

required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 22, 2004.

**Kerrigan G. Clough,**

*Acting Regional Administrator, Region VIII.*

■ 40 CFR part 52 is amended to read as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

#### Subpart G—Colorado

■ 2. Section 52.349 is amended by adding paragraph (k) to read as follows:

##### § 52.349 Control strategy: Carbon monoxide.

\* \* \* \* \*

(k) Revisions to the Colorado State Implementation Plan, carbon monoxide NAAQS, revised maintenance plan for Longmont entitled "Revised Carbon Monoxide Maintenance Plan for the Longmont Attainment/Maintenance Area", as adopted by the Colorado Air Quality Control Commission on December 18, 2003, State effective March 1, 2004, and submitted by the Governor on April 12, 2004.

[FR Doc. 04-21926 Filed 9-29-04; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[OAR-2003-0228, FRL-7821-6]

RIN 2060-AG12

#### Protection of Stratospheric Ozone; Listing of Substitutes in the Foam Sector

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Today the Environmental Protection Agency (EPA) is taking final action to change the listing of HCFC-141b from acceptable to unacceptable for use as a foam blowing agent under the Significant New Alternatives Policy (SNAP) Program under section 612 of the Clean Air Act. The SNAP program reviews alternatives to Class I and Class II ozone depleting substances and approves use of alternatives which reduce the overall risk to public health and the environment. On July 11, 2000 EPA issued a proposed rule concerning the use of several hydrochlorofluorocarbons (HCFCs) in foam blowing applications. On July 22, 2002, EPA took final action with respect to a number of the HCFCs, but deferred its decision on changing the list for HCFC-141b in foam blowing applications due to the pending production and import ban of HCFC-141b (effective as of January 1, 2003) and incomplete information regarding the technical viability of alternatives. Since the publication of that final rule, EPA received information from outside parties through letters, meetings, and the HCFC-141b Exemption Allowance Petition process (68 FR 2819) that addresses the use of HCFC-141b in foam blowing applications. On March 10, 2004, EPA issued a Notice of Data Availability (NODA) which contained the new information mentioned above and sought comment on its completeness and accuracy. Today, based on the information contained in the NODA and the comments received on the NODA, EPA is making its final decision to change the listing for use of HCFC-141b as a foam blowing agent from acceptable to unacceptable.

**DATES:** This rule is effective on November 29, 2004.

**ADDRESSES:** EPA has established an official public docket for this action under Docket ID No. OAR-2003-0228 (continuation of Docket A-2000-18). All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed

in the index, confidential business information (CBI) or other information whose disclosure is restricted by statute is not publically available. Certain other material, such as copyrighted material, is also listed in the index but not placed on the Internet. This material will be publicly available only in hard copy form. Publicly available docket materials are available electronically in EDOCKET. The official public docket is the collection of materials that is available for public viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566-1742, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Suzie Kocchi, Stratospheric Protection Division, Office of Atmospheric Programs (6205J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343-9387; fax number: (202) 343-2363; e-mail address: [kocchi.suzanne@epa.gov](mailto:kocchi.suzanne@epa.gov). The published versions of notices and rulemakings under the SNAP program are available on EPA's Stratospheric Ozone Web site at <http://www.epa.gov/ozone/snap/regs>.

#### SUPPLEMENTARY INFORMATION:

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#### I. Regulated Entities

Today's rule regulates the use of HCFC-141b as a foam blowing agent used in the manufacture of rigid polyurethane/polyisocyanurate foam products. Businesses that currently might be using HCFC-141b, or might want to use it in the future, include:

- Businesses that manufacture polyurethane/polyisocyanurate foam systems.
- Businesses that use polyurethane/polyisocyanurate systems to apply insulation to buildings, roofs, pipes, etc.

Table 1 lists potentially regulated entities:

TABLE 1.—POTENTIALLY REGULATED ENTITIES, BY NORTH AMERICAN INDUSTRIAL CLASSIFICATION SYSTEM (NAICS) CODE OR SUBSECTOR

| Category       | NAICS code or subsector | Description of regulated entities                                   |
|----------------|-------------------------|---|
| Industry ..... | 326150                  | Urethane and Other Foam Product (except Polystyrene) Manufacturing. |

This table is not intended to be exhaustive, but rather a guide regarding entities likely to be regulated by this action. If you have any questions about whether this action applies to a particular entity, consult the person listed in the preceding section, **FOR FURTHER INFORMATION.**

**II. Section 612 Program**

*A. Statutory Requirements*

Section 612 of the Clean Air Act (CAA) requires EPA to develop a program for evaluating alternatives to ozone depleting substances (ODS). EPA refers to this program as the Significant New Alternatives Policy (SNAP) program. The major provisions of section 612 are:

- *Rulemaking*—Section 612(c) requires EPA to promulgate rules making it unlawful to replace any class I (chlorofluorocarbon, halon, carbon tetrachloride, methyl chloroform, methyl bromide, and hydrobromofluorocarbon) or class II (hydrochlorofluorocarbon) substance with any substitute that the Administrator determines may present adverse effects to human health or the environment where the Administrator has identified an alternative that (1) reduces the overall risk to human health and the environment, and (2) is currently or potentially available.

- *Listing of Unacceptable/Acceptable Substitutes*—Section 612(c) also requires EPA to publish a list of the substitutes unacceptable for specific uses. EPA must publish a corresponding list of acceptable alternatives for specific uses.

- *Petition Process*—Section 612(d) grants the right to any person to petition EPA to add a substitute to or delete a substitute from the lists published in accordance with section 612(c). The Agency has 90 days to grant or deny a petition. When the Agency grants a petition, EPA must publish the revised lists within an additional six months.

- *90-day Notification*—Section 612(e) directs EPA to require any person who produces a chemical substitute for a class I substance to notify EPA not less than 90 days before new or existing chemicals are introduced into interstate

commerce for significant new uses as substitutes for a class I substance. The producer must also provide EPA with the producer’s health and safety studies on such substitutes.

- *Outreach*—Section 612(b)(1) states that the Administrator shall seek to maximize the use of federal research facilities and resources to assist users of class I and II substances in identifying and developing alternatives to the use of such substances in key commercial applications.

- *Clearinghouse*—Section 612(b)(4) requires the Agency to set up a public clearinghouse of alternative chemicals, product substitutes, and alternative manufacturing processes that are available for products and manufacturing processes which use class I and II substances.

*B. Regulatory History*

On March 18, 1994, EPA published a rule (59 FR 13044) which described the process for administering the SNAP program and issued EPA’s first acceptability lists for substitutes in the major industrial use sectors. These sectors include: Refrigeration and air conditioning, foam manufacturing, solvents cleaning, fire suppression and explosion protection, sterilants; aerosols, adhesives, coatings and inks; and tobacco expansion. These sectors comprise the principal industrial sectors that historically consumed large volumes of ozone-depleting compounds.

