ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[OAR–2003–0130; FRL–7774–2]

Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing this action to conform its regulations governing the trade of certain ozone depleting substances with the Montreal Protocol and to correct a drafting error. We are proposing minor adjustments to domestic regulations to ensure that those complying with the U.S. regulations are also complying with the terms of the Montreal Protocol. Elsewhere in today's **Federal Register** EPA has also issued today a Direct Final Rule.

DATES: Comments must be received on or before July 19, 2004. If requested by July 2, 2004 a hearing will be held on July 19, 2004 and the comment period will be extended until August 2, 2004.

ADDRESSES: Submit your comments, identified by EDocket ID No. OAR–2003–0130 (Legacy docket A–98–33) by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- Fax comments to (202) 566–1741.
- *Mail/Hand delivery:* Submit comments to Air and Radiation Docket at EPA West, 1301 Constitution Avenue NW., Room B108, Mail Code 6102T, Washington, DC 20460, Phone: (202) 566–1742.

Instructions: Direct your comments to Docket ID No. OAR–2003–0130. The historical docket for this rulemaking is A–98–33. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Cindy Newberg, EPA, Global Programs Division, Office of Atmospheric Programs, Office of Air and Radiation (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 343–9729.

SUPPLEMENTARY INFORMATION: (1) Under the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol), as amended, the U.S. and other industrialized countries that are Parties to the Protocol have agreed to limit production and consumption of hydrochlorofluorocarbons (HCFCs) and to phase out consumption in a step-wise fashion over time, culminating in a complete phaseout in 2030. The Parties to the Montreal Protocol met November 10–14, 2003 in Nairobi, Kenya where they discussed and agreed to Decision XV/3. As a Party to the Protocol, the United States was represented at that meeting, participated in the discussions, and agreed with the resulting Decision XV/3. Upon review of the current domestic regulations in relation to Decision XV/3, EPA identified discrepancies between the Decision and EPA's regulations. Therefore, Decision XV/3 led to this action aimed at promulgating minor adjustments to the regulations issued January 21, 2003 (68 FR 2820) to ensure that those complying with the U.S. regulations are also complying with the terms of the Montreal Protocol.

EPA views this as a noncontroversial action and anticipates no adverse comment. Therefore, in today's **Federal Register**, we are publishing a separate Direct Final rulemaking to revise the trade restrictions provisions. This direct final rule will be effective on August 16, 2004 without further notice unless we receive adverse comment by July 19, 2004. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. If necessary, we will consider and address all public comments in any subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

(2) Abbreviations and Acronyms Used in This Document:

Act—Clean Air Act Amendments of 1990
ANPRM—Advance Notice of Proposed Rulemaking
Article 2 countries—industrialized countries who are not parties operating under paragraph 1 of Article 5 of the Montreal Protocol
Article 5 countries—developing countries who satisfy certain conditions laid out in paragraph 1 of Article 5 of the Montreal Protocol
CAA—Clean Air Act Amendments of 1990
cap—limitation in level of production or consumption
CFC—chlorofluorocarbon
CFR—Code of Federal Regulations
EPA—Environmental Protection Agency
FDA—Food and Drug Administration
FR—**Federal Register**
HCFC—hydrochlorofluorocarbon
NASA—National Aeronautics and Space Administration

NODA—Notice of Data Availability
NPRM—Notice of Proposed Rulemaking
ODP—ozone depletion potential (CFR 40, part 82)
ODS—ozone-depleting substance
Party—States and regional economic integration organizations that have consented to be bound by the Montreal Protocol on Substances that Deplete the Ozone Layer
Protocol—Montreal Protocol on Substances that Deplete the Ozone Layer
SBREFA—Small Business Regulatory Enforcement Fairness Act
SNAP—Significant New Alternatives Policy
UNEP—United Nations Environment Programme
U.S.—United States

(3) Tips for Preparing Your Comments. When submitting comments, remember to:

• Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

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I. Regulated Entities

The HCFC allowance allocation system will affect the following categories:

