Parties to the Protocol formally decided in Copenhagen that a use qualifies as "essential" only if:

> (i) it is necessary for the health, safety, or is critical for the functioning of society (encompassing cultural and intellectual aspects); and
>
> (ii) there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health.[7]

The Parties further decided that production and consumption of a controlled substance for essential uses may be permitted only if:

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6 "Consumption" is a term of art defined in Article 1(6) of the Montreal Protocol and Section 601(6) of the Clean Air Act, 42 U.S.C. § 7671(6), to mean production plus imports minus qualifying exports. It does not mean use.

7 UNEP/OzL. Pro. 4/15 (Nov. 25, 1992): Decision IV/25, Essential Uses (Exhibit B).

> (i) economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance; and
>
> (ii) the controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances, also bearing in mind the developing countries' need for controlled substances.[8]

At the Copenhagen meeting, the Parties established a procedure for the Parties to nominate essential use production exemptions.

Section 604 of the Clean Air Act specifies exemptions from the phase-out schedules contained in the Act. Section 604(d)(3) allows exemptions for limited quantities of halons solely for purposes of aviation safety. 42 U.S.C. § 7671c(d)(3). Exceptions under this section are limited to annual quantities no greater than 10 percent of the baseline year production of the person receiving the exemption. Section 604(g) permits EPA to authorize production of halons for fire suppression and explosion prevention, but expressly provides that EPA may not grant such exemptions after 1999, except for use on the North Slope of Alaska, for which production may be allowed through 2004, subject to a cap of 3 percent of baseline production annually. 42 U.S.C. § 7671c(g). Section 604(f) also authorizes the President to exempt production and use of halons if necessary for national security. 42 U.S.C. § 7671c(f).

EPA has published notices indicating the procedures it will follow in processing applications for essential use exemptions for halons, 58 Fed. Reg. 6786 (Feb. 2, 1993) (Exhibit E), and generally, 58 Fed. Reg. 15014, 15025-026 (March 18, 1993)(Exhibit D). EPA has made clear that:

> The need for essential use exemptions for halon will largely depend on the success of programs to reallocate those halons stored in existing systems to more necessary applications where other alternatives are suitable. Efforts to initiate such "halon banking" have recently begun and EPA urges all

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8 Id.

> halon users to act quickly to assess their current use of these compounds and to determine if alternative approaches to fire protection are feasible. If so, the Agency encourages users to contribute any unneeded halon to one of the banking programs currently being established, such as the Halon Recycling Corporation (HRC) recently established by the Halon Alternatives Research Corporation.[9]

58 Fed. Reg. at 6787.

Even if production exemptions for halon-1301 for essential uses were authorized under the Montreal Protocol and the Clean Air Act, it is extremely unlikely that enough production would be approved to provide an attractive market for restarting production.

Management of Existing Halon Bank

The Parties to the Protocol have expressly encouraged recovery, recycling, and reclamation of halons in order to meet world needs after the phase-out date. Working groups were directed to consider and make recommendations to the next meeting of the Parties concerning "evaluation and comparison of existing and proposed recycled halon bank management programmes" and to identify "possible means of further facilitating international recycled halon bank management."[10]

For its part, EPA "is working closely with the military and industry to establish halon banks, potentially large reservoirs of halon that can service the fire protection business for necessary applications far into the future," 58 Fed. Reg. 15014 at 15023. Indeed, the development of these programs now is in EPA's view "critical to a successful production phase-out by 1994," "[s]ince halon banking systems are critical to meeting the

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9 As discussed below, HRC has not yet been incorporated and has not yet commenced any of the proposed activities; the establishment of HRC is subject to business review clearance by the Department of Justice under 28 C.F.R. § 50.6.

10 UNEP/OzL. Pro. 4/15 (Nov. 25, 1992): Decision IV/26 (Exhibit B).

longer term critical needs of halon users." Id. at 15024. According to EPA:

> The [Halons Technical Options] Committee [of the United Nations Environment Programme (UNEP)] estimated that the bank of Halon-1301 will be adequate to supply maintenance quantities for equipment for at least 40 years after production ceases. Although these estimates are based on a 2000 phase-out, the differences between available recycled halon with a 2000 phase-out and a 1994 phase-out, relative to the 1986 baseline are small. . . . For Halon-1301, 54 percent will be available after a 2000 phase-out; around 40 percent of baseline will be available after a 1994 phase-out.

Id. at 15023-024.

