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Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide; Request for Information on Existing and Available Stocks of Methyl Bromide; Proposed Rule and Notice

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–7802–3]

RIN 2040–0170

Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA is proposing to amend the accelerated phaseout regulations that govern the production, import, export, transformation and destruction of substances that deplete the ozone layer under the authority of Subchapter VI of the Clean Air Act (CAA), as amended. Today's proposed amendments provide the framework for an exemption permitted under the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol) and Subchapter VI of the CAA and specify the amount of methyl bromide that may be supplied in 2005 from available stocks and new production and consumption to meet proposed critical uses. Specifically, EPA is proposing requirements to govern the ''critical use'' exemption from the production and consumption (defined as production plus imports minus exports) phaseout for quantities of class I, Group VI controlled substances (methyl bromide) that are produced or imported for critical uses. EPA is also proposing the list of uses that qualify for the critical use exemption in 2005, the amount of additional methyl bromide that may be produced or imported for those uses in 2005, and limitations on the sale of existing inventories for use in critical use categories that are a necessary condition applicable to those who are granted the privilege in 2005 of obtaining a dedicated supply of methyl bromide from new production and imports for critical uses after the scheduled phaseout date.

DATES: Written comments on the proposed rule must be received on or before October 12, 2004. Any party requesting a public hearing must notify the contact person listed below by 5 p.m. eastern standard time on September 7, 2004. If a hearing is requested it will be held September 10, 2004. If a hearing is held, commenters will have 30 days to submit follow up comments before the close of the comment period. Persons interested in attending a public hearing should consult with the contact person below regarding the location and time of the hearing.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0230, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- *E-mail: finman.hodayah@epa.gov.*
- *Fax:* 202–343–2337 attn: Hodayah Finman.
- *Mail:* Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* 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 Docket ID No.OAR–2003–0230. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air 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. You may also visit the Ozone Depletion Web site of EPA's Global Programs Division at *http://www.epa.gov/ozone* for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and other related topics.

SUPPLEMENTARY INFORMATION: This proposed rule concerns Clean Air Act restrictions on the consumption, production and on the use of methyl bromide (class I, Group VI controlled substance) for critical uses after the phaseout date of January 1, 2005. Under the Clean Air Act, methyl bromide consumption and production will be phased out on January 1, 2005, apart from allowable exemptions, namely the proposed critical use exemption and the existing quarantine and pre-shipment exemption. With today's action, EPA is

proposing a framework for how the critical use exemption will operate as well as specific amounts of methyl bromide to be made available for proposed critical uses.

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I. General Information

A. Regulated Entities

Entities potentially regulated by this proposed action are those associated with the production, import, export, sale, application and use of methyl bromide. Potentially regulated categories and entities include:

Category	Examples of regulated entities
Industry	Producers, Importers and Exporters of methyl bromide; Applicators, Distributors of methyl bromide; Users of methyl bromide, *e.g.* farmers of vegetable crops, fruits and seedlings; and owners of stored food commodities and structures such as grain mills and processors, Government and non-government researchers.

The above table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is aware could potentially be regulated by this proposed action. To determine whether your facility, company, business, or organization is regulated by this proposed 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 Air Docket ID No. OAR–2003–0230. 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 Ave., 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. EPA prefers that you use the electronic EPA Dockets at *http://*

www.epa.gov/edocket/ to submit or view public comments and access the index listing of the contents of the official public docket. To locate the docket on EPA's docket Web site, select ''search,'' then key in the appropriate docket identification number, in this case OAR–2003–0230. Additional supporting documents related to this proposed action may be found in EPA's electronic docket system, docket numbers OAR–2002–0018 and OAR–2003–0017 and in EPA's paper docket, Air Docket ID No. A–2000–24.

Certain types of information will not be placed in the EPA Dockets. Information claimed as confidential business information (CBI) and other information whose disclosure is restricted by statute, will not be included in the official public docket and 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 identified in Unit B.

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.

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?

EPA is seeking comments on options that are proposed, as well as all other options and methods that are discussed. You may submit comments electronically, by mail or through hand delivery/courier. The preferred method for submitting comments on this proposed rulemaking is to submit comments to the electronic docket OAR–2003–0230. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment, in this instance OAR–2003–0230. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of comment period will be marked late. EPA is not required to consider late comments. If you plan to submit comments, please notify Hodayah Finman, U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, (202) 343–9246.