EPA defines a “substitute” as any chemical, product substitute, or alternative manufacturing process, whether existing or new, that could replace a class I or class II substance (40 CFR 82.172). Anyone who produces a substitute must provide EPA with health and safety studies on the substitute at least 90 days before introducing it into interstate commerce for significant new use as an alternative (40 CFR 82.174(a)). This requirement applies to chemical manufacturers, but may include importers, formulators, or end-users when they are responsible for introducing a substitute into commerce.

*C. Listing Decisions*

Under section 612, EPA has considerable discretion in the risk management decisions it can make under the SNAP program. In the SNAP rule, the Agency identified four possible decision categories: acceptable; acceptable subject to use conditions; acceptable subject to narrowed use limits; and unacceptable (40 CFR 82.180(b)). Fully acceptable substitutes, *i.e.*, those with no restrictions, can be used for all applications within the relevant sector end-use.

After reviewing a substitute, EPA may make a determination that a substitute is acceptable only if certain conditions of use are met to minimize risk to human health and the environment. Such substitutes are described as “acceptable subject to use conditions.”

Even though EPA can restrict the use of a substitute based on the potential for adverse effects, it may be necessary to permit a narrowed range of use within a sector end-use because of the lack of alternatives for specialized applications. Users intending to adopt a substitute acceptable with narrowed use limits must first ascertain that other acceptable alternatives are not technically feasible. Companies must document the results of their evaluation, and retain the results on file for the purpose of demonstrating compliance. This documentation must include descriptions of substitutes examined and rejected, processes or products in which the substitute is needed, reason for rejection of other alternatives, *e.g.*, performance, technical or safety standards, and the anticipated date other substitutes will be available and projected time for switching to other available substitutes.

It is a violation of the CAA and EPA’s SNAP regulations to replace an ODS with a substitute listed as unacceptable or to use of substitute in contravention of the limits set by a use condition or the narrowed use limits (40 CFR 82.174).

EPA does not believe that notice and comment rulemaking procedures are required to list alternatives as acceptable with no restrictions. Such listings do not impose any sanction, nor

do they remove any prior license to use a substitute. Consequently, EPA adds substitutes to the list of acceptable alternatives without first requesting comment on new listings (59 FR 13044). Updates to the acceptable lists are published as separate Notices of Acceptability in the **Federal Register**.

As described in the original March 18, 1994 rule for the SNAP program (59 FR 13044), EPA believes that notice-and-comment rulemaking is required to place any alternative on the list of prohibited substitutes, to list a substitute as acceptable only under certain use conditions or narrowed use limits, or to remove an alternative from either the list of prohibited or acceptable substitutes. In this final rule, EPA is revising its determination regarding the acceptability of HCFC-141b as a substitute in the foams blowing sector. Today's rule finalizes and incorporates decisions that were proposed on July 11, 2000 at 65 FR 42653 (referred to hereinafter as "the proposal"). The section below presents a detailed discussion of the determination that is made final in today's Final Rule.

### III. Listing Decision on HCFC-141b in the Foam Sector

#### A. Background

A major goal of the SNAP program is to facilitate the transition away from ODS. In 1994, EPA listed several HCFCs as acceptable replacements for CFCs because the Agency believed that HCFCs provided a temporary bridge to alternatives that do not deplete stratospheric ozone ("ozone-friendly"). At that time, EPA believed that HCFCs were necessary transitional alternatives to CFC blowing agents in thermal insulating foam (59 FR 13083). As a result, HCFC-141b became one of the most common foam blowing agents in place of CFC-11. Pursuant to the CAA and the *Montreal Protocol on Substances that Deplete the Ozone Layer* HCFC-141b was phased out of production and import on January 1, 2003.<sup>1</sup> Since the time EPA initially listed HCFC-141b as acceptable in certain foam blowing uses, the Agency has listed several other non-ODS alternative blowing agents, including hydrofluorocarbons (HFCs), hydrocarbons, carbon dioxide, and other compounds as acceptable substitutes in foam blowing.<sup>2</sup> As of 2003, the vast

majority of the foam industry has implemented alternatives other than HCFC-141b.<sup>3</sup> Finished products containing these alternatives are commercially available today. Spray foam is the only significant foam end use that has not completed the transition away from ODS. However, some spray foam companies have implemented non-ODS alternatives and are marketing foam systems containing non-ODS alternatives today. Others have identified non-ODS alternatives, overcome technical constraints and are working on the final implementation of non-ODS alternatives, such as acquiring final building code approvals before offering foam systems in the market by the end of 2004.

The spray foam sector operates differently than many other end users regulated under SNAP. Rather than the end user directly buying and using an alternative, the alternative is first processed by a formulator. The formulators purchase raw materials, including the blowing agent (e.g. HCFC-141b), isocyanates, surfactants, fire retardants, etc. from suppliers and blend the materials into a spray foam system. Because the re-formulating and testing is done by the formulators, they are relied upon for much of the technical expertise and support provided to the ultimate end user—on-site contractors. The contractors purchase these systems from the formulators in order to produce the actual foam product (e.g., roof or wall insulation). Thus, in the spray foam sector, the formulators are responsible for implementing alternatives to HCFC-141b and providing the contractors with systems that produce foam meeting the necessary technical and code requirements. However, both the formulators and contractors are subject to SNAP regulations because both use the blowing agent (e.g. HCFC-141b). In the former case this entails blending the blowing agent in a foam formulation and in the latter case this involves producing the foam with aid of the blowing agent.

On July 11, 2000, EPA published a proposal that addressed the use of various HCFCs in foam end-uses (65 FR 42653). Part of that proposed rule was a proposal to list HCFC-141b as unacceptable in all foam end-uses upon finalization of the rule, with existing users allowed to continue use (i.e., grandfathered) until January 1, 2005.

EPA believed that this time period was sufficient for these end-users to transition to alternative foam blowing agents, considering the production phaseout of HCFC-141b on January 1, 2003. The Agency allowed 60 days for public comment and received 45 responses to the proposal by the close of the comment period (September 11, 2000). EPA received comments from chemical manufacturers, appliance manufacturers, spray foam manufacturers, associations, and others. Copies of the comments can be obtained through the Air Docket by referencing A-2000-18, IV-D-1 through 45 (see **ADDRESSES** section above for docket contact information). Specifically, the comments to the proposal on HCFC-141b detailed issues surrounding the technical viability and availability of non-ODS alternatives in the spray foam sector. On July 22, 2002, EPA took final action on other aspects of the July 11, 2000 proposed rule. In response to the comments regarding the technical viability and availability of alternatives in the spray foam sector, EPA deferred final action on the proposal to list HCFC-141b as unacceptable in order to monitor the progress of the spray foam sector in implementing technically viable alternatives (67 FR 47703).