Category	NAICS code	SIC code	Examples of regulated entities
Chlorofluorocarbon gas manufacturing	325120	2869	Chlorodifluoromethane manufacturers; Dichlorofluoroethane manufacturers; Chlorodifluoroethane manufacturers.
Chlorofluorocarbon gas importers	325120	2869	Chlorodifluoromethane importers; Dichlorofluoroethane importers; Chlorodifluoroethane importers.
Chlorofluorocarbon gas exporters	325120	2869	Chlorodifluoromethane exporters; Dichlorofluoroethane exporters; Chlorodifluoroethane exporters.
Polystyrene Foam Products Manufacturing	326140	3086	Plastics Foam Products (Polystyrene Foam Products).
Urethane and Other Foam Products (Except Polystyrene) Manufacturing.	326150	3086	Insulation and cushioning, foam plastics (except polystyrene) manufacturing.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be affected. To determine whether your facility, company, business organization, or other entity is regulated by this action, you should carefully examine these regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

II. Background

In 1990, as part of a resolution on ozone-depleting substances, the Parties to the Protocol identified HCFCs as transitional substitutes for CFCs and other more destructive ozone-depleting substances (ODSs). In 1992, the Parties negotiated amendments to the Protocol (the ''Copenhagen Amendment'') that created a detailed phaseout schedule for HCFCs, with a cap on consumption for Article 2 (industrialized) countries like the U.S. The Protocol defines consumption as production plus imports minus exports. The consumption cap is derived from the formula of 2.8 percent of the Party's CFC consumption in 1989, plus the Party's consumption of HCFCs in 1989. Based on this formula, the consumption cap for the U.S. is 15,240 ODP-weighted metric tonnes, effective January 1, 1996.

In the Copenhagen Amendments, the Parties created a schedule with graduated reductions and the eventual phaseout of the consumption of HCFCs. The schedule calls for a 35 percent reduction of the cap in 2004, followed by a 65 percent reduction in 2010, a 90 percent reduction in 2015, a 99.5 percent reduction in 2020, and a total phaseout in 2030. As a party to the Copenhagen Amendment (the U.S. deposited its instrument of ratification on March 2, 1994), the U.S. must comply with this phaseout schedule under the Protocol.

In 1999, the Parties negotiated another amendment to the Protocol (the Beijing Amendment''), where they agreed to a cap on HCFC production for industrialized countries, effective January 1, 2004. This cap was derived from the average of the Party's consumption cap (2.8 percent of the Party's CFC consumption in 1989, plus the Party's HCFC consumption 1989) and the result of the same formula for production (2.8 percent of the Party's CFC production in 1989, plus the Party's HCFC production in 1989). This formula results in a U.S. production cap of 15,537 ODP-weighted metric tonnes. Since the U.S. subsequently joined the Beijing Amendment (the U.S. deposited its instrument of ratification on October 1, 2003) EPA has promulgated regulations that are consistent with that production cap as authorized by section 606 of the CAA.

In addition, Parties to the Beijing Amendment agree that under the Beijing Amendment, beginning in January 1, 2004, they will ban HCFC imports from and exports to "any State not party to this Protocol.'' These amendments are reflected in Article 4 of the Protocol in paragraphs 1 quin. and 2 quin.

As a party to the Beijing Amendment, the U.S. therefore, has an obligation from January 1, 2004 to ban trade in HCFCs with respect to "any State not party to this Protocol.'' The Protocol defines this phrase (Article 4(9)) to include any State or regional economic integration organization (of which the European Community is the only present example) that has not agreed to be bound by the control measures in effect for HCFCs.

To implement the Protocol, as amended by the Copenhagen and Beijing Amendments, EPA established an allowance system to control the U.S. consumption of HCFCs and published the implementing regulations in the **Federal Register** on January 21, 2003 (68 FR 2820). The HCFC allowance system is part of EPA's program to reduce the emissions of ODSs to protect the stratospheric ozone layer. These regulations also included a provision, section 82.15(e), to implement the ban on trade with states not a Party to the Protocol. EPA interpreted Article 4 of the Protocol to ban imports from and exports to countries that had not ratified the amendments to the Protocol containing control measure for HCFCs relevant to that country (*e.g.*, for countries that produce HCFCs they needed to be a Party to Beijing, but for countries that only consume, but do not produce HCFCs, they needed to be Party to Copenhagen).

