

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 82**

[FRL-7971-6]

RIN 2060-AK45

Protection of Stratospheric Ozone: Adjusting Allowances for Class I Substances for Export to Article 5 Countries**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of proposed rulemaking.

SUMMARY: Today's action proposes adjustments to allocations of Article 5 allowances that permit production of Class I ozone depleting substances (ODSs) solely for export to developing countries to meet those countries' basic domestic needs. Today's action proposes adjustments to the baseline Article 5 allowances for companies for specific Class I controlled substances and establishes a schedule for reductions in the Article 5 allowances for these Class I controlled substances in accordance with the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the Clean Air Act (CAA). Today's proposal also would extend the allocation of Article 5 allowances for the manufacture of methyl bromide solely for export to developing countries beyond January 1, 2005, in accordance with the Montreal Protocol and the CAA.

DATES: Written comments on this proposed rule must be received on or before November 21, 2005. If a public hearing takes place, it will be scheduled for October 6, 2005. Any party requesting a public hearing must notify the contact person listed below by 5pm Eastern Standard Time on September 28, 2005. After that time, interested parties may call EPA's Stratospheric Ozone Protection Information Hotline at 1-800-296-1996 for information on whether a hearing will be held, as well as the time and place of such a hearing.

ADDRESSES: Submit your comments, identified by Regional Material in EDOCKET (RME) ID No. OAR-2005-0151, by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. 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.

3. E-mail: A-and-R-docket@epa.gov.

4. Fax: 202-343-2338, Attn: Hodayah Finman.

5. Mail: "OAR-2005-0151", Air Docket, Environmental Protection Agency, Mail code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

6. Hand Delivery or Courier. Deliver your comments to: EPA Air Docket, EPA West 1301 Constitution Avenue, NW., Room B108, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to OAR-2005-0151. 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 site 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 and any form of encryption, and should be free of any defects or viruses.

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, such as 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 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility 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: For further information about this proposed rule, contact Hodayah Finman by telephone at (202) 343-9246, or by e-mail at finman.hodayah@epa.gov, or by mail at Hodayah Finman, U.S. Environmental Protection Agency, Stratospheric Protection Division, Stratospheric Program Implementation Branch (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Overnight or courier deliveries should be sent to 1310 L Street, NW., Washington, DC 20005. You may also visit the Ozone Depletion Web site of EPA's Global Programs Division at <http://www.epa.gov/ozone/index.html> for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and other topics.

SUPPLEMENTARY INFORMATION: Today's action proposes to establish a new Article 5 allowance baseline for specified Class I substances, establish a schedule for phased reductions in such allowances, and extend the time allowed for Article 5 production for methyl bromide.

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I. General Information

A. Regulated Entities

Entities potentially regulated by this action are those associated with the production and export of Class I ODSs. Potentially regulated categories and entities include:

| Category | Examples of regulated entities |
|----------------|--|
| Industry | Producers and Exporters of Class I ODSs. |

The above 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. To determine whether your facility, company, business, organization is regulated by this action, you should carefully examine the regulations promulgated at 40 CFR part 82, subpart A. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. Docket. EPA has established an official public docket for this action under the Office of Air and Radiation Docket & Information Center, Electronic Docket ID No. OAR-2005-0151. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related

to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at EPA West, 1301 Constitution Avenue, NW., Room B108, Mail Code 6102T, Washington, DC 20460, Phone: (202)-566-1742, Fax: (202)-566-1741. The materials may be inspected from 8:30 a.m. until 4:30 p.m. Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying docket materials.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and access documents in the public docket that are available electronically. Once in the system, select "search," then type in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the

copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked late. EPA is not required to consider these late comments. If you plan to submit late comments, please also notify Hodayah Finman, U.S. Environmental Protection Agency, Stratospheric Protection Division (mail code 6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 343-9246.

Information designated as CBI under 40 CFR part 2, subpart 2, must be sent directly to the contact person for this notice. However, the Agency requests that all respondents submit a non-confidential version of their comments to the docket as well.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD-ROM you submit, and in any cover letter accompanying the disk or CD-ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

The electronic public docket is EPA's preferred method for receiving comments. Go directly to EPA dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments.

2. By Mail. Send two copies of your comments to: Air and Radiation Docket (6102), Docket No. OAR-2005-0151, U.S. Environmental Protection Agency, Mailcode 6205J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

3. By Hand Delivery or Courier. Deliver your comments to: 1310 L Street NW., Washington, DC 20005, Attention: Docket ID No. OAR-2005-0151. Such deliveries are only accepted during the Docket's normal hours of operation as identified under **ADDRESSES**.