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

To submit an electronic comment as described 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments is the preferred method for submitting comments. Go directly to EPA dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments to docket OAR–2003–0230.

ii. *By Mail.* Send one copy of your comments to each of the following two offices: U.S. Environmental Protection Agency, Air and Radiation Docket (6102), Electronic Air Docket ID No. OAR–2003–0230 Washington, DC 20460 and to U.S. Environmental Protection Agency, (6205J) 1200 Pennsylvania Ave., NW., Washington, DC 20460, attn: Hodayah Finman docket no. OAR–2003–0230.

iii. *By Hand Delivery or Courier.* Deliver your comments to: Hodayah Finman 1310 L Street, NW., Washington, DC 20005, Attention Electronic Air Docket ID No. OAR–2003–0230. Such deliveries are only accepted during the normal hours of operation 9 a.m to 5 p.m.

iv. *By Facsimile.* Fax your comments to both: (202) 566–1741, Attention Electronic Air Docket ID No. OAR–2003–0230 and to (202) 343–2337, Attention Hodayah Finman, Electronic Air Docket No. OAR–2003–0230.

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 in the **FOR FURTHER INFORMATION CONTACT** section, Electronic Air Docket ID No. OAR–2003–0230. 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 should 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 Background to 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 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 (CAAA) that included Title VI on Stratospheric Ozone Protection to ensure that the United States could satisfy its obligations under the Protocol. EPA has made several amendments to the regulations since that time.

III. What Is Methyl Bromide?

Methyl bromide is an odorless, colorless, toxic gas, which is used as a broad-spectrum pesticide and is controlled under the CAAA as a Class I ozone depleting substance (ODS). Methyl bromide is used in the U.S. and throughout the world as a fumigant to control a wide variety of pests such as insects, weeds, rodents, pathogens, and nematodes. Additional characteristics and details about the uses of methyl bromide can be found in the proposed rule on the phaseout schedule for methyl bromide published in the **Federal Register** on March 18, 1993 (58 FR 15014), and the final rule published in the **Federal Register** on December 10, 1993 (58 FR 65018). The phaseout schedule for methyl bromide was revised in a concurrent proposal and direct final rulemaking on November 28, 2000 (65 FR 70795), which allowed for the phased reduction in methyl bromide consumption and extended the phaseout to 2005. The revised phaseout schedule was again amended to allow for an exemption for quarantine and preshipment purposes on July 19, 2001 (66 FR 37751), with an interim final rule and with a final rule (68 FR 238) on January 2, 2003. Information on methyl bromide can be found at the following sites of the World Wide Web: *http://www.epa.gov/ozone/mbr* and *http://teap.org* or by contacting the Stratospheric Ozone Hotline at 1–800–296–1996.

Because it is a pesticide, methyl bromide is also regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and other statutes and regulatory authority and by states under their own statutes and regulatory authority. Under FIFRA, methyl bromide is a restricted use pesticide. Because of this status, a restricted use pesticide is subject to certain federal and state requirements governing its sale, distribution, and use. Nothing in this proposed rule implementing the Clear Air Act is intended to derogate from provisions in any other federal, state, or local laws or regulations governing actions including, but not limited to, the sale, distribution, transfer, and use of methyl bromide. All entities that would be affected by the proposed provisions must continue to comply with FIFRA and other pertinent statutory and regulatory requirements for pesticides (including, but not limited to, requirements pertaining to restricted use pesticides) when importing, exporting, acquiring, selling, distributing, transferring, or using methyl bromide for critical uses. The proposed regulations in today's rulemaking are intended only to implement Clean Air Act restrictions on the production, consumption and use of methyl bromide for critical uses exempted from the phaseout of methyl bromide.

IV. What Is the Legal Authority for Exempting the Production and Import of Methyl Bromide for Critical Uses Authorized by the Parties to the Montreal Protocol?

Methyl bromide was added to the Protocol as an ozone depleting substance in 1992 through the Copenhagen Amendment to the Protocol. The Parties to the Protocol established a freeze in the level of methyl bromide production and consumption for industrialized countries at the 1992 Meeting in Copenhagen. The Parties agreed that each industrialized country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing the freeze. EPA published a final rule in the **Federal Register** on December 10, 1993 (58 FR 69235), listing methyl bromide as a class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 level, and, in section 82.7 of the rule, setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until the year 2001 (58 FR 65018). This phaseout date was consistent with requirements under section 602(d) of the CAA for newly listed class I ozone-depleting substances that ''no extension under this subsection may extend the date for termination of production of any class I substance to a date more than 7 years after January 1 of the year after the year in which the substance is added to the list of class I substances.'' Therefore, the 1993 regulation established a United States phaseout for methyl bromide in 2001.