Since EPA's deferral on the decision to find the use HCFC-141b in foam blowing applications unacceptable, the Agency has undertaken a number of initiatives to address the concerns of spray foam formulators that non-ODS alternatives were not technically and economically viable. There are approximately 15-20 companies in the U.S. that formulate spray foam for thousands of customers, including roofing contractors and others. Several of these formulators are larger businesses, but many are small businesses. In comments on the SNAP proposal and on a separate but related rulemaking (the HCFC Allowance Allocation proposal, July 20, 2001, 66 FR 38063), some small businesses that used HCFC-141b requested an industry wide exemption from the HCFC-141b production phaseout of January 1, 2003 (the phaseout date established in 1993). Based on their view of the technical viability and availability of alternatives, the formulators explained that access to HCFC-141b beyond the phaseout would allow them to complete all the tests and qualifications necessary to implement alternative blowing agents (see Air Docket A-98-33: IV-D-35 to IV-D-66 and IV-G-06 to IV-G-09). Upon review of these comments, EPA concluded that allowing production of HCFC-141b for the entire spray foam sector would

<sup>1</sup> The phaseout schedule was established on December 10, 1993 (58 FR 65018) as authorized under section 606 of the Clean Air Act.

<sup>2</sup> These listings are published in the following **Federal Register** notices: 61 FR 47012, 62FR 10700, 62 FR 30275, 63 FR 9151, 64 FR 30410, 64 FR

68039, 65 FR 19327, 65 FR 37900, 65 FR 78977 and 68 FR 50533.

<sup>3</sup> Within the context of this rule, the word alternative refers to a technically viable SNAP approved alternative that presents a lower overall risk to human health and the environment.

unfairly penalize companies who had invested in the transition from HCFC-141b. Additionally, hundreds if not thousands of companies had been relying on the HCFC-141b phaseout for ten years and had made investments according to the phaseout date established in 1993. EPA did not believe an industry wide exemption from the production ban would provide any small businesses that were experiencing technical constraints access to HCFC-141b produced after January 1, 2003, because they would be forced to compete with other companies for a limited supply of HCFC-141b (68 FR 2827). Therefore, in an immediate effort to address the concerns of small businesses, EPA funded a three-year grant (2001-2004) to the Spray Polyurethane Foam Alliance (SPFA). This grant assisted the SPFA to investigate and test non-ODS alternatives as well as provide guidance to the spray foam sector on implementation of those alternatives. EPA also provided outreach and assistance through various meetings, presentations and guidance directed at the spray foam sector from 2001 to 2004 (Air Docket OAR-2003-0228-30 and 31 and <http://www.epa.gov/ozone/snap/foams/index.html>).

More importantly, in response to the small businesses' requests for an extension of the production phaseout of HCFC-141b, EPA created the HCFC-141b Exemption Allowance Petition process in the final HCFC Allowance Allocation rule (January 21, 2003, 68 FR 2819). This process allowed formulators of HCFC-141b to individually petition EPA (on an annual basis) for new production of HCFC-141b beyond the phaseout date. The petitions must detail the technical viability of alternatives, access to stockpiled HCFC-141b and efforts to implement alternatives as well as the other information required under 40 CFR 82.16(h). Over the past two years, EPA has received approximately 25 petitions from formulators for a variety of applications, the majority of which were spray foam roofing and wall insulation.

The switch to alternatives has been slowed in the spray foam market because of the continued availability of HCFC-141b. Although stockpiled HCFC-141b will be depleted by the end of 2004, that is not the only source of HCFC-141b being used for spray foam applications. "Blended" polyurethane foam systems<sup>4</sup> containing HCFC-141b

as the blowing agent are being imported to the U.S. under this scenario, HCFC-141b is newly produced and blended with the isocyanates, surfactants, fire retardants, etc. into a system in a country that is not subject to the production phaseout in the Montreal Protocol. Then, that "blended" system is imported into the U.S. for use in spray foam applications.

EPA has been monitoring this situation since the production phaseout on January 1, 2003 in order to determine whether this vehicle for obtaining HCFC-141b beyond the phaseout date would be exploited. As explained in the 2002 final foam rule, " \* \* \* if this activity becomes widespread and compromises or undermines the intent of the U.S. HCFC-141b phaseout, disadvantages companies that have made good faith investments in developing and implementing non-ODS alternative technologies, EPA could consider establishing a SNAP use restriction \* \* \*" (67 FR 47708). Given the information EPA has received since HCFC-141b production was phased out, it is apparent that the continued availability of HCFC-141b through these "blended" systems is not only delaying the transition to alternatives in the spray foam sector but threatens to reverse the transition by penalizing companies that have either transitioned to alternatives, or are technically capable of transitioning to alternatives but choose not to because of the widespread availability of foam systems containing HCFC-141b.

Based on the information from the HCFC-141b Exemption Allowance Petitions and other information provided by the industry, on March 10, 2004, EPA published a NODA (69 FR 11358) pertaining to the availability, including the technical viability, of alternatives, and the import of "blended" HCFC-141b polyurethane foam systems. EPA allowed 30 days for comment and received 16 comments on the information by the close of the comment period (April 9, 2004). The Agency received information on the technical viability of alternatives from chemical manufacturers, spray foam manufacturers, contractors, industry associations, and others. Copies can be obtained through the Air Docket by referencing OAR-2003-0228, Reference Numbers 14-29 (see **ADDRESSES** section

metering/mixing device which allows the components to be delivered in the appropriate proportions. The components are then sent to a mixing gun and dispensed as foam directly to a surface such as a roof or tank. The "blended" foam systems being imported to the U.S. are complete systems, containing all the ingredients including the polyisocyanate and the blowing agent.

above for docket contact info). Of the 16 comments received, 5 were from small businesses raising some concerns about the use of stockpiled HCFC-141b and the ability for all businesses to transition to alternatives by January 1, 2005. EPA addressed these and other issues the commenters raised below. In addition, EPA addressed any comments received to the 2004 NODA after the comment period closed on April 9, 2004 in a document titled "Response To Late Comments" found in Air Docket OAR-2003-0228. Today, EPA is making its final decision regarding the acceptability of HCFC-141b in the foam sector. EPA's decisions are based on the technical viability of alternatives, timing and availability of alternatives, the need for products that maintain thermal efficiency, structural integrity, safety, and the potential economic implications of this action.

#### B. Decision

Based on the comments received on the proposal and NODA, EPA is taking the following final actions: (1) Changing the listing decision for HCFC-141b so that it is unacceptable for all foam blowing end uses (other than those applications specifically exempted) as of January 1, 2005, (2) exempting the use of HCFC-141b for space vehicle, nuclear and defense foam applications from the unacceptability determination, (3) exempting the use of HCFC-141b for laboratory research and development applications from the unacceptability determination and (4) allowing the use of fully formulated HCFC-141b foam systems in inventory before January 1, 2005 until July 1, 2005.