4. By Facsimile. Fax your comments to: (202) 566-1741, Attention: Docket ID No. OAR-2005-0151.

D. How Should I Submit Confidential Business Information (CBI) to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the mail or courier addresses listed above, as appropriate, to the attention of Docket ID No. OAR-2005-0151. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI. If you submit CBI on disk or CD-ROM, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD-ROM, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

II. What Is the Legislative and Regulatory Background of the Phaseout Regulations for Ozone-Depleting Substances?

The current regulatory requirements of the Stratospheric Ozone Protection Program that limit production and consumption of ozone depleting substances can be found at 40 CFR part 82, subpart A. The regulatory program was originally published in the **Federal Register** on August 12, 1988 (53 FR 30566), in response to the 1987 signing and subsequent ratification of the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol). The U.S. was one of the original signatories to the 1987 Montreal Protocol and the U.S. ratified the Protocol on April 21, 1988. Congress then enacted, and President Bush signed into law, the Clean Air Act Amendments of 1990 (CAA of 1990), which included Title VI on Stratospheric Ozone Protection, codified as 42 U.S.C. chapter 85, subchapter VI, to ensure that the United States could satisfy its obligations under the Protocol. EPA issued new regulations to implement this legislation and has made several amendments to the regulations since.

The requirements contained in the final rules published in the **Federal Register** on December 20, 1994 (59 FR 65478) and May 10, 1995 (60 FR 24970) establish an Allowance Program. The Allowance Program and its history are described in the notice of proposed rulemaking published in the **Federal Register** on November 10, 1994 (59 FR 56276). The control and the phaseout of the production and consumption of Class I ODSs as required under the Protocol and the CAA are accomplished through the Allowance Program.

In developing the Allowance Program, we collected information on the amounts of ODSs produced, imported, exported, transformed and destroyed within the U.S. for specific baseline years for specific chemicals. This information was used to establish the U.S. production and consumption ceilings for these chemicals. The data were also used to assign company-specific production and import rights to companies that were in most cases producing or importing during the specific year of data collection. These production or import rights are called "allowances." Due to the complete phaseout of many ODSs, the quantities of allowances granted to companies for those chemicals were gradually reduced and eventually eliminated. Production allowances and consumption allowances no longer exist for any Class I ODSs. All production or consumption

of Class I controlled substances is prohibited under the Protocol and the CAA, except for a few narrow exemptions.

In the context of the regulatory program, the use of the term "consumption" may be misleading. Consumption does not mean the "use" of a controlled substance, but rather is defined as the formula: production + imports - exports, of controlled substances (Article 1 of the Protocol and section 601 of the CAA). Class I controlled substances that were produced or imported through the expenditure of allowances prior to their phaseout date can continue to be used by industry and the public after that specific chemical's phaseout under these regulations except where the regulations include explicit use restrictions. Use of such substances may be subject to other regulatory limitations.

The specific names and chemical formulas for the Class I ODSs are in appendix A and appendix F in subpart A of 40 CFR part 82. The specific names and chemical formulas for the Class II ODSs are in appendix B and appendix F in subpart A.

Although the regulations phased out the production and consumption of Class I controlled substances, a very limited number of exemptions exist, consistent with U.S. obligations under the Protocol. The regulations allow for the manufacture of phased-out Class I controlled substances, provided the substances are either transformed or destroyed. They also allow limited manufacture if the substances are (1) exported to countries operating under Article 5 of the Protocol or (2) produced for essential or critical uses as authorized by the Protocol and the regulations. Limited exceptions to the ban on the import of phased-out Class I controlled substances also exist if the substances are: (1) Previously used, (2) imported for essential or critical uses as authorized by the Protocol and the regulations, (3) imported for destruction or transformation only, or (4) a transshipment or a heel (a small amount of controlled substance remaining in a container after discharge) (40 CFR 82.4).

III. How Did the Beijing Amendments to the Montreal Protocol Change the Levels and Schedules of ODS Production To Meet the Basic Domestic Needs of Developing Countries?

Under the Montreal Protocol, industrialized countries and developing countries have differentiated schedules for phasing out the production and import of ODSs. Developing countries operating under Article 5, paragraph 1

of the Protocol in most cases have substantial additional time in which to phase out ODSs. The Parties to the Protocol recognized that it would be inadvisable for developing countries to spend their scarce resources to build new ODS manufacturing facilities to meet their basic domestic needs as industrialized countries phase out. The Parties therefore decided to permit a small amount of production in industrialized countries, above and beyond the amounts permitted under those countries' phaseout schedules, to meet the basic domestic needs of developing countries.