At their 1995 meeting, the Parties made adjustments to the methyl bromide control measures and agreed to reduction steps and a 2010 phaseout date for industrialized countries with exemptions permitted for critical uses. At this time, the U.S. continued to have a 2001 phaseout date in accordance with the Clean Air Act language. At their 1997 meeting, the Parties agreed to further adjustments to the phaseout schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phaseout for industrialized countries. In October 1998, the U.S. Congress amended Subchapter VI of the CAA to prohibit the termination of production of methyl bromide prior to January 1, 2005, to bring the U.S. phaseout of methyl bromide in line with the global requirements specified under the Protocol and to provide for the exemptions under the Protocol. These amendments were contained in section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105–277, October 21, 1998) and were codified in section 604 of the CAA. On November 28, 2000, EPA issued regulations to amend the phaseout schedule for methyl bromide and extend the complete phaseout of production and consumption to 2005 (65 FR 70795).

Today, in accordance with the 1998 amendments to the CAA, EPA is proposing to further amend 40 CFR part 82 to implement an exemption to the 2005 phaseout of methyl bromide that allows continued production and consumption of methyl bromide for critical uses. Section 604(d)(6) of the Clean Air Act provides that ''[t]o the extent consistent with the Montreal Protocol, the Administrator, after notice and the opportunity for public comment, and after consultation with other departments or instrumentalities of the Federal Government having regulatory authority related to methyl bromide, including the Secretary of Agriculture, may exempt the production, importation, and consumption of methyl bromide for critical uses.'' 42 U.S.C. 7671c(d)(6). Article 2H (5) of the Montreal Protocol provides that the 2005 methyl bromide phaseout shall not apply ''to the extent the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.''

Both section 604(d)(6) and section 614(b) of the CAA address the relationship between the Montreal

Protocol and actions taken under Subchapter VI of CAA. Section 604(d)(6) addresses critical uses specifically, while section 614(b) is more general in scope. Section 604(d)(6) states that ''to the extent consistent with the Montreal Protocol,'' the Administrator may exempt methyl bromide for critical uses. Section 614(b) states that Subchapter VI ''shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol, as provided in Article 2, paragraph 11 thereof, and shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In case of a conflict between any provision of this subchapter and any provision of the Montreal Protocol, the more stringent provision shall govern.''

EPA must take into account not only the text of Article 2H but also the related Decisions of the Protocol Parties that interpret that text. Under customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (8 International Legal Materials 679 (1969)) both the treaty text and the practice of the parties in interpreting that text form the basis for its interpretation. Although the United States is not a party to the 1969 Convention, the United States has regarded it since 1971 as ''the authoritative guide to current treaty law and practice.'' See Secretary of State William D. Rodgers to President Richard Nixon, October 18, 1971, 92d Cong., 1st Sess., Exec. L (November 22, 1971). Specifically, Article 31(1) of the Vienna Convention provides that ''[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'' Article 31(3) goes on to provide that ''[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.'' In the current circumstances Decisions of the Parties can be construed as subsequent consensus agreements among the Parties to the Montreal Protocol, including the United States, regarding the interpretation and application of the Protocol.

In accordance with Article 2H(5), the Parties have issued several Decisions pertaining to the critical use exemption. At their Ninth Meeting in 1997, the Parties issued Decision IX/6 which established criteria applicable to the critical use exemption. In paragraph 1 of Decision IX/6, the Parties agreed as follows:

(a) That a use of methyl bromide should qualify as ''critical'' only if the nominating Party determines that:

(i) The specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and

(ii) There are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances of the nomination;

(b) That production and consumption, if any, of methyl bromide for critical uses should be permitted only if:

(i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;

(ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide;

(iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes, taking into account the circumstances of the nomination * * * Non-Article V [Developed country] parties must demonstrate that research programmes are in place to develop and deploy alternatives and substitutes* * *

The Parties also agreed in Decision IX/6 that the technical panel (discussed below) that reviews nominations and makes recommendations to the Parties regarding approval of critical use exemptions, would base its review and recommendations on the criteria in paragraphs (a)(ii) and (b). The criterion in paragraph (a)(i) was not subject to review by this technical panel.