III. Proposed Action

A. Incorporation of Decision XV/3: Obligations of Parties to the Beijing Amendments Under Article 4 of the Montreal Protocol With Respect to Hydrochlorofuorcarbons

The Parties to the Montreal Protocol met November 10–14, 2003 in Nairobi, Kenya where they discussed and agreed to Decision XV/3. The Decision was necessary because different Parties to the Beijing Amendment, including the U.S., were adopting differing and conflicting interpretations of the term "state not Party to this Protocol: Domestically and in ways that would have created great uncertainty and confusion within the regulated community with respect to which states trade was allowed under Article 4. As a Party to the Protocol, including both the Copenhagen and Beijing amendments, the United States was represented at that meeting, participated in the discussions, and agreed with the resulting Decision XV/3. Upon review of the current domestic regulations in relation to Decision XV/3, EPA identified discrepancies between the Decision and EPA's regulations. Therefore, Decision XV/3 led to this action aimed at promulgating minor adjustments to the regulations issued January 21, 2003 (68 FR 2820) to ensure that those complying with the U.S. regulations are also complying with the terms of the Montreal Protocol. What follows is a review of Decision XV/3 and a discussion of what changes are being made to the current regulations through this action.

Decision XV/3 reads as follows:

Affirming that it is operating by consensus,

Reaffirming the obligation to control consumption of hydrochlorofluorocarbons by the Parties to the amendment adopted by the Fourth Meeting of the Parties to the Montreal Protocol at Copenhagen on 25 November 1992 (the "Copenhagen Amendment''),

Reaffirming the obligation to control production of hydrochlorofluorocarbons by the Parties to the amendment adopted by the Eleventh Meeting of the Parties to the Montreal Protocol at Beijing on 3 December 1999 (the "Beijing Amendment''),

Strongly urging all States not yet party to the Copenhagen or Beijing Amendments to ratify, accede to or accept them as soon as possible,

Recalling that, as of 1 January 2004, the Parties to the Beijing Amendment have accepted obligations under Article 4, paragraph 1 quin., and paragraph 2 quin., of the Protocol to ban the import and export of the controlled substances in group 1 of Annex C (hydrochlorofluorocarbons) from any "State not a party to this Protocol,''

Noting that Article 4, paragraph 9 of the Protocol provides that "for the purposes of this Article, the term "State not party to this Protocol'' shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound the control measures in effect for that substance,''

Acknowledging that the meaning of the term "State not party to this Protocol'' may be subject to differing interpretation with respect to hydrochlorofluorocarbons by Parties to the Beijing Amendment, given that control measures for the consumption of hydrochlorofluorocarbons were introduced in the Copenhagen Amendment while control measures for the production of hydrochlorofluorocarbons were introduced in the Beijing Amendment,

Acknowledging also that, for those Parties operating under Article 5, paragraph 1, of the Protocol no control measures for the consumption of production of hydrochlorofluorocarbons will be in effect under either the Copenhagen or Beijing Amendments until 2016,

Desiring to decide in that context on a practice in the application of Article 4, paragraph 9 of the Protocol by establishing by consensus a single interpretation of the term "State not party to this Protocol,'' to be applied by Parties to the Beijing Amendment for the purpose of trade in hydrochlorofluorocarbons under Article 4 of the Protocol,

Expecting Parties to the Beijing Amendment to import or export hydrochlorofluorocarbons in ways that do not result in the importation of exportation of hydrochlorofluorocarbons to any "State not party to this Protocol'' as that term is interpreted herein, recognizing the need to assess the fulfillment of that expectation,

1. That the Parties to the Beijing Amendment will determine their obligations to ban the import and export of controlled substances in group I of Annex C (hydrochlorofluorocarbons) with respect to States and regional economic organizations that are not parties to the Beijing Amendment by January 1, 2004 in accordance with the following:

(a) The term "State not party to this Protocol'' in Article 4, paragraph 9 does not apply to those States operating under Article 5, paragraph 1, of the Protocol until January 1, 2016 when, in

accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under Article 5, paragraph 1, of the Protocol;

(b) The term ''State not party to this Protocol'' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments;

(c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term ''State not party to this Protocol,'' paragraph 1 (b) shall apply unless such a State has by 31 March 2004:

(i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible;

(ii) Certified that it is in full compliance with Articles 2, 2A to 2G and Article 4 of the Protocol, as amended by the Copenhagen Amendment;

(iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005,

in which case that State shall fall outside the definition of ''State not party to this Protocol'' until the conclusion of the Seventeenth Meeting of the Parties;

2. That the Secretariat shall transmit data received under paragraph 1(c) above to the Implementation Committee and the Parties;

3. That the Parties shall consider the implementation and operation of the foregoing decision at the Sixteenth Meeting of the Parties, in particular taking into account any comments on the data submitted by States by 31 March 2004 under paragraph 1(c) above that the Implementation Committee may make.

This Decision differs from the corresponding U.S. requirements promulgated at 40 CFR part 82, subpart A. The Parties' recent agreement to Decision XV/3 permits trade in HCFCs when the criteria stated in the Decision have been met. The current regulations also provide for trade in HCFCs; however, the criteria in Decision XV/3 are different from the current criteria at 40 CFR part 82, subpart A.

§ 82.15(e) reads:

(e) Trade with Parties. Effective January 1, 2004, no person may import or export any quantity of a class II controlled substance listed in Appendix A to this subpart, from or to any foreign state that is not listed as a Party either:

(1) In Appendix L of this subpart and also listed in Appendix C, Annex 1 of the Protocol as having ratified the Beijing Amendments, or

(2) In Appendix C, Annex 1 of the Protocol as having ratified Copenhagen Amendments but not listed in Appendix L of this subpart, or

(3) In Appendix C, Annex 2 of the Protocol, as being a foreign state complying with the Beijing Amendments if the foreign state is listed in Appendix L of this subpart, or as being a foreign state complying with Copenhagen Amendments if the foreign state is not listed in Appendix L of this subpart.

This NPRM proposes to modify the current regulations to eliminate the inconsistencies with Decision XV/3. In addition, as set forth below, this action proposes corrections to drafting errors discovered after the Final Rule was published in the **Federal Register** in January 21, 2003. As a result, the revised regulations will permit trades consistent with the requirements decided by the Parties and in accordance with the terms of Decision XV/3.

Under section 614(b) of the Clean Air Act, Title VI of the Act ''shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol, as provided in Article 2, paragraph 11 thereof and shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol.'' 42 U.S.C. 7671m(b). Furthermore, with respect to trade restrictions, this provision specifically states that ''[n]othing in this subchapter shall be construed, interpreted, or applied to affect the authority or responsibility of the Administrator to implement Article 4 of the Montreal Protocol with other appropriate agencies.'' Finally, section 614(b) of the Act provides that ''[i]n case of a conflict between any provision of this subchapter [Title VI] and any provision of the Montreal Protocol, the more stringent provision shall govern.'' Accordingly, EPA may not promulgate regulations under the Clean Air Act that authorize trade of HCFCs with nations not authorized under Article 4 and Decision XV/3 of the Montreal Protocol. In addition, EPA does not wish to impose trade restrictions more stringent than those required under the Protocol.

EPA considers Decisions of the Parties, as well as the text of the Protocol itself, when applying section 614(b). Under customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (8 International Legal Materials 679 (1969)) both the treaty text and the practice of the parties in interpreting that text form the basis for its interpretation. Although the United States is not a party to the 1969 Convention, it has regarded it since 1971 as ''the authoritative guide to current treaty law and practice.'' See Secretary of State William D. Rodgers to President Richard Nixon, October 18, 1971, 92nd Cong., 1st Sess., Exec. L (November 22, 1971). Specifically, Article 31(1) of the Vienna Convention provides that ''[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'' Article 31(3) goes on to provide that ''[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'' Decision XV/3 constitutes a subsequent consensus agreement among the Parties to the Montreal Protocol, including the United States, regarding the interpretation and application of the trade restriction provision in Article 4 of the Protocol. Decision XV/3 also constitutes subsequent practice in the application of the Montreal Protocol by the Parties to it, including the United States. Thus, EPA intends to conform its regulations on trade restrictions with Decision XV/3.