The original Montreal Protocol schedule for industrialized country production of ODSs to meet the basic domestic needs of developing countries was based on a percentage of each producing country's baseline. The initial level was set at 10 percent of the baseline and this level changed to 15 percent upon phaseout of each specific ODS or group of chemicals (see section IV). Current EPA regulations reflect this approach.

The adjustments to the Montreal Protocol adopted by the Parties at their 11th meeting in Beijing change the basis for calculating production by industrialized countries to meet the basic domestic needs of developing countries for specific ODSs or groups of ODSs. Instead of being calculated as a percentage of total production of the ODS in a given year, the new baselines for basic domestic need production are calculated based on the average quantity of the ODS exported to Article 5 countries over a specified range of years. The new baseline calculation agreed to in Beijing reflects the Parties' concern, which EPA shares, that global oversupply of certain Class I ODSs is interfering with the transition to alternatives. The oversupply of these ODSs results in low prices that make it difficult for non-ozone depleting alternatives to compete in the marketplace. Businesses and individuals thus lack an economic incentive to transition to alternatives. The new baseline calculation is designed to overcome this problem with respect to Article 5 countries by reducing supply to those countries. The price of these ODSs should rise to reflect the decrease in supply.

The adjustments agreed to in Beijing also establish reduction schedules for the manufacture of ODSs by industrialized countries to meet the basic domestic needs of developing countries. Article 5 countries are subject to periodic step-downs in the amount of ODSs they may consume. If industrialized countries' production for

export to Article 5 countries were not adjusted to take into account these step-downs, the problem of oversupply likely would recur. Therefore, the Parties agreed at Beijing to reduction schedules that would mirror each step-down in Article 5 consumption. The schedules also reflect the complete consumption phaseouts in Article 5 countries. Under these schedules, industrialized countries must cease production for export to developing countries of CFCs by January 1, 2010, and of methyl bromide by January 1, 2015.

To ensure consistency with the Montreal Protocol, EPA is proposing to adopt new baselines and reduction schedules at 40 CFR part 82, subpart A. Under this proposed rule, the amount of ODSs that could be produced to meet the basic domestic needs of developing countries would be reduced by a certain percentage of the baseline in accordance with the step-down schedule for Article 5 developing countries for those chemicals until they are completely phased out.

The details of the new baselines and reduction schedules agreed to in Beijing, as well as updated baselines proposed by EPA, are in the sections below. EPA is also removing obsolete provisions from the regulations at 682.4(h) to increase the clarity of the regulations.

IV. How Do EPA's Regulations Permit Additional Production for Export to Article 5 Countries?

Section 604(e) of the Clean Air Act allows EPA to authorize, through rulemaking, limited production of Class I ODSs for export to developing countries, for the purpose of satisfying their basic domestic needs. The limits on such production must be no less stringent than the Protocol. With respect to the Class I ODSs specifically listed in the Act, EPA may not authorize an amount of production greater than 15 percent of baseline, and the exception must terminate no later than January 1, 2010, or, in the case of methyl chloroform, 2012. Production of methyl bromide for export to developing countries is addressed separately in section 604(e)(3). The CAA does not contain a specific cap or termination year for production of methyl bromide for this purpose. Consistent with section 604(e) of the CAA, EPA created a category of allowances called "Article 5 Allowances" in § 82.9 of the regulations to permit limited production of Class I ODSs explicitly for export to developing countries. Based on the original Protocol agreement regarding production to meet the basic domestic needs of Article 5 countries, each U.S. producer of an ODS

is granted Article 5 allowances equal to an additional specified percentage of its baseline production allowances as listed in § 82.5. This quantity of additional production is permitted solely for export to Article 5 countries.

Today's proposed action would ensure that EPA's regulations concerning Article 5 allowances continue to be no less stringent than the Protocol, as required by the CAA. Section 614 of the Clean Air Act states that the Act shall "be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol, * * * 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. In the case of conflict between any provision of [Title VI of the Act] and any provision of the Montreal Protocol, the more stringent provision shall govern." In accordance with section 614, today's proposed action would ensure full implementation of the Montreal Protocol's limitations on production for export to Article 5 countries and, in the case of the baseline for CFCs, would impose more stringent limitations based on more recent information than that available to the Parties in Beijing. Today's proposal would also ensure consistency with the termination date for Article 5 allowances in section 604(e), by specifying that holders of baseline Article 5 allowances for production of CFCs will receive zero percent of their baseline beginning January 1, 2010. In addition, as discussed below, today's proposed action would ensure that Article 5 allowances for production of CFCs prior to that date would not exceed the maximum level of 15 percent of baseline specified in the Act.