The majority of the HCFC-141b users in the foam industry transitioned to alternatives on or before January 1, 2003. The remaining portion of the industry, specifically the spray foam sector, required additional time to implement alternatives to HCFC-141b. This sector includes small businesses at both the formulator level and the contractor level. Of the 15-20 formulators in the U.S. some are small businesses. Equally, of the thousands of contractors many are small businesses. Both the formulators and contractors use the blowing agent (e.g. HCFC-141b) in the manufacture of foam. The formulators use the blowing agent by blending it into the foam formulations found in the spray foam systems. The contractors use the blowing agent by spraying the foam system containing the blowing agent to create the actual foam product (e.g. roof, wall, pipe insulation). Over the past three years, EPA has been working extensively with this sector in order to ensure a safe and timely

<sup>4</sup> A foam system typically consists of two transfer pumps that deliver ingredients (polyisocyanate from one side and a mixture including the blowing agent and stabilizers from the other side) to a

transition to less harmful alternatives, through the SPFA grant, the HCFC-141b Exemption Allowance Petition process and through the outreach efforts cited above.

In 2000, before the phaseout of HCFC-141b, small business formulators requested an extension of the HCFC-141b phaseout date in order to complete testing, qualification and code approvals of their alternative systems. EPA's technical expert, Caleb Management Services, surveyed the foam industry through a review of technical data and industry interviews and concluded that due to the field testing and approval process necessary for spray foam, commercial products containing alternatives would not be widely available until the beginning of 2005 (Air Docket A-2000-18, IV-D-78). The formulators supported this assessment and urged EPA to take action consistent with the Caleb Report. EPA agreed with the formulators and Caleb's assessment and established the HCFC-141b Exemption Allowance Petition process to provide relief to any business that did not have access to HCFC-141b while they were developing alternatives.

Suppliers of HCFC-141b and the majority of spray foam formulators (which hold the stockpiled HCFC-141b) provided key information to EPA through the two years of the HCFC-141b Exemption Allowance Petition process. This information included the quantity of stockpiled HCFC-141b available to the industry and the progress of formulators in implementing alternatives across the industry. EPA's analysis of that information determined that stockpiled HCFC-141b will be depleted by the end of 2004, the majority of technical constraints limiting the use of other acceptable alternatives have been overcome and alternatives will be implemented by the end of 2004 (Air Docket OAR-2003-0228-0009).

In the second half of 2002 the suppliers produced a large quantity of stockpiled HCFC-141b, including approximately 6.5 million pounds of uncommitted HCFC-141b. As a result, the majority of formulators purchased stockpiled HCFC-141b to meet their needs as they transitioned to non-ODS alternatives. Those formulators that did not purchase stockpiled HCFC-141b in 2002 before the phaseout, did so in both 2003 and 2004. As a result, the spray foam sector primarily relied on stockpiled HCFC-141b. During this period, EPA did not authorize new production of HCFC-141b through the HCFC-141b Exemption Allowance Petition process, with the exception of small quantities for specialized space

vehicle applications (Air Docket A-98-33, IV-G-26-30).

Some formulators have made significant progress to transition away from HCFC-141b since their 2000 extension request. These firms now offer on the market foam systems containing non-ODS alternatives and others will be doing the same throughout 2004 (Air Docket OAR-2003-0228-0009). As EPA stated when establishing the HCFC-141b Exemption Allowance Petition process in January 2003, "EPA believes all or almost all formulators can have fully-approved commercially available foam systems using alternatives by the end of 2004." (68 FR 2828). The information gathered through the HCFC-141b Exemption Allowance Petition process supports EPA's belief that alternatives to HCFC-141b are technically and economically viable for foam applications.

Although alternatives are technically and economically viable for the majority of end uses in the foam industry, a few exceptions exist for space, nuclear and defense applications. EPA received information from the National Aeronautics and Space Administration (NASA), the National Nuclear Security Administration (NNSA) of the U.S. Department of Energy (DOE) and their contractors about specific foam applications that require continued use of HCFC-141b. These applications which include the use of HCFC-141b to insulate the external tank of the space shuttle and space launch vehicles in order to meet rigorous technical and human health and safety requirements. Alternatives to these uses have not proved technically viable to date (Air Docket OAR-2003-18, 20, 14 and 33). Those entities project their use of HCFC-141b will continue to at least 2010 when either the projects will be complete or alternatives will be qualified. Based on the highly specialized safety and technical requirements, EPA is allowing the continued use of HCFC-141b in space vehicle, nuclear and defense foam applications beyond January 1, 2005.

Additionally, suppliers of blowing agents, isocyanates, surfactants, fire retardants, etc. in the foam industry use small quantities of stockpiled HCFC-141b in laboratory-scale research and development for users outside the US.<sup>5</sup>

<sup>5</sup> Although raw material suppliers are currently relying on stockpiled HCFC-141b for their research and development needs they may require additional production or import of *de minimis* quantities of HCFC-141b in the future. In a 2002 final rule, EPA defined *de minimis* quantities of class I controlled substances as 5 pounds or less (December 31, 2002, 67 FR 79861). EPA regulations exempt import and production of *de minimis* quantities of class I

This use includes various research and development activities such as preparing control samples, blending formulations, analyzing samples, etc. Given the fact that this is a small use that does not develop HCFC-141b foam products for the U.S., EPA is allowing the continued use of HCFC-141b in laboratory research and development applications beyond January 1, 2005.

Finally, EPA received comments from spray foam formulators and contractors requesting the use of inventoried HCFC-141b spray foam systems beyond January 1, 2005. Since 2000, EPA has provided continual updates on the status of the proposal through regulatory actions every year.<sup>6</sup> EPA believes that the spray foam sector has had sufficient notice to prepare and plan for the use restriction. This includes the prudent management of their inventories of stockpiled HCFC-141b and fully formulated systems containing HCFC-141b.

On the other hand, EPA recognizes that the actual application of spray foam is weather dependent, especially in the winter months where spray foam jobs are scheduled and delayed because of uncontrollable weather events. Additionally, EPA understands that a fully formulated spray foam system typically has a shelf life of approximately six months. In other words, if a spray foam system was formulated in December for a roofing application but that application was delayed due to weather, that formulated system has to be used by the end of June in order to maintain the foam's high quality and performance characteristics (after six months, the formulation could degrade and thus produce lower quality foam that does not meet all of the required performance standards). The total inventory of fully formulated spray foam systems is low in the winter because it is historically the slowest time of the year with relatively few spray foam applications scheduled. Thus, EPA is allowing the application of existing stock of fully formulated

(CFCs) controlled substances for laboratory use from the phaseout of those substances with specific restrictions outlined in Appendix G in accordance with the Montreal Protocol (66 FR 14760). The issue of an HCFC-141b laboratory exemption including commercial research and development will be addressed in a separate rulemaking at a later date.

<sup>6</sup> These actions are as follows:

- SNAP Foam NPRM, July 11, 2000, 65 FR 42653, 28408,
- SNAP Foam NODA, May 23, 2001, 66 FR 28408,
- SNAP Foam Final rule, July 22, 2002, 67 FR 47703,
- HCFC Allowance Allocation Final rule, January 21, 2003, 68 FR 2819,
- SNAP Foam NODA, March 10, 2004, 69 FR 11385.

systems containing HCFC-141b until July 1, 2005.