1. Trade With States That Have Ratified the Copenhagen and Beijing Amendments or Have Shown Their Intention To Ratify, Accede, Accept, or Approve

Section 82.15(e)(2) permits trade with non-producing countries that have ratified the Copenhagen Amendments. However, Decision XV/3 is more restrictive than the current EPA promulgated regulations. According to Decision XV/3 starting on January 1, 2004, notwithstanding the ability to trade with States operating under Article 5(1) of the Protocol, U.S. companies cannot trade HCFCs with any State not operating under Article 5(1) of the Protocol that has not agreed to be bound by (ratified) the Copenhagen and Beijing Amendments, unless that State has fulfilled the requirements under paragraphs 1(c)(i) through (iii) of Decision XV/3 and submitted the information to the Ozone Secretariat by March 31, 2004. In accordance with this Decision, it would be a violation of the Protocol to trade HCFCs with a non-Article 5(1) Party that has not ratified both the Copenhagen and Beijing Amendments, unless the State has provided the relevant

information listed in paragraphs (c)(i) through (iii) of Decision XV/3 to the Ozone Secretariat by March 31, 2004. Therefore, as a Party to the Protocol and a participant in the discussions that resulted in Decision XV/3, EPA believes it is necessary to amend the regulations to be consistent with the Decision.

In addition, under EPA's current interpretation of § 82.15(e)(3) (correcting for the absence of the referenced Appendix C to the Protocol as set forth below), this regulation permitted trade with any party determined by EPA to be in compliance with relevant amendment to the Protocol and listed by EPA in Appendix C of 40 CFR part 82, subpart A. However, before trade with such nations is permitted, Decision XV/3 requires such parties to submit notification, certification, and data to the Ozone Secretariat in accordance with paragraphs (1)(c)(i)–(iii) of the Decision. As a Party to the Protocol and a participant in the discussions that resulted in Decision XV/3, EPA must amend its regulations to reflect these additional requirements of the Decision.

EPA recognizes that the process to ratify amendments to the Protocol can be lengthy and cumbersome. Further, often countries make their intention to ratify amendments and begin to comply with the terms of the amendments in advance of actual ratification. The criteria established by Decision XV/3 (c)(i) through(iii) provide an appropriate mechanism for the Ozone Secretariat and EPA to ensure compliance with the terms of the amendments in advance of ratification of the amendments by those States.

Through this action, EPA is proposing to amend § 82.15(e) to permit trade with non-Article 5(1) Parties that have not ratified both the Copenhagen and Beijing Amendments, if the States have provided the relevant information listed in paragraphs (c)(i) through (iii) of Decision XV/3 to the Ozone Secretariat by March 31, 2004.

The Ozone Secretariat has agreed to collect the necessary documentation required by Decision XV/3(c) and will publish the list of countries that met the March 31, 2004 deadline. At this time, the Ozone Secretariat is maintaining a list of countries that have submitted the required data on its Web site: *http://www.unep.org/ozone/index.asp,* Obligations of Parties to the Beijing Amendment under Article 4 of the Montreal Protocol with Respect to Hydrochlorofluorocarbons (HCFCs). To ensure that the regulated community, the Agency and all interested parties are referencing the most accurate and complete list of Parties complying with Decision XV/3(c), EPA recommends referring to Ozone Secretariat's list. However, to further simplify implementation, through this action, EPA is adding to Appendix C of subpart A of 40 CFR part 82, Annex 3, titled Nations that are Parties to the Montreal Protocol that have not yet ratified all applicable Amendments to the Protocol but have Notified the Ozone Secretariat and Properly Submitted Supporting Documentation in Accordance with the Requirements of Decision XV/3. This list of Parties that will appear in Annex 3 to Appendix C is consistent with the most recent information provided to the EPA by the Ozone Secretariat. It is intended to mirror the Ozone Secretariat's document. The reader is informed that the list maintained by the Ozone Secretariat may be used to supplement the Annex since the Ozone Secretariat's list may include additional States that complied with the Decision and met the deadline. EPA consults with the Ozone Secretariat regularly and therefore believes that only a select number of additional States may be added to the Ozone Secretariat's list, but noting this potential, EPA believes its own Annex may need to be supplemented from time to time. EPA plans to use other non-regulatory outreach means to alert the regulated entities of any States that have been included on the Ozone Secretariat's list but do not appear in Annex 3. Further, the Agency plans to appropriately revise Annex 3 to Appendix C through a subsequent notice.