At the First Extraordinary Meeting of the Parties in March of 2004, the Parties issued several decisions that address the agreed critical uses, the allowable levels of new production and consumption for critical uses, the conditions for granting critical use exemptions, and reporting obligations. Decision Ex. I/3 covers the agreed critical uses and allowable levels of new production and consumption for the year 2005. This Decision includes the following terms:

1. For the agreed critical uses set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol for each Party, to permit, subject to the conditions set forth in decision Ex. I/4, the levels of production and consumption set forth in annex II B to the present report which are necessary to satisfy critical uses, with the understanding that additional levels and categories of uses may be approved by the Sixteenth Meeting of the Parties in accordance with decision IX/6;

2. That a Party with a critical-use exemption level in excess of permitted levels of production and consumption for critical uses is to make up any such difference between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available;

3. That a Party using stocks under paragraph 2 above shall prohibit the use of stocks in the categories set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol when amounts from stocks combined with allowable production and consumption for critical uses exceed the total level for that Party set forth in annex II A to the present report;

4. That Parties should endeavor to allocate the quantities of methyl bromide recommended by the Technology and Economic Assessment Panel as listed in annex II A to the report of the First Extraordinary Meeting of the Parties;

5. That each Party which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting or authorizing the use of methyl bromide and that such procedures take into account available stocks. Each Party is requested to report on the implementation of the present paragraph to the Ozone Secretariat;

The agreed critical uses and allowable levels of production and consumption are set forth in annexes to the Parties' report. Decision Ex I/4 addresses the conditions for granting and reporting critical-use exemption for methyl bromide.

Decisions IX/6, Ex. I/3, and Ex. I/4 are subsequent consensus agreements of the Parties that address the interpretation and application of the critical use provision in Article 2H(5) of the Protocol. For example, Decision Ex. I/3 reflects a decision called for by the text of Article 2H(5) where the parties are directed to ''decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.'' EPA intends to follow the terms of Decisions IX/6, Ex. I/3, and Ex. I/4. This would ensure consistency with the Montreal Protocol and satisfy the requirements of Section 604(d) (6) and Section 614(b) of the CAA.

Decision Ex. I/3 recognizes that article 2H(5) of the Protocol contemplates that the Parties will make two separate determinations when establishing the critical use exemption. First, the Parties agree on the total amount and categories

of uses that are deemed critical under the criteria established in Decision IX/6. Second, the Parties determine the maximum level of new production and consumption that should be permitted because it is necessary to satisfy those critical uses. Under paragraph 1 of Decision Ex. I/3, the first of these determinations (the ''agreed critical uses'') is reflected in annex II A to the report of the First Extraordinary Meeting of the Parties. For the United States, the Parties agreed to 16 critical uses for methyl bromide and authorized use of 8,942 metric tons of methyl bromide for these critical uses. The second of these determinations is set forth in annex II B which allows the United States 7,659 metric tons of production and consumption of methyl bromide to satisfy critical uses. Where the level of agreed critical uses exceeds the level of new production and consumption determined by the Parties to be necessary to satisfy those uses, a Party is to utilize available stocks of methyl bromide to fill the gap. Decision Ex. I/3, para. 2. Parties are to ensure that the total use of methyl bromide material supplied from existing stocks and new production and consumption does not exceed the overall level of use agreed to be critical. Decisions Ex. I/3, para. 3. Thus, Decision Ex. I/3 establishes two caps with respect to methyl bromide for 2005—one on the level of new production and consumption for critical uses and one on the total usage of methyl bromide in the agreed critical use categories.

Under Decision Ex I/3, the United States is allowed to use a total of 8,942 metric tons of methyl bromide in 2005 to satisfy critical uses. In accordance with Decision Ex I/3, the quantity of new production and consumption in combination with the amount of stocks determined to be available for the specified critical uses cannot exceed for 2005 the amount of 8,942 metric tons. Because of the cap on the amount of methyl bromide available for the specified critical uses, EPA will not authorize new production and consumption that, when combined with use of available stocks, would exceed the agreed critical use level of 8,942 metric tons. The methyl bromide to satisfy those uses may be derived from available stocks of material or new production and consumption. The upper limit on the amount of new production and consumption for the specified critical uses is 7,659 metric tons. However, this level of new production and consumption was authorized by the Parties subject to compliance with the conditions set forth in Decisions Ex. I/3 and Ex. I/4. One of these conditions, in paragraph 5 of Decision Ex. I/3, provides that ''each Party which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting or authorizing the use of methyl bromide and that such procedures take into account available stocks.'' Thus, in deciding the level of new production and consumption allowed in the United States, EPA is proposing to consider the amount of methyl bromide from stocks recognized by EPA to be ''available'' for critical uses.