V. What Is the New Calculation of Baselines of Article 5 Allowances?

Pursuant to the Beijing Amendments of the Montreal Protocol and section 604(e) of the CAA, this rule proposes to adjust the calculation of the baseline of Article 5 allowances for some of the Class I ODSs. The Parties considered but decided not to change the basic domestic needs baselines for carbon tetrachloride and methyl chloroform (Group IV and Group V controlled substances, respectively) at the meeting in Beijing; thus the current regulatory baselines for these substances remain consistent with Protocol requirements. EPA believes that there is no need, at this time, to propose a change to the baselines for carbon tetrachloride and methyl chloroform, since these substances are exported primarily for

use as a feedstock in the manufacture of other substances, and are thus transformed. While the Parties did adopt new, more stringent baselines for Group II substances (halons), Article 5 allowances for these substances ceased to be available in the U.S. as of January 1, 2003. Accordingly, this proposed rule does not address those substances.

Thus EPA is proposing to change the existing regulations only with respect to CFCs (Groups I and III) and methyl bromide (Group VI). The Protocol contains a formula for calculating the new Article 5 allowance baselines for each of these Class I controlled substances. The Protocol also contains a range of years to be used for the calculation of each baseline as articulated in Articles 2A, 2C, and 2H. At the time of the meeting in Beijing (1999), the years chosen for establishing new baselines for production to meet Article 5 countries' basic domestic needs were the years of most recent and complete historical available data to the Parties for the particular group of ODSs.

For CFCs, EPA is proposing to amend the phaseout regulations to make the new baselines for Article 5 allowances reflect more recent historical data for exports to Article 5 countries. For methyl bromide, EPA is proposing to amend the phaseout regulations to reflect the new baselines for Article 5 allowances specified in Article 2H of the Protocol. With respect to CFCs, EPA considered granting allowances to companies exporting CFCs to Article 5 countries based on an average of data from the range of years specified in Articles 2A and 2C of the Protocol. The Agency is seeking comment on the use of these time periods to calculate the baseline. However, EPA prefers a more stringent approach. The presence of only minor price fluctuations for CFCs in recent years suggests that there is no shortage of CFCs in Article 5 countries (see p. 33 of Technology and Economic Assessment Panel (TEAP) Task Force Report on Basic Domestic Needs—October 2004). In addition, the October 2004 TEAP report says, “* * * in 2002 no deficit of CFCs were reported in any Article 5(1) country” (p. 24, para. (a)) and “there has been no sign of any shortage [of CFCs] in any Article 5(1) country (even during 2004)” (p. 24, para. (d)). Thus it appears that current supplies are adequate. In addition, the U.S. has not historically been a major supplier of CFCs to developing countries. EPA's tracking database shows that the U.S. supply of CFCs has been significantly lower than the TEAP report indicates. To view the aggregate data on CFC supply and production by the U.S., visit EDOCKET OAR-2005-

0151. Also, the ability to reuse and recycle CFCs taken out of refrigeration products provides an additional source of supply should demand for CFCs exceed expectations.

With respect to methyl bromide, the phaseout is in an earlier stage and the adequacy of supply is less certain. The U.S. provides a large percentage of the supply of methyl bromide to developing countries. As a result, decreasing the U.S. baseline could have a substantial effect on the amount of supply potentially available to those countries. Therefore, EPA is not proposing a more stringent baseline for methyl bromide.

Each substance or group of substances has its own formula for calculating the new baseline as described below. The new baselines for each company would be specified in § 82.11.

A. CFCs Subject to Earliest Controls

As discussed above, under the current regulations Article 5 allowances are currently calculated as a percentage of the original production baseline. Section 601(2) of the CAA and EPA's implementing regulations at 40 CFR 82.5 establish the year 1986 as the production baseline for Class I, Group I substances. Under the current § 82.9, every person apportioned baseline production allowances for Group I CFCs received Article 5 allowances equal to 10 percent of their 1986 baseline for each control period ending before January 1, 1996 (the phaseout date), and 15 percent of their baseline for each control period thereafter.