In order to accommodate users who may have some remaining systems in inventory at the end of 2004, EPA is granting a one-time exception. Any fully formulated spray foam system containing HCFC-141b that is on-site and in the company's physical inventory, as of December 31, 2004 can be used through June 30, 2005, pursuant to this one time exception. However, effective July 1, 2005, it will be illegal to use an inventoried fully formulated system containing HCFC-141b for the purpose of foam application. As explained above, a fully formulated spray foam system typically has a finite shelf life of approximately six months before the reactivity of the system slows down and it will not perform to specification. Therefore, once blended the fully formulated spray foam systems needs to be applied within that limited period.

In order to comply with this exception, the spray foam systems containing HCFC-141b must be fully formulated and in existing stock with the formulator or contractor before January 1, 2005. Existing stock is defined as the total number of fully formulated systems containing HCFC-141b physically on-site at the company's facility on December 31, 2004 and listed on the inventory list. An inventory list must be created reflecting the total number of fully formulated systems containing HCFC-141b, on-site, at the facility. The inventory list must identify the name, address (not a Post Office Box), city, state, zip code, of the facility where the fully formulated systems are stored, and a signature attesting that the total number of fully formulated systems is true and accurate as of December 31, 2004. The facility must keep a copy of the inventory list at the facility site which stores the fully formulated systems list for three years.

Fully formulated systems that meet these conditions must be applied before July 1, 2005. Any user who knowingly applies an inventoried fully formulated system containing HCFC-141b on or after July 1, 2005 may be fined up to \$27,500 per kilogram of HCFC-141b.

#### IV. Response to Comments

EPA received 45 comments during the comment period to the 2000 proposal. Those comments referred to all provisions in the proposal, including those related to the use of HCFC-22 and HCFC-142b, and were addressed in the 2002 final foam rule (67 FR 477703). The comments received on the 2000 proposal and the 2001 NODA regarding HCFC-141b were responded to in the

final HCFC Allowance Allocation rule (28 FR 6819) which created the HCFC-141b Exemption Allowance Petition process. In addition, EPA received 16 comments during the comment period on the 2004 NODA. EPA addressed any late comments received to the 2004 NODA after the comment period closed on April 9, 2004 in a document titled "Response To Late Comments" found in Air Docket OAR-2003-0228. The comments EPA received within the comment period related to the use of HCFC-141b are summarized in the following 6 topics which are addressed in detail below:

1. Technical Availability of Alternatives.
2. Quantity of Stockpiled HCFC-141b.
3. Import into the U.S. of "Blended" Polyurethane Foam Systems.
4. Clean Air Act.
5. North American Free Trade Agreement.
6. De-listing HCFC-141b and Grandfathering under SNAP.

#### *Technical Viability of Alternatives*

Some commenters said that not all spray foam formulators will have qualified non-ODS alternatives available to them at the end of 2004. EPA's decision to list HCFC-141b as unacceptable in foam blowing is based on the fact that alternatives that provide a lower risk to human health and the environment are technically viable and commercially available. The commenters did not suggest or provide evidence why alternatives are not available to spray foam formulators. EPA's analysis of the information gathered from the HCFC-141b Exemption Allowance Petitions indicates that some formulators are already offering commercial products using non-ODS alternative blowing agents and the majority of formulators will be able to offer such products by the end of 2004 (Air Docket OAR-2003-0228-0009). As EPA stated when establishing the HCFC-141b Exemption Allowance Petition process, "EPA believes the spray and pour foam industries have had access to sufficient quantities of HFC-245fa [the alternative of choice for most formulators] for research, development and testing purposes since early 2001 and in many cases before. Therefore, by 2004, EPA believes that most, if not all, formulators in this sector will have had sufficient time to test and implement alternatives." (68 FR 2828).

Moreover, the formulators that petitioned EPA for newly produced HCFC-141b had to provide detailed information about the status of their implementation of alternatives. That

information demonstrated that, overall, any remaining technical constraints were being addressed and alternatives would be implemented by the end of 2004 (Air Docket OAR-2003-0228-0009). It is important to note that these findings correspond and are consistent with the assessment in the Caleb Report of the spray foam sector and the formulators' support of that assessment. The Caleb Report stated that after completing field testing and achieving code approvals, the spray foam sector would be able to offer commercial products containing alternatives by 2005. Due to the progress in development, field testing and qualification in the sector, EPA believes by the beginning of 2005, the spray foam demand can be met with non-ODS alternatives. HCFC-141b will not be required to maintain technical requirements, such as structural integrity or thermal efficiency, in foam applications. However, as discussed in the previous section there are certain specialized space vehicle, nuclear and defense applications that do require HCFC-141b to meet rigorous technical, human health and safety requirements (*i.e.* space shuttle flight safety). For those limited applications, EPA is allowing the continued use of HCFC-141b.

#### *Quantity of Stockpiled HCFC-141b*

Some commenters recommended that EPA allow the use of any remaining stockpiled HCFC-141b in 2005. Before the phaseout of HCFC-141b, EPA encouraged stockpiling HCFC-141b for use during the transition to alternatives, especially for formulators that were experiencing technical constraints. According to EPA's analysis of data received from formulators and HCFC-141b suppliers, the remaining stockpiled HCFC-141b will be depleted by the end of 2004. In fact, petitioners in the HCFC-141b Exemption Allowance Petition process provided EPA with the quantity of stockpiled HCFC-141b they currently held and then demonstrated they did not have access to additional stockpiled HCFC-141b. Moreover, the foam industry has been aware of the need to plan for its transition from HCFC-141b since 1993, which includes the use and management of a finite quantity of HCFC-141b. It is unlikely any company would be holding a large stockpile of HCFC-141b two years beyond the phaseout date. EPA is confident its analysis accurately reflects the quantity of stockpiled HCFC-141b available for use in the foam industry because it is based on data from the same industry that has requested to use stockpiles in

2005. EPA has been provided with no evidence that large stockpiles of HCFC-141b will exist in the spray foam sector beyond January 1, 2005. Therefore, EPA has determined that it is not necessary to allow stockpiled HCFC-141b to be used in 2005.

In a related issue, EPA acknowledges that some formulators and contractors could have HCFC-141b systems formulated and purchased in 2004 held in inventory at the beginning of 2005 due to weather delays. Given the fact that the production of HCFC-141b has been phased out since January 1, 2003 and that the use restriction was proposed in 2000, the foam industry has been on notice and should be making every effort to use HCFC-141b systems and transition to alternative based systems as soon as possible. However, as discussed in the previous section, in order to allow for the uncertainty of the winter months, EPA is allowing the use of fully formulated HCFC-141b foam systems that are in inventory before January 1, 2005 until July 1, 2005. This allowance will accommodate any formulators and contractors holding fully formulated HCFC-141b systems at the end of 2004 and ensure that HCFC-141b produced before the phaseout is consumed without a loss to the purchaser.