In addition, to prevent the total use levels of methyl bromide from exceeding the critical use cap, Paragraph 3 of Decision Ex I/3 requires that Parties prohibit the use of stocks of methyl bromide under certain circumstances. This provision states ''that a Party using stocks under paragraph 2 above shall prohibit the use of stocks in the categories set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol when amounts from stocks combined with allowable production and consumption exceed the total level for that Party set forth in annex II A to the present report.'' This restriction applies in countries where methyl bromide material necessary to meet the agreed critical uses is derived from a combination of available stocks and new production or imports. In this situation, a Party may not allow the total amount of material supplied from stocks and new production and consumption to exceed the level of use for categories determined by the Parties to be critical. This restriction is necessary to ensure that a Party's total level of use in critical use categories does not exceed the level which formed the basis for the Parties' decision to authorize new production and consumption at particular levels. This limitation was deemed to be a necessary condition applicable to Parties authorized under the critical use exemption to produce or import a dedicated supply of methyl bromide to meet critical needs after the 2005 phaseout of methyl bromide.

Thus, in accordance with Decision Ex. I/3, if EPA authorizes new production and consumption to supplement available stocks, EPA will restrict the use of existing stocks of methyl bromide in cases where use of stocks combined with the authorized level of new production and consumption could exceed the critical use cap. In light of the Parties' agreement in Decision Ex. I/3 that such a restriction is needed to implement Article 2H(5) of the Protocol, EPA is authorized under sections 604(b)(6) and 614(b) of the Clean Air Act to regulate the use of existing stocks of methyl bromide. EPA's power under section 604(b)(6) to exempt new production, importation, and consumption of methyl bromide for critical uses exists ''to the extent consistent with the Montreal Protocol.'' 42 U.S.C. 7671c(b)(6). Because the Parties have interpreted the Protocol to impose such a use restriction as a condition for the authorization of new production and consumption for critical uses, EPA will adhere to the same restriction in its domestic implementation of the critical use exemption. This adherence is consistent with section 614(b) of the Clean Air Act. 42 U.S.C. 7671m(b).

Although many parts of the Montreal Protocol and Subchapter VI of the Clean Air Act focus on controlling the production and consumption of ozone depleting substances, select provisions also require restrictions on the use of such substances. For example, section 605 of the Clean Air Act restricts the use of class II substances (hydrochlorofluorocarbon) to a limited number of applications starting in 2015. 42 U.S.C. 7671d(a). Section 608 of the CAA requires the Administrator to promulgate regulations to reduce the use and emission of class I substances during the service, repair, and disposal of appliances and refrigeration equipment. 42 U.S.C. 7671g. The essential use exemption in sections 604(d)(1)-(3) authorizes limited production of controlled substances subject to the limitation that such substances may only be used in specific applications. 42 U.S.C. 7671c(d). Likewise, the critical use exemption under section 604(d)(6) permits exempted production, importation, and consumption but only ''for critical uses.'' 42 U.S.C. 7671c(d)(6). Thus, under the essential use and critical use exemptions, new production and consumption is necessarily restricted to particular use categories.

In the case of the critical use exemption for methyl bromide, the Parties recognized in Decision Ex. I/3 that the use restrictions on newly produced material must also extend to the use of existing stocks of such material in those use categories for which new production and consumption has been permitted by the Parties under the exemption. As noted above, such a restriction is necessary to ensure that Parties abide by the critical use representations underlying the authorization of new production and consumption. Where new production and consumption is authorized because sufficient material is not available from

existing stocks, then the predicate for this decision would be undermined if Article 2H(5) of the Protocol was interpreted to permit unrestricted use of existing stocks in the categories of use that may utilize newly produced or imported material. Furthermore, placing such a limitation on the use of existing stocks encourages the entities in possession of the methyl bromide material to make it available for critical uses. This limitation reduces the incentive for entities to withhold methyl bromide material from the market in order to induce EPA to authorize more new production.