As a result of these changes to subpart A to incorporate Decision XV/3, EPA is also proposing to eliminate Appendix L to Subpart A. The Ozone Secretariat's list and Annex 3 to Appendix C of this subpart provides the reader with sufficient guidance to ensure that Parties have submitted data in accordance with Decision XV/3(c); therefore, Appendix L to part 82, subpart A—Parties to the Montreal Protocol that Have Reported Production of HCFCs Since 1996 in Accordance with Article 7, paragraph 3 of the Montreal Protocol is no longer needed. Eliminating Appendix L will limit the potential for misinterpretation. Thus, through this action, EPA is proposing to remove Appendix L from subpart A.

EPA requests comment on amending § 82.15(e), Appendix C to this subpart and eliminating Appendix L to conform with the Decision XV/3 of the Parties to the Montreal Protocol.

2. Article 5 Parties

Parties to the Montreal Protocol that are operating under Article 5(1) have been given a different schedule for phasing out their production and consumption of ozone-depleting substances, than those that are not listed under Article 5(1). EPA would like to clarify that in accordance with the Protocol, Parties to the Protocol that operate under Article 5(1) may continue to trade in HCFCs with other Parties as long as they continue to meet the appropriate obligations under the Protocol and its amendments, until the date for phasing out HCFC consumption and production by Article 5(1) countries has been reached. Under Article 5 (1) of the Protocol no control measures for the consumption or production of HCFCs will be in effect under either the Copenhagen or Beijing Amendments until 2016. Therefore, through this action, EPA is proposing to amend § 82.15(e) appropriately.

EPA is also proposing to add to Appendix C of this subpart Annex 4: Nations that are Parties to the Montreal Protocol and are operating under Article 5(1) as of June 17, 2004. The proposed Annex 4 is a list of nations that are operating under Article 5(1) of the Montreal Protocol. Including this annex in the subpart will assist regulated entities complying with the regulations by providing a list of nations operating under Article 5(1) in the regulatory text. While this information will be valuable, the Agency notes that the list is dated June 17, 2004. Additional Nations may agree to the terms of the Montreal Protocol, become a Party to the treaty, and qualify to operate under these provisions after this list appears in the **Federal Register**, and thus will not be included in Annex 4. Therefore, while including this Annex in this subpart is useful and will benefit the regulated entities, this annex is not intended to be the sole and complete catalogue of Article (5)(1) nations.

Through this action, EPA is proposing to add Annex 4: Nations that are Parties to the Montreal Protocol and are operating under Article 5(1) as of June 17, 2004 to Appendix C of subpart A.

EPA requests comment on amending the § 82.15(e) to clarify that trade with Article (5)(1) countries may continue in accordance with the terms of this Subpart and the Montreal Protocol. Further, EPA requests comment on adding Annex 4 to Appendix C of this subpart to assist regulated entities complying with these trade restrictions.

B. Corrections to the References to Appendices

Appendix C of 40 CFR part 82, subpart A provides information on ratification, accession, acceptance, and approval of the Montreal Protocol, London amendment, Copenhagen Amendment, Montreal Amendment and

the Beijing Amendment. Section 82.15(e) was intended to cite this Appendix. However, the language at § 82.15(e) contains drafting errors and refers instead to Appendix C of the Montreal Protocol. There is no Appendix C to the Montreal Protocol. In the absence of an Appendix C to the Protocol, EPA interprets § 82.15(e) to refer to Appendix C of subpart A. While the Agency has made this interpretation known through letters to regulated entities, a change to the regulations is necessary to ensure that all interested parties are able to correctly interpret the regulations. Therefore, through this action, EPA proposes to amend § 82.15(e) to ensure that all references are to Appendix C of subpart A of 40 CFR part 82.