#### *Import Into the U.S. of "Blended" Polyurethane Foam Systems*

EPA received comments suggesting that restricting the use HCFC-141b would unfairly impact Mexico because such a restriction would preclude the use of "blended" foam systems containing HCFC-141b that are manufactured in and imported from Mexico. Restricting the use of HCFC-141b in foam applications in the U.S. does not restrict Mexico's ability to obtain HCFCs or use HCFCs. Under the Montreal Protocol, as an Article 5 country (a developing country), Mexico is allowed to produce and import HCFCs until 2040 in accordance with their baseline (which will be established in 2015). Equally, this use restriction does not prevent the use of or import into the U.S. of refrigerators or metal panels, for example, that contain HCFC-141b. Those products can continue to be manufactured in Mexico (or any other country) and imported into the U.S.

The commenters did not provide the quantity of HCFC-141b they were importing into the U.S. via these "blended" foam systems but another commenter stated that as much as 8-9 million pounds of HCFC-141b could be imported into the U.S. in this manner (Air Docket OAR-2003-0019).

- Some of the commenters contend that they are relying on the revenue from the sale of these "blended" foam systems for use in the U.S. to fund their research and development into alternatives in Mexico. This issue is beyond scope of this rulemaking because the SNAP program focuses on the transition to alternatives in the U.S. rather than other countries.

#### *Clean Air Act*

Another commenter stated that Section 610 of the CAA prevents EPA from restricting the use of HCFC-141b in foam applications. Under Section 610, EPA promulgated regulations prohibiting the sale and distribution and the offer for sale and distribution of nonessential products containing Class I and Class II controlled substances as of January 1994 (58 FR 4768 and 58 FR 69638). In Section 610, Congress provided a list of products manufactured with those controlled substances that it considered nonessential and that should be banned from sale and distribution in the U.S. However, in the language of CAA Section 610(d)—the Class II Nonessential Ban, Congress did not provide a list of products it considered essential. It listed exceptions to the self-effectuating ban for certain products (including "foam insulation products" containing Class II controlled substances), stating that those products should not be banned from sale and distribution in the U.S. at that time. Additionally, Section 610(d) provides the criteria that EPA should use to determine if additional products should be exempted from the ban. During the initial rulemaking to implement the Class II Nonessential Ban, EPA promulgated a definition for "foam insulation products" because the Agency determined that the use of the term "insulation" in the statute was ambiguous.<sup>7</sup> EPA used its authority to reach a reasonable interpretation in developing a definition of foam insulation.

Specifically, the commenter stated because Section 610 identifies foam insulation products as excluded from the nonessential product ban, EPA "has

<sup>7</sup> Foam insulation products are defined as a product containing or consisting of the following foam types: Closed cell rigid polyurethane foam; closed cell rigid polystyrene boardstock foam; closed cell rigid phenolic foam; and closed cell rigid polyethylene foam when such foam is suitable in shape, thickness and design to be used as a product that provides thermal insulation around pipes used in heating, plumbing, refrigeration, or industrial process systems (40 CFR 82.62). Any use of acceptable HCFC substitutes listed under the Section 612 SNAP program must comply with these restrictions.

no authority to restrict HCFC use in foam insulation products based on the availability of substitutes." EPA agrees that under Section 610 it cannot ban the sale of foam insulation products made with ODS. However, the regulatory authority under Section 610 does not address EPA's ability to regulate the transition from the use of ODS to alternatives in the manufacturing of products such as foam. EPA has consistently interpreted the relationship between Section 610 and 612 as being independent, in that, Section 612 can restrict the use of a substitute in a product regardless of whether or not that product is considered nonessential under Section 610 (58 FR 69646).

Additionally, that same commenter states that EPA cannot prevent the use of "blended" foam systems containing HCFC-141b because Sections 604, 605 and 606 of the CAA are limited to controlled substances rather than products. Sections 604 and 605 mandate EPA to phaseout consumption (production + import - export) of Class I and Class II controlled substances. Section 606 gives EPA the power to accelerate the phaseout schedule of Class I and Class II controlled substances based on new scientific or technological information or in accordance with changes in the Montreal Protocol. In 1993, EPA promulgated a regulation phasing out the production and import of Class I and Class II controlled substances (58 FR 65018). As with Section 610, regulations promulgated under Sections 604, 605 and 606 do not limit the ability of EPA to address the transition from ODS to alternatives under Section 612, in particular whether an ODS is an acceptable substitute for another ODS in light of the availability of less harmful substitutes. While Sections 604, 605, and 606 regulate the production of HCFC-141b, this rule under Section 612 only restricts the use of HCFC-141b as a foam blowing agent substitute. The rule does not prohibit the production and import of HCFC-141b or products containing HCFC-141b (both of these issues are addressed in the separate EPA rulemakings discussed above).

#### *North American Free Trade Agreement (NAFTA)*

The commenter also states that if EPA prevents the use of HCFC-141b in foam applications the Agency would violate NAFTA because EPA's action would exempt grandfathered domestic use of HCFC-141b while restricting the import of similar products from Mexico. EPA has considered this argument and does not believe that the final rule is inconsistent with U.S. obligations under

the NAFTA (or any other international trade agreement to which the United States is a signatory), including Article 301 (national treatment) or Chapter 11. This rule does not regulate trade in HCFC-141b.<sup>8</sup> In terms of the use restriction on HCFC-141b, this rule does not distinguish where the HCFC-141b or the foam system containing HCFC-141b comes from. Rather, the use restriction applies to the use of HCFC-141b in certain foam blowing applications in the United States in the end uses covered by the SNAP regulations, including the use of foam systems containing HCFC-141b, regardless of the point of origin (domestic or foreign) of the HCFC-141b or how it is packaged. EPA is unaware of any other uses of foam systems containing HCFC-141b other than the uses covered by this rule. Thus, after December 31, 2004, it is unlikely that there will be a market for HCFC-141b systems in the United States. Although this rule does not restrict the import of HCFC-141b systems, we do not anticipate that these systems will continue to be imported after that date.

#### *De-Listing HCFC-141b and Grandfathering Under SNAP*

The same commenter argues that EPA does not have the authority to “de-list” HCFC-141b once it has found it unacceptable unless petitioned to do so under Section 612(d). EPA found HCFC-141b acceptable in foam applications in 1994, but stated it was doing so as an interim measure (59 FR 13044). In the proposal, EPA was following its mandate to review ODS alternatives and make determinations on their acceptability in order to ensure that substitutes for ODSs that are determined acceptable present a lower risk to human health and the environment than the ODS they replace and as compared with other potential substitutes. EPA disagrees, and as the Agency explained in the 2000 proposal, it has the authority to amend its regulations and change SNAP determinations independent of any petitions (65 FR 42659). Nothing in the statute bans such action and EPA believes that inherent in our authority to promulgate regulations initially is the authority to review and revise those

regulations as the state of science advances.