This kind of a restriction on the use of existing stocks is also authorized under the essential use exemption for production or import of CFCs and other class I controlled ozone-depleting substances as a condition for allowing new production and consumption. However, for practical reasons the Parties and EPA have never needed to expressly impose such restrictions under the essential use exemption. The limited quantities of CFCs and methyl chloroform produced and consumed in the United States under the essential use exemption have historically been held by the users of such substances. In addition, the number of essential uses and size of the user community is very small. Essential uses have been limited to use of CFCs as propellants in asthma inhalers by not more than 10 companies and the servicing of space vehicles by the National Aeronauticsal and Space Administration. Thus, it has been much easier under the essential use exemption for the Parties and EPA to determine how much existing material is available to the essential users and to ensure that the exempted production and consumption in a given year was not grossly exceeding the level of essential need. In the case of the essential use exemption, the Parties never agreed to a Decision that limited the amount of material available from stocks for uses deemed essential. However, the Parties track the stocks of these essential use materials to ensure the exempted production and consumption does not result in a growing stockpile.

In contrast, in the case of methyl bromide, the majority of existing stocks of methyl bromide are not owned and controlled by users but by producers, distributors, and importers of such material. There are also hundreds of potential users and many uses for methyl bromide. In addition, the Parties have authorized a greater number of critical uses for methyl bromide (16 categories in the U.S. for 2005), and these uses were identified based on specific limiting conditions under which methyl bromide use in those categories becomes critical. In this situation, there is more risk that the use level in critical use categories could exceed the level of agreed critical use without express regulation. In the case of essential use allowances, there was no need for an express restriction on use of existing stocks because the marketplace and the user community self-regulated. However, in a situation such as methyl bromide where the distribution patterns of the material are different and the user group and critical use profile is much larger, the EPA can no longer rely solely on self-regulation to ensure the appropriate use level.

Thus, in accordance with these authorities, EPA is proposing a limit on the sale of stocks of methyl bromide to the approved users permitted to obtain new production and consumption for their critical uses. We propose that holders of stocks will only be authorized to sell methyl bromide for critical uses by expending critical stock allowances (CSAs) allocated by EPA through this rulemaking action. The proposed limitation on the sale of stocks is narrowly defined and applicable only to the categories of critical uses for which new production and consumption has been authorized because of a demonstrated critical need for methyl bromide in that category under certain limiting conditions. Consistent with Decision Ex. I/3, those critical users who benefit from the greater assurance of obtaining a dedicated supply of methyl bromide for critical uses in 2005 from new production or imports, as a condition of obtaining this benefit, have limited access to existing stocks of methyl bromide to avoid exceeding the overall critical use cap established in Decision Ex. I/3.

EPA is proposing a limitation on the amount of stocks that may be sold to the end-users, defined as ''approved critical users'' (*see* description below in Section VI.I.), who may obtain a dedicated supply of methyl bromide from new production or imports under the critical use exemption. In addition, EPA is proposing that end-users in these same categories listed in Decision Ex. I/3, who applied for an exemption but were determined in the preparation of the U.S. government nomination to have technically and economically feasible alternatives to methyl bromide available for their circumstances of use (thus lacking the critical need for methyl bromide) would not have access to methyl bromide from stockpiles. Thus, EPA is proposing that holders of pre-phaseout stocks would not be permitted to sell these stocks in 2005 to end-users in nominated sectors who do not have the ''limiting critical conditions'' (*see* Section VI.K below) that make methyl bromide use critical for the categories listed in Decision Ex I/3. In reviewing applications and developing the U.S. nomination for 2005 critical use exemptions, the U.S. government determined and submitted documentation that in particular circumstances there is a critical need for methyl bromide, and that for the other circumstances in that sector there are technically and economically available alternatives to methyl bromide (*e.g.*, curcurbit production in Michigan with less than moderate fungal pathogen infestation). EPA is proposing that end-users in sectors nominated by the U.S. that do not have the specified ''limiting critical conditions'' would not have access to stocks of methyl bromide because, without the limiting critical conditions, they can use the technically and economically feasible alternatives. EPA seeks comment on these proposed limitations.