As a result of the Beijing Amendment to the Protocol, Article 2A, paragraphs 4–7 state that an industrialized Party's allowable production of CFCs 11, 12, 113, 114, and 115 to meet the basic domestic needs of Article 5 Parties shall be measured against “the annual average of its production of [these substances] for basic domestic needs for the period 1995 to 1997 inclusive.” However, EPA has more recent historical data on CFC exports to developing countries over the period 2000–2003 that show much lower levels being exported to Article 5 countries.

Using the recent data on exports of CFCs from the U.S. to developing countries, specifically for the years 2000–2003, EPA is proposing a new baseline of Article 5 allowances which would be less than one percent (< 1%) of the 1986 production allowance baseline for CFCs. The proposed new baseline for Article 5 allowances for Group I CFCs therefore meets the requirement in section 604(e)(2)(B) of the CAA to limit Article 5 allowances to no more than 15 percent of the 1986 production baseline. Since the purpose

of adjusting the Article 5 allowance baselines is to avoid oversupply of CFCs in Article 5 countries, EPA is proposing to establish the new baselines for Article 5 allowances based on this more recent historical data. These new baselines should be a more accurate starting point for the reduction schedule specified in the Protocol.

B. Other Fully Halogenated CFCs

As discussed above, under the current regulations Article 5 allowances are calculated as a percentage of the original production baseline. Section 601(2) of the CAA and EPA's implementing regulations at 40 CFR 82.5 establish the year 1989 as the production baseline for Class I, Group III substances. Under the current § 82.9, every person apportioned baseline production allowances for Group III CFCs received Article 5 allowances equal to 10 percent of their 1989 baseline for each control period ending before January 1, 1996 (the phaseout date), and 15 percent of their baseline for each control period thereafter.

As a result of the Beijing Amendment to the Protocol, Article 2C, paragraphs 3–4 state that an industrialized Party's allowable production of other fully halogenated CFCs to meet the basic domestic needs of Article 5 Parties shall be measured against “the annual average of its production of [these substances] for basic domestic needs for the period 1998–2000 inclusive.” However, EPA has more recent historical data on exports of CFCs to developing countries over the period 2000–2003 that show much lower levels of CFC being exported to Article 5 countries.

Since there was no export of Class I, Group III substances during the 2000–2003 period being proposed as the basis for calculating new allocations of Article 5 allowances, today's proposal would establish a new baseline of zero. Since the purpose of adjusting the Article 5 allowance baselines is to reduce the amount of CFCs globally, and more recent data should provide a more accurate starting point for the reduction schedule, EPA is proposing to establish the new baselines for Article 5 allowances based on this more recent historical data.

C. Methyl Bromide

As discussed above, under the current regulations Article 5 allowances are calculated as a percentage of the original production baseline. Section 601(2) of the CAA and EPA's implementing regulations at 40 CFR 82.5 establish the year 1991 as the production baseline for Class I, Group VI substances (methyl

bromide). Under the current § 82.9, every person apportioned baseline production allowances for Group VI substances received Article 5 allowances equal to 15 percent of their 1991 baseline for each control period ending before January 1, 2005 (the phaseout date). There is currently no regulatory framework in place to allow for the production of methyl bromide for export to developing countries past the phaseout date. Section VII of this proposed rulemaking proposes to amend the current regulations to allow for exempted production of methyl bromide for export to Article 5 countries past January 1, 2005 in accordance with section 604(e)(3) of the CAA.

As a result of the Beijing Amendment to the Protocol, paragraphs 5–5 bis of Article 2H stipulate that an industrialized Party's allowable production of methyl bromide to meet the basic domestic needs of Article 5 Parties shall be measured against "the annual average of its production of [methyl bromide] for basic domestic needs for the period 1995 to 1998 inclusive." EPA is therefore proposing to establish the average of each company's production exported to Article 5 countries for the years 1995–1998 as the new Article 5 allowance baseline for methyl bromide.

VI. What Is EPA's Proposed Schedule To Reflect the Beijing Amendment for Phased Reductions of Article 5 Allowances?

Today's proposed action would establish a schedule for phased reductions in the manufacture of certain Class I ODSs to meet the basic domestic needs of Article 5 countries in accordance with the adjustments to the Protocol agreed to in Beijing. For each control period specified in the table in § 82.11, EPA proposes to grant each U.S. company the specified percentage of the baseline Article 5 allowances apportioned to it under § 82.11.