Because one goal of the SNAP program is to expedite the transition from ODS to alternatives, the basis for EPA’s proposal in 2000 was that the Agency believed alternatives were technically and economically viable in all foam applications. EPA deferred final action in 2002 because of insufficient information regarding the availability substitutes that presented a lower risk to human health and the environment. Because of concerns that the spray foam sector was experiencing technical constraints in implementing alternatives, in a separate rulemaking under Sections 605 and 606, EPA established the HCFC-141b Exemption Allowance Petition process as a mechanism to ensure formulators had access to HCFC-141b after the phaseout date. EPA also funded a three year grant to assist SPFA to develop and test alternatives. Today, considering the information generated by the above efforts, EPA believes alternatives are technically and economically viable and that the continued use of HCFC-141b contravenes the purpose and goal of Section 612, which is to ensure the use of alternatives that pose a lower risk to human health and the environment when such alternatives are technically and economically viable.

The commenter also claims that restricting the use of HCFC-141b would violate EPA’s grandfathering practice. As explained in the proposal, “in the original SNAP rulemaking, EPA recognized that, where appropriate, EPA can grandfather the use of a substitute by setting the effective date of its unacceptability listing for one or more specific parties in the future.” (65 FR 42658). In addition, the U.S. District Court for the District of Columbia established a four part test to judge the appropriateness of grandfathering which includes: (1) Is the new rule an abrupt departure from Agency practice, (2) what is the extent the interested parties relied on the previous rule, (3) what is the burden of the new rule on the interested parties and (4) what is the statutory interest in making the new rule effective immediately, as opposed to grandfathering interested parties (59 FR 13057). EPA disagrees with the commenter that grandfathering is appropriate here.

Grandfathering is designed to avoid penalizing users who have made good faith investments in alternatives. The foam industry has been on notice since 1993 (when the production phaseout date for HCFC-141b was published) about the need to find alternatives to HCFC-141b. Furthermore, in 1994 in

the initial SNAP rulemaking, EPA stated that the Agency was finding HCFC-141b acceptable as a substitute for CFC-11 in foam blowing as an interim measure (59 FR 13083). Additionally, in 2000, EPA proposed to change the listing for HCFC-141b from acceptable to unacceptable effective January 1, 2005. Therefore, listing HCFC-141b as unacceptable is not an “abrupt departure” of EPA policy. Acknowledging the production phaseout of HCFC-141b, the majority of the foam industry made considerable investments and successfully transitioned to a variety of alternatives for a broad set of applications. The spray foam sector used stockpiled HCFC-141b for the remaining applications for an additional two years beyond the phaseout date in order to overcome any technical issues and qualify alternatives. That stockpile is expected to be depleted by the end of 2004 and the spray foam sector now has technically and economically viable alternatives to HCFC-141b (Air Docket OAR-2003-0228-0009).

However, despite the technical and commercial availability of alternatives, the transition from HCFC-141b in the spray foam applications is delayed by the continued availability of HCFC-141b in the U.S. The alternatives which are technically and economically available pose a lower overall risk to human health and the environment. There is no technical reason why the transition to alternatives should not be completed in the foam industry. Thus, EPA is finding HCFC-141b unacceptable in foam applications as of January 1, 2005.

#### **V. Summary**

A major objective of the SNAP program is to facilitate the transition from ozone-depleting chemicals by promoting the use of substitutes which present a lower risk to human health and the environment (40 CFR 82.170(a)). In this light, a key policy interest of the SNAP program is promoting the shift from ODSs to alternatives posing lower overall risk and that are currently or potentially available (59 FR 13044). Today’s decision to list HCFC-141b as unacceptable in foam applications is based on EPA’s finding that the continued use of HCFC-141b in applications where non-ozone depleting alternatives are technically and economically available, would contribute to the continued depletion of the ozone layer, and will perpetually delay the transition to alternatives that pose lower overall risk to the health and the environment.

<sup>8</sup>This rule applies to the use of HCFC-141b, in the U.S., in foam applications covered by SNAP regulations. This rule does not apply to the production and import of ozone depleting substances (ODS). For information about trade of bulk ozone depleting substances, including HCFC-141b, between Parties of the Montreal Protocol please refer to the Direct Final rule EPA published on June 17, 2004 (69 FR 34024).



## VI. 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 the regulatory action is "significant" and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "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 entitlement, 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.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

### B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0226.

This action does not impose any new information collection burden. Today's final rule is an Agency determination. OMB has previously approved the information collection requirements contained in the existing regulations in subpart G of 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 2060-0226 (EPA ICR No. 1596.05). This Information Collection Request (ICR) included five types of respondent reporting and record-keeping activities pursuant to SNAP regulations: submission of a SNAP petition, filing a SNAP/Toxic Substances Control Act

(TSCA) Addendum, notification for test marketing activity, record-keeping for substitutes acceptable subject to use restrictions, and record-keeping for small volume uses.

Copies of the ICR document(s) may be obtained from Susan Auby, by mail at the Office of Environmental Information, Office of Information Collection, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460, by email at [auby.susan@epa.gov](mailto:auby.susan@epa.gov), or by calling (202) 566-1672. A copy may also be downloaded off the Internet at <http://www.epa.gov/icr>. Include the ICR and/or OMB number in any correspondence.

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 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 (APA) 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 impacts of today's rule on small entities, small entity is defined as:

(1) A small business that has fewer than 500 employees;

(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.

Types of businesses that are subject to today's final rule include:

- Businesses that manufacture polyurethane/polyisocyanurate foam systems (NAICS 326150).
- Businesses that use polyurethane/polyisocyanurate systems to apply insulation to buildings, roofs, pipes, etc. (NAICS 326150).

The proposal preceding this final rule contained provisions related to HCFC-141b, HCFC-22 and HCFC-142b. As explained in the 2001 NODA and the 2002 final rule (66 FR 28408, 67 FR 47703), there were many small users of HCFC-22 and HCFC-142b that EPA was unaware of at the time of the proposal. The Agency hired a technical expert to investigate the concerns of the small businesses using HCFC-22 and HCFC-142b and published the findings in the 2001 NODA mentioned above. Subsequently, EPA addressed those concerns in the 2002 final rule mentioned above.

Furthermore, as described in the preamble to this rule, EPA deferred its decision on the use of HCFC-141b in the 2002 final rule in order to address the concerns of the small businesses using HCFC-141b. Through a separate process, those small businesses in the spray foam sector requested an extension of the January 1, 2003 production phaseout of HCFC-141b in order to complete the field testing and approvals necessary to transition to other alternatives. In response to the request, EPA established the HCFC-141b Exemption Allowance Petition process in the HCFC Allowance Allocation final rule (January 21, 2003, 68 FR 2819). This process allows formulators to petition EPA for new production of HCFC-141b if they do not have access to stockpiled HCFC-141b and meet the other criteria in 40 CFR 82.16(h).