With the promulgation of this action, Appendix C of subpart A will have four separate sections (annexes). Currently, the CFR includes the 2 sections: Appendix C to Subpart A:—Parties to the Montreal Protocol (As of June 14, 2002) and Annex 2: Annex 2 to Subpart A—Nations Complying with, But Not Parties to, the Protocol. This action proposes adding the following sections: Annex 3: Nations that are Parties to the Montreal Protocol that have not yet ratified all applicable Amendments to the Protocol but have Notified the Ozone Secretariat and Properly Submitted Supporting Documentation in Accordance with the Requirements of Decision XV/3 and Annex 4: Nations that are Parties to the Montreal Protocol and are operating under Article 5(1) as of June 17, 2004. To further clarify that Appendix C has four distinct sections, through this action, EPA is proposing to amend the titles of each section to include "Appendix C'' in each and to label the sections as "Annex 1,'' "Annex 2,'' "Annex 3,'' and " Annex 4'' respectively. Thus the proposed revised titles will be:

—Appendix C to Subpart A, Annex 1—Parties to the Montreal Protocol, As Amended by the Beijing Amendment (As of June 14, 2002)

—Appendix C to Subpart A, Annex 2—Nations Complying with, But Not Parties to, the Protocol

—Appendix C to Subpart A, Annex 3—Nations that are Parties to the Montreal Protocol that have not yet ratified all applicable Amendments to the Protocol but have Notified the Ozone Secretariat and Properly Submitted Supporting Documentation in Accordance with the Requirements of Decision XV/3.

— Appendix C to Subpart A, Annex 4—Nations that are Parties to the Montreal Protocol and are operating under Article 5(1) as of June 17, 2004.

EPA requests comment on these changes to Appendix C of 40 CFR part 82, subpart A.

IV. Administrative Requirements

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a "significant'' regulatory action as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA does not believe that this rule is a "significant regulatory action'' within the meaning of the Executive Order. EPA requests comment on this determination.

B. Paperwork Reduction Act

This action does not propose any new information collection burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0170 (EPA ICR No. 1432.21). A copy of the OMB approved Information Collection Request (ICR) may be obtained from The Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an Agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small government jurisdictions.

For the purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business that is identified by the North American Industry Classification System (NAICS) Code in the Table below; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Category	NAICS code	SIC code	NAICS small business size standard (in number of employees or millions of dollars)
1. Chemical and Allied Products, NEC	424690	5169	100
2. Chlorofluorocarbon gas exporters	325120	2869	100

After considering the economic impacts of this proposed rule on small entities, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. None of the entities affected by this rule are considered small as defined by the NAICS Code listed above. EPA requests comments on this determination.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal government and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a written statement is required under section 202, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or the selection of this alternative is inconsistent with law.

Section 203 of the UMRA requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule. Section 204 of the UMRA requires the Agency to develop a process to allow elected State, local, and tribal government officials to provide input in the development of any proposal containing a significant Federal intergovernmental mandate.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more by State, local and tribal governments, in the aggregate, or by the private sector, in any one year. The provisions in this proposed rule fulfill the obligations of the United States under the international treaty, The Montreal Protocol on Substances that Deplete the Ozone Layer, as well as those requirements set forth by Congress in the Clean Air Act. Viewed as a whole, all of today's proposed amendments do not create a Federal mandate resulting in costs of $100 million or more in any one year for State, local and tribal governments, in the aggregate, or for the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has also determined that this proposal contains no regulatory requirements that might significantly or uniquely affect small governments; therefore, EPA is not required to develop a plan with regard to small governments under section 203. Finally, because this proposal does not contain a significant intergovernmental mandate, the Agency is not required to develop a process to obtain input from elected State, local, and tribal officials under section 204. EPA requests comments regarding these determinations.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the regulation.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposal is expected to primarily affect importers and exporters of HCFCs. Thus, the requirements of section 6 of the Executive Order do not apply. EPA requests comment regarding this determination.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Today's proposal does not significantly or uniquely affect the communities of Indian tribal governments. It does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule. EPA requests comment on this determination.

G. Applicability of Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an

environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This is not such a rule, and therefore E.O. 13045 does not apply. This proposed rule is not subject to E.O. 13045 because it implements specific trade measures adopted under the Montreal Protocol and required by section 614 of the CAA. EPA requests comment on this determination.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. The National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Exports, Imports, Reporting and recordkeeping requirements.

Dated: June 10, 2004.

Michael O. Leavitt,

Administrator.

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