The idea of reduction schedules for the manufacture of ODSs to meet basic domestic needs of developing countries is new to the Protocol and to U.S. regulations. While the CAA does not require a reduction schedule, such a schedule is a reasonable means of assuring that production of Class I substances for this purpose will terminate in accordance with the deadlines provided in the Act and in the Protocol. In addition, the CAA does not allow EPA to authorize Article 5 allowances in a manner inconsistent with the Protocol. Thus, today's action proposes to freeze and gradually phase out the production of ODSs in the United States to meet the basic domestic

needs of Article 5 parties in line with the Protocol's phase down schedules for consumption in Article 5 countries. So, every time the developing countries have a step down in the percentage of their consumption for a Class I ODS, the allowable production in the United States to meet those countries' basic domestic needs will mirror that step down. For instance, in 2005, developing countries operating under Article 5(1) must reduce their consumption of CFCs by 50 percent of their baseline; therefore, the amount of Article 5 allowances for producing CFCs to meet those countries' basic domestic needs is also reduced by 50 percent.

A. CFCs Subject to Earliest Controls

In the Montreal Protocol, Article 2A, paragraphs 5–8 set forth the reduction schedule for the production of CFCs 11, 12, 113, 114, and 115 for basic domestic needs of Article 5 countries. EPA is proposing to incorporate this reduction schedule into the phaseout regulations. Hence, the Article 5 allowance reduction schedule for production of the Class I, Group I controlled substances would be as follows: 50% of the Article 5 allowance baseline for the 2006 control period; 15% of baseline for each of the control periods from January 1, 2007, to December 31, 2009; and 0% (complete phaseout) for the control periods beginning January 1, 2010, and thereafter.

B. Other Fully Halogenated CFCs

Paragraphs 3–5 of Article 2C of the Montreal Protocol establish the reduction schedule for the production of other fully halogenated CFCs (the Class I, Group III controlled substances) to meet the basic domestic needs of Article 5 countries. If EPA were to set a baseline other than zero for these CFCs, the reduction schedule for their production would be: 80% of baseline for the 2006 control period; 15% of baseline for each of the control periods from January 1, 2007 to December 31, 2009; and 0% (complete phaseout) for the control periods beginning January 1, 2010 and thereafter. However, EPA's preferred option is to set a zero baseline based on 2000–2003 data, which would make a reduction schedule unnecessary.

C. Methyl Bromide

Article 2H, paragraphs 5 bis. and 5 ter. of the Montreal Protocol set forth the reduction schedule for production of methyl bromide to meet the basic domestic needs of Article 5 countries. EPA is proposing to incorporate this reduction schedule into the phaseout regulations. The reduction schedule for the production of methyl bromide (Class

I, Group VI controlled substances) would be as follows: 80% of the Article 5 allowance baseline for each of the control periods from January 1, 2006 to December 31, 2014; 0% (complete phaseout) starting January 1, 2015 and thereafter.

VII. What Is the New Timeline for Article 5 Production of Methyl Bromide?

The current regulations have no provision that allows for exempted production of methyl bromide for export to Article 5 countries past January 1, 2005. This rule proposes to create a new basis for exempted production of methyl bromide for export to Article 5 countries beyond the 2005 phaseout in the U.S. The methyl bromide phaseout date for Article 5 countries is 2015 and allowing continuing U.S. production to meet such countries' basic domestic needs up to that phaseout date obviates the need to install ODS production capacity in those countries. The Protocol allows limited production for this purpose up until January 1, 2015. The CAA, in Section 604(e)(3), does not specify a termination date for this exemption but does require consistency with the Protocol. In addition, section 614 requires the regulations to be no less stringent than the Protocol. Therefore, EPA is proposing to allow limited production of methyl bromide for export to Article 5 countries up until January 1, 2015.

VIII. Other Options

In this section EPA describes another option it considered regarding the baseline for CFC production and why it is not the Agency's preferred approach. EPA looked at granting allowances to companies exporting CFCs to Article 5 countries based on an average of data from the range of years specified in Article 2A (for Group I) and 2C (for Group III) of the Protocol (see section V). Although this is not EPA's preferred approach, the Agency is seeking comment on the use of these time periods to calculate the baseline.

EPA prefers a more stringent approach than that described in Articles 2A and 2C. As described earlier, observed market indicators suggest that there is no shortage of CFCs in the marketplace in Article 5 countries because the price of CFCs has remained stable over the past several years. Also, as described earlier, reported data described in the October 2004 TEAP Task Force Report on Basic Domestic Needs indicates that CFC supplies are stable.