In view of the impending phase-out of production of halons, with the encouragement of EPA the non-profit Halon Alternatives Research Corporation ("HARC") was organized in 1989 to promote research and development of alternative products. HARC has a membership of more than 50 companies, including manufacturers of halons, users, fire suppression equipment manufacturers and distributors, standards organizations, consultants, and insurance companies. In addition to its research and development activities, at EPA's urging HARC has also been considering how existing halons now being used in non-essential fire control apparatus might be recovered, recycled, and made available for re-use in critically important facilities or service areas such as the airline and energy industries, where other effective fire protection options are not presently available.[11]

To accomplish this objective, a number of members of HARC now propose to form the Halon Recycling Corporation, a voluntary non-profit organization with its principal place of business in Washington, D.C. Subject to Department of Justice approval, the following companies (all halon users or suppliers) have committed to funding the formation of HRC and serving on its Board of Directors:

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11 EPA Brochure, "Recycling and Banking to Help Protect the Ozone Layer" (Exhibit F).

Alyeska Pipeline Service Company
ARCO Alaska, Inc.
BP Exploration Alaska, Inc.
The Boeing Company
Hughes Aircraft Company
Pacific Scientific
Walter Kidde Aerospace, Inc.

Other companies (all halon users, producers, or suppliers) that have expressed an interest and which may participate in HRC are:

Entergy Operations, Inc.
Great Lakes Chemical Corporation
GTE Telephone Operations
ICI General Chemicals, Ltd.
Yamato Protec Corporation

In addition, it is anticipated that EPA and some non-governmental environmental organizations such as the Natural Resources Defense Council and Friends of the Earth may also participate in HRC as affiliated members.

HRC's Proposed Plan of Operations

As production of halons world-wide is being phased out, there is a growing concern about the availability of an adequate supply of halon-1301 for critical needs pending development of effective substitutes. A large inventory of halon-1301 is stored in existing fire protection systems and devices which may not serve essential needs; adequate alternative fire/explosion suppressants or means may be available for many facilities or needs. Depending upon individual assessments of the risks involved, and the potential for disposal liability from continued ownership of a material such as halons, it is believed that many owners may be willing to contribute or sell their halon stocks to other users, especially if the owners can be assured that the new user has a critical need and that the halons will be used in an environmentally responsible manner. HRC proposes to establish an information exchange and marketing system to encourage and facilitate such transfers. Initially, HRC will operate in the United States. If successful, HRC's activities might in the future be expanded and become international in scope.

For sellers who wish to dispose of halon-1301 to users with a critical need, HRC will undertake to identify prospective buyers who meet the criteria described below. For buyers who are

seeking a source of halon-1301 for a critical usage, HRC will identify sellers who are willing to sell to such buyers. The parties would then negotiate directly between themselves as to price and terms, and if a sale is consummated, HRC would receive a brokerage fee to cover its operating costs.[12]

HRC proposes to establish a two-tiered voluntary certification system to identify prospective buyers with critical needs. Buyers may voluntarily elect either a self-certifying procedure (registration) or certification by an independent review committee to be established by HRC, which will be designated the Critical Halon Use Committee (CHUC).

A buyer who seeks only a "Registered Use" designation would complete a registration form attesting in good faith that the buyer believes its need is critical in accordance with criteria established by the UNEP Halons Technical Options Committee.[13] A buyer seeking a "Certified Use" designation will be required to submit additional information in support of its claim that its need for halon-1301 is critical in accordance with the UNEP criteria and its application for certification will be subject to review and approval by CHUC.

Sellers wishing to utilize the services of HRC to transfer their halon-1301 will decide voluntarily and independently whether they wish to sell both to Certified and Registered buyers, or only to Certified buyers. If a seller desires to sell

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12 HRC does not presently plan to acquire or "bank" halons in its own storage facilities for recycling and sale.

13 Montreal Protocol 1991 Assessment, Report of the Halons Technical Options Committee (Dec. 1991) (Exhibit G) at 72. These criteria are as follows:

> A critical need must exist to minimize damage due to fire, explosions or extinguishing agent application, which would otherwise result in serious impairment of an essential service to society, or pose an unacceptable threat to life, the environment, or national security and all other appropriate fire protection measures have been taken.

only to Certified buyers, the seller will be required to agree not to refuse to sell to such a buyer solely by reason of that Certified buyer's proposed end use. Buyers seeking to use the facilities of HRC to purchase halon-1301 may voluntarily and independently decide whether they wish a listing as Registered or Certified, and will be required to pay the appropriate fee for such listing. Buyers seeking a Certified use listing must agree to be bound by the decision of CHUC, subject to CHUC's appeal process.