After two years of development and field testing in the spray foam sector, alternatives are technically and economically viable and products containing those alternatives are commercially available. The majority of the spray foam sector has overcome the technical constraints and will be able to meet the demand in 2005 with alternatives. The spray foam sector consists of approximately 15-20 formulators and thousands of

contractors, both groups include small businesses. The spray foam sector operates differently than many other end users regulated under SNAP, in that the contractors purchase the spray foam systems from the formulators and thus rely heavily on those formulators to provide technical expertise and qualified spray foam systems.

EPA's analysis, found at Air Docket OAR-2003-0228, discusses the impact on formulators and contractors in the spray foam industry. This analysis indicates that due to the availability of multiple alternatives and the depletion of stockpiled HCFC-141b any economic impact on small businesses will be insignificant. Furthermore, virtually all those potential economic impacts result from the production and import phaseout of HCFC-141b in 2003. Because the production and import of HCFC-141b was phased out in the U.S. in 2003 and stockpiles of HCFC-141b will be depleted at the end of this year, spray foam formulators are transitioning to non-ODP blowing agents. Moreover, as explained in the analysis, EPA believes that the formulators that have completed the transition to alternatives have the capacity to meet the contractors demand in 2005. Finally, as described earlier in the preamble, in order to account for any remaining inventory of fully formulated systems containing HCFC-141b and to minimize any potential impact on contractors, EPA is allowing spray foam contractors to use those HCFC-141b systems in inventory at the end of the year until July 1, 2005.

As noted above, there are numerous alternatives available and some users have independently transitioned away from the substances listed as unacceptable. The actions herein may well provide benefits to small businesses who have transitioned to alternatives and made good faith efforts and investments in the transition. After considering the economic impacts of today's rule on small entities, EPA has concluded that this rule will not have a significant economic impact on a substantial number of small entities.

#### *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 burdensome 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 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. Today's final rule does not affect State, local, or tribal governments. The enforceable requirements of the rule for the private sector affect only a small number of foam manufacturers using HCFC-141b in the United States, and there are technically viable alternatives for those manufacturers. The impact of this rule on the private sector is less than \$100 million per year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This regulation applies directly to facilities that use these substances and not to governmental entities.

#### *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 final 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 regulation applies directly to facilities that use these substances and not to governmental entities. 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." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. 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.

Today's final rule does not significantly or uniquely affect the communities of Indian tribal governments, because this regulation applies directly to facilities that use these substances and not to governmental entities. Thus, Executive Order 13175 does not apply to this final rule.

#### *G. Executive Order 13045: Protection of Children From Environmental Health and 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.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The use of HCFC-141b in foam manufacture occurs in the workplace where we expect adults are more likely to be present than children, and thus, the agents do not put children at risk disproportionately.

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

This 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 likely to have a significant adverse effect on the supply, distribution, or use of energy. This action would impact the manufacture of foam using HCFC-141b. Further, we have concluded that this rule is not likely to have any adverse energy effects.

*I. National Technology Transfer and Advancement Act*

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104-113, § 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as

defined by 5 U.S.C. 804(2). This rule will be effective November 29, 2004.

**VII. Additional Information**

For more information on EPA’s process for administering the SNAP program or criteria for evaluation of substitutes, refer to the SNAP final rulemaking published in the **Federal Register** on March 18, 1994 (59 FR 13044). Notices and rulemakings under the SNAP program, as well as EPA publications on protection of stratospheric ozone, are available from EPA’s Ozone Depletion Web site at <http://www.epa.gov/ozone/> and from the Stratospheric Protection Hotline number at (800) 296-1996.

**List of Subjects in 40 CFR Part 82**

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

Dated: September 23, 2004.

**Michael O. Leavitt,**  
*Administrator.*

■ For the reasons set out in the preamble, 40 CFR part 82 is amended 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.

**Subpart G—Significant New Alternatives Policy Program**

■ 2. Subpart G is amended by adding Appendix M to read as follows:

**Appendix M to Subpart G—Unacceptable Substitutes Listed in the September 30, 2004 Final Rule, Effective November 29, 2004**

FOAM BLOWING—UNACCEPTABLE SUBSTITUTES

| End-use   | Substitute      | Decision           | Comments                                     |
|---|-----------------|--------------------|--|
| <p><b>All foam end-uses:</b></p> <ul style="list-style-type: none"> <li>—Rigid polyurethane and polyisocyanurate laminated boardstock</li> <li>—Rigid polyurethane appliance</li> <li>—Rigid polyurethane spray and commercial refrigeration, and sandwich panels</li> <li>—Rigid polyurethane slabstock and other foams</li> <li>—Polystyrene extruded insulation boardstock and billet</li> <li>—Phenolic insulation board and bunstock</li> <li>—Flexible polyurethane</li> <li>—Polystyrene extruded sheet</li> </ul> <p><b>Except for:</b><sup>1</sup></p> <ul style="list-style-type: none"> <li>—Space vehicle</li> <li>—Nuclear</li> <li>—Defense</li> <li>—Research and development for foreign customers</li> </ul> | HCFC-141b ..... | Unacceptable ..... | Alternatives exist with lower or zero = ODP. |

<sup>1</sup> Exemptions for specific applications are identified in the list of acceptable substitutes.

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 BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 174**

[OPP-2004-0249; FRL-7372-6]

**Bacillus thuringiensis var. aizawai strain PS811 (Cry1F insecticidal protein); Exemption from the Requirement of a Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of *Bacillus thuringiensis* var. *aizawai* strain PS811 (Cry1F insecticidal protein) and the genetic material necessary for its production in cotton when applied/used as a plant-incorporated protectant. DowAgro Sciences, LLC submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus thuringiensis* var. *aizawai* strain PS811 (Cry1F insecticidal protein) and the genetic material necessary for its production in cotton when used as a plant-incorporated protectant.

**DATES:** This regulation is effective September 30, 2004. Objections and

requests for hearings must be received on or before November 29, 2004.

**ADDRESSES:** To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket identification (ID) number OPP-2004-0249. 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 Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

**FOR FURTHER INFORMATION CONTACT:** Leonard Cole, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-5412; e-mail address: [cole.leonard@epa.gov](mailto:cole.leonard@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are a person or company involved with agricultural biotechnology, that may develop and market plant-incorporated protectants. Potentially affected entities may include, but are not limited to:

- Seed companies (NAICS code 111)
- Pesticide manufacturers (NAICS code 32532)
- Establishments involved in research and development in the life sciences (NAICS code 54171)
- Colleges, universities, and professional schools (NAICS code 611310).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

*B. How Can I Access Electronic Copies of this Document and Other Related Information?*

In addition to using EDOCKET (<http://www.epa.gov/edocket/>), you may access this **Federal Register** document electronically through the EPA Internet under the “**Federal Register**” listings at <http://www.epa.gov/fedrgrstr/>. A