In addition, historically the U.S. has not been a major supplier of CFCs to

developing countries. EPA's tracking database shows that the U.S. supply of CFCs has been significantly lower than the TEAP report indicates. (To view the aggregate data on CFC supply and production by the U.S., visit EDOCKET OAR-2005-0151.) Also, the ability to reuse and recycle CFCs taken out of refrigeration products provides an additional source of supply should demand exceed expectations.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this proposed 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 governments 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.

It has been determined by OMB and EPA that this proposed action is not a "significant regulatory action" under the terms of Executive Order 12866, and is therefore not subject to OMB review under the Executive Order.

B. Paperwork Reduction Act

This proposed action does not add any information collection requirements or increase burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations, 40 CFR part 82, 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 number 1432. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, 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 are listed in 40 CFR part 9 and 48 CFR chapter 15.

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 Regulatory Flexibility Act (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 governmental jurisdictions.

For purposes of assessing the impact 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 code (NAICS) 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 | SIC small business size standard (in number of employees or millions of dollars) |
|--|------------|----------|--|
| 1. Chemical and Allied Products, NEC | 422690 | 5169 | 100 |

After considering the economic impacts of today's proposed rule on small entities, I certify 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, as it regulates large corporations that produce, import, or export Class I ODSs. There are no small entities in this regulated industry. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome

comments on issues related to such impacts.

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 governments 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 to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, 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. The provisions of section 205 do not apply when they are inconsistent with applicable law.

Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burden some alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This proposed rule imposes stricter baselines and reduction schedules for Article 5 allowances and extends the availability of an exemption from a regulatory prohibition. It does not impose mandates on State, local, or tribal governments and does not result in substantial expenditures for the private sector. Thus, today's rule is not subject to the requirements of sections 202 or 205 of the UMRA.

We determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments; therefore, we are not required to develop a plan with regard to small governments under section 203. Finally, because this proposed rule 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.

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." 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. This proposed rule relates to an exemption used by large corporations that produce, import, or export Class I ODSs. It has no effect on State or local governments. Thus Executive Order 13132 does not apply to this rule.

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 6, 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. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This proposed rule relates to an exemption used by large multinational corporations that produce, import, or export Class I ODSs. It has no effect on tribal governments. Thus Executive Order 13175 does not apply to this proposed rule.

G. 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" 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.

While this proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, we nonetheless have reason to believe that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. Depletion of stratospheric ozone results in greater transmission of the sun's ultraviolet (UV) radiation to the earth's surface. The following studies describe the effects on children of excessive exposure to UV radiation: (1) Westerdahl J, Olsson H, Ingvar C. "At what age do sunburn episodes play a crucial role for the development of malignant melanoma," *Eur J Cancer* 1994; 30A: 1647-54; (2) Elwood JM, Jopson J. "Melanoma and sun exposure: an overview of published studies," *Int J Cancer* 1997; 73:198-203; (3) Armstrong BK. "Melanoma: childhood or lifelong sun exposure" In: Grobb JJ, Stern RS, Mackie RM, Weinstock WA, eds. "Epidemiology, causes and prevention of skin diseases," 1st ed. London, England: Blackwell Science, 1997: 63-6; (4) Whiteman D., Green A. "Melanoma and Sunburn," *Cancer Causes Control*, 1994: 5:564-72; (5) Kricger A, Armstrong, BK, English, DR, Heenan, PJ. "Does intermittent sun exposure cause basal cell carcinoma? A case control study in Western Australia," *Int J Cancer* 1995; 60: 489-94; (6) Gallagher, RP, Hill, GB, Bajdik, CD, et. al. "Sunlight exposure, pigmentary factors, and risk of nonmelanocytic skin cancer I, Basal cell carcinoma," *Arch Dermatol* 1995; 131: 157-63; (7) Armstrong, BK. "How sun exposure causes skin cancer: an epidemiological perspective," *Prevention of Skin Cancer*. 2004. 89-116.

The methyl bromide phaseout date for Article 5 countries is 2015 and allowing continuing U.S. production to meet such countries' basic domestic needs avoids the need for those countries to install new ODS manufacturing facilities. The effect of extending the availability of Article 5 allowances for methyl bromide should be that methyl bromide that would otherwise be produced at new facilities in developing countries will instead be produced in the U.S. for export to those countries. The amount of methyl bromide that will be released to the atmosphere should remain the same regardless of the manufacturing location. In addition, avoiding the installation of new capacity is one means of ensuring that production levels continue to decline. Thus, this rule is not expected to increase the impacts on children's

health from stratospheric ozone depletion.