HRC will maintain a data base of sellers and buyers. All sellers who contract to use the services of HRC will be furnished a list of all potential buyers, and all Certified buyers will be furnished a list of all sellers. Registered buyers will be provided only a list of those sellers who have indicated a willingness to sell to Registered buyers, i.e., those who do not require certification by CHUC of the buyer's critical need.

If a sale is transacted between a buyer and seller listed with HRC, HRC will receive a set brokerage fee. The brokerage fee will be paid by the buyer unless the parties agree otherwise. Upon listing its halon with HRC, a seller will be assessed an advertising fee unless the halon is to be transferred to the buyer free of charge. The buyer will be required to agree that upon completion of a purchase transaction, the buyer becomes the sole owner of the halon and responsible for its future disposition.

The CHUC will review all applications for a Certified use designation. The Committee will be comprised of eleven members designated by the Board of Directors of HRC. Membership on CHUC will reflect a broad spectrum of interests. Three members will be paid consultants who are recognized experts in fire protection. One of these consultants will serve as chair of each review or appeals panel. Four of the members will be industry representatives who are members of HARC. Each will represent a different sector of the user community. HARC members will be expected to represent the views of the overall HARC organization and not the individual views of their respective companies or industries. Non-governmental environmental organizations will be asked to nominate two members of CHUC, and EPA will be asked to nominate two staff members to serve on CHUC.

Each application for a listing as a Certified user will be reviewed by a five-member panel of CHUC consisting of one fire protection consultant; one EPA representative; one non-

governmental environmental group representative; and two HARC representatives from different user sectors. Decisions of a review panel will be by majority vote, i.e., no less than three votes. If an applicant is denied a Certified listing, the applicant may appeal the decision. Appeals will be heard by another five-member panel of CHUC, no members of which were involved in the original decision. Decisions of the appeals panel will also be by majority vote. The appeals process will be concluded within thirty days from the submission of the appeal. If an applicant is denied a Certified listing, the applicant may request to be listed as Registered.

Analysis

In the past, market forces have maintained a reasonable balance between supply and demand for halons. No serious shortage has yet occurred, because of the availability of new production. However, production will phase out in the very near future, and recycled halons will become the only available supply for essential applications pending the development of new alternatives. To meet this urgent need, EPA has encouraged the establishment of a mechanism to promote and manage transfers between contributors and consumers of recyclable halons. The halon-1301 exchange program proposed by HRC is intended to meet this need.

While designed to develop a market for recycled halon-1301, HRC will have no role in establishing price or terms of sale. These matters will be negotiated and resolved directly by the parties to the transactions. HRC's role is strictly to put buyers and sellers in touch with one another and to certify, where requested to do so, that a prospective buyer's need for halon-1301 constitutes a critical use under the criteria established by the UNEP Halons Technical Options Committee. No buyers or sellers are required to utilize HRC to purchase, sell, or otherwise transfer halon-1301. Nothing in HRC's proposal is intended to or does restrict a seller from selling halon-1301 to any buyer at any price, or any buyer from dealing with any seller who will sell to that buyer. The only restriction placed on the seller by HRC is that the seller not refuse to sell halons to a Certified buyer solely because of the buyer's intended usage.

Antitrust Precautions

HRC plans to engage in these activities only if it may do so in complete conformity with all applicable laws, including the antitrust laws. In order to insure strict compliance with the

antitrust laws, HRC will adopt an antitrust policy as a statement of conduct to guide its meetings and activities. That policy will prohibit any participant from discussing during the course of the meetings or activities: (i) prices or terms or conditions of sale; (ii) profits or profit margins, shares of the market, bids or intent to bid, sales or refusals to sell with respect to any particular buyer or seller; and (iii) the volume of halon-1301 required by any particular buyer or other confidential information.

HRC will establish and adhere to appropriate procedural steps to prevent even inadvertent discussion of matters that may raise questions about potential antitrust violations.

Conclusion

HRC's proposed activities should raise no significant antitrust concerns. Because of the urgent public interest in implementing HRC's proposed program promptly, I respectfully request that this business review request be given expedited consideration in accordance with the Department of Justice procedures announced on December 1, 1992.

Very truly yours,

Daniel H. Margolis

Daniel H. Margolis

cc: Mr. Stephen R. Seidel
Director, Stratospheric Protection Division
United States Environmental Protection Agency