The public is invited to submit or identify peer-reviewed studies and data, of which EPA may not be aware, that assessed results of early life sun exposure.

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. Today's proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

Dated: September 14, 2005.

Stephen Johnson,
Administrator.

Title 40, Code of Federal Regulations, part 82, is amended to read as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Section 82.3 is amended by revising the entry for "Article 5 allowance" to read as follows:

§ 82.3 Definitions for class I and class controlled substances.

* * * * *

Article 5 allowances means the allowances apportioned under § 82.9(a), § 82.11(a)(2), and § 82.18(a).

* * * * *

3. Section 82.4 is amended by revising paragraphs (b)(1) and (h) to read as follows:

§ 82.4 Prohibitions for class I controlled substances.

* * * * *

(b)(1) Effective January 1, 1996, for any Class I, Group I, Group II, Group III, Group IV, Group V or Group VII controlled substances, and effective January 1, 2005 for any Class I, Group VI controlled substances, and effective August 18, 2003, for any Class I, Group VIII substance, no person may produce, at any time in any control period (except that are transformed or destroyed domestically or by a person of another Party) in excess of the amount of conferred unexpended essential use allowances or exemptions, or in excess of the amount of unexpended critical use allowances, or in excess of the amount of unexpended Article 5 allowances as allocated under § 82.9 and § 82.11, as may be modified under § 82.12 (transfer of allowances) for that substance held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess production constitutes a separate violation of this subpart.

* * * * *

(h) No person may sell in the U.S. any Class I controlled substance produced explicitly for export to an Article 5 country.

* * * * *

4. Section 82.9 is amended by revising paragraph (a)(4) to read as follows:

§ 82.9 Availability of production allowances in addition to baseline production allowances for Class I controlled substances.

(a) * * *

(4) 15 percent of their baseline production allowances for Class I, Group IV and Group V controlled substances listed under § 82.5 of this subpart for each control period beginning January 1, 1996 until January 1, 2010;

* * * * *

5. Section 82.11 is amended by revising paragraph (a) introductory text and adding a new paragraph (a)(2) and (a)(3) to read as follows:

§ 82.11 Exports of Class I controlled substances to Article 5 Parties.

(a) If apportioned Article 5 allowances under § 82.9(a) or § 82.11(a)(2), a person may produce Class I controlled substances, in accordance with the prohibitions in § 82.4 and the reduction schedule in § 82.11(a)(3), to be exported (not including exports resulting in transformation or destruction, or used controlled substances) to foreign states listed in appendix E to this subpart (Article 5 countries).

* * * * *

(2) Persons who reported exports of Class I, Group I controlled substances to Article 5 countries in 2000–2003 are apportioned baseline Article 5 allowances as set forth in § 82.11(a)(2)(i). Persons who reported exports of Class I, Group VI controlled substances to Article 5 countries in 1995–1998 are apportioned baseline Article 5 allowances as set forth in § 82.11(a)(2)(ii).

(i) For Group I controlled substances:

| Controlled substance | Person | Allowances (kg) |
|----------------------|-------------------------|-----------------|
| CFC-11 | Honeywell | 7,150 |
| | Sigma Aldrich | 1 |
| CFC-113 | Fisher Scientific | 5 |
| | Honeywell | 313,686 |
| CFC-114 | Sigma Aldrich | 48 |
| | Honeywell | 24,798 |
| | Sigma Aldrich | 1 |

(ii) For Group VI controlled substances:

| Controlled substance | Person | Allowances (kg) |
|----------------------|--|-----------------|
| Methyl Bromide | Albemarle | 1,152,714 |
| | Ameribrom | 176,903 |
| | Great Lakes Chemical Corporation | 3,825,846 |

(3) Phased Reduction Schedule for Article 5 Allowances allocated in § 82.11.

For each control period specified in the following table, each person is granted the specified percentage of the

baseline Article 5 allowances apportioned under § 82.11.

| Control period | Class I substances in group I (percent) | Class I substances in group VI (percent) |
|----------------|---|--|
| 2006 | 50 | 80 |
| 2007 | 15 | 80 |
| 2008 | 15 | 80 |
| 2009 | 15 | 80 |
| 2010 | 0 | 80 |
| 2011 | 0 | 80 |
| 2012 | 0 | 80 |
| 2013 | 0 | 80 |
| 2014 | 0 | 80 |
| 2015 | 0 | 0 |

* * * * *

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