The Agency recognizes there may be other options for controlling access to methyl bromide inventories after the phaseout if necessary to maintain use below the cap set forth in Decision Ex. I/3. Other groups of users who might be subject to controls on use of stocks could include: (1) Those users who did not apply for a critical use exemption, (2) those users who did apply but whose category of use did not, under any limiting condition, meet the conditions necessary to be included in the U.S. government nomination for critical use exemptions, or (3) those users who applied and were nominated by the U.S. government but whose use was not included among the agreed critical uses for 2005 set forth in the Parties' Decision Ex I/3. Thus, we request comment on whether these groups of users should also be subject to a limitation on the use of stocks of methyl bromide produced or imported prior to the phaseout and whether we may establish such a limitation under applicable legal authority.

V. What Is the Critical Use Exemption Process?

The procedural requirements for the critical use exemption are delineated in Decision IX/6 of the Parties to the Protocol. As applied in the United States, users of methyl bromide who believe they may meet the criteria to qualify for a critical use exemption may make an application to EPA for inclusion in the U.S. nomination of critical uses. Starting in 2002, EPA began notifying applicants as to the availability of the application, and the

deadline to apply, with a notice in the **Federal Register** (68 FR 24737) and an announcement on the methyl bromide Web site at *http:/www.epa/.gov/ozone/mbr.* Applicants for the critical use exemption must provide information demonstrating to the U.S. government that the specific use of methyl bromide is critical because (1) the lack of availability of methyl bromide for that use would result in significant market disruption, and (2) the applicants have no technically and economically feasible alternatives or substitutes to methyl bromide available to them that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances of use. Applicants for the exemption must also submit information on their use of methyl bromide, on research into the use of alternatives to methyl bromide, on efforts to minimize use of methyl bromide and to reduce emissions and on the specific technical and economic results of testing alternatives to methyl bromide. Applicants may apply as individuals or as part of a group of users (a ''consortium'') who face the same limiting critical conditions (*i.e.* specific conditions which establish a critical need for methyl bromide).

The U.S. government reviews applications and creates a package for submission to the Ozone Secretariat of the Protocol for uses nominated as having a critical need for methyl bromide beyond the phaseout. Each Party must justify such a request by determining that (1) the specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and (2) there are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances of the nomination.

The critical use nominations (CUNs) of various countries are then reviewed by a technical committee that advises the countries that have ratified the Protocol (the ''Parties'' to the Protocol). This technical committee is known as the Methyl Bromide Technical Options Committee (''MBTOC'') of the Technical and Economic Assessment Panel (''TEAP''). The TEAP is an advisory body to the Parties to the Protocol and is directed by the Parties to provide assessments and reviews for consideration by the Parties at their annual meetings. The TEAP has subgroups called Technical Option Committees that are organized to focus on specific topic areas of interest to the Parties. Based on the recommendations of MBTOC and TEAP and their own review of the Critical Use Nominations (CUNs) submitted by various countries seeking a critical use exemption, the Parties, at their annual meetings, take decisions to authorize critical use exemptions which ''permit the level of production or consumption [of methyl bromide] that is necessary to satisfy uses agreed to them to be critical uses'' (Article 2H, paragraph 5).

After decisions by the Parties, for each control period, EPA will provide an opportunity such as this for comment on the amounts of methyl bromide that may be supplied under the critical use exemption and the end uses eligible to use critical use methyl bromide.

EPA recognizes that users of methyl bromide who qualify for a critical use exemption and producers and importers of methyl bromide, need to have certainty regarding the amounts of methyl bromide that will be available under this proposed exemption and the additional regulatory procedures that govern the production and use of critical use methyl bromide before the phaseout date of January 1, 2005. Therefore, EPA is considering all available regulatory procedures that will allow affected entities to have operational certainty about an exemption in advance of the phaseout date.

VI. What Are the Details of Today's Proposed Action To Implement the Critical Use Exemption for Methyl Bromide?

In today's proposed action, the Agency is proposing both (1) the regulatory framework for how the critical use exemption will operate; (2) and the allocation of allowances established under this framework to methyl bromide producers, importers and suppliers for the 2005 control period.

A. What Is the Total Amount of Methyl Bromide That May Be Supplied for U.S. Critical Uses?

EPA is proposing a determination that the United States has a critical use level for methyl bromide of 8,942,214 kilograms for 2005 (including amounts from available stocks and new production or imports). This is the amount that the U.S. government included in the U.S. Critical Use Nomination as adjusted by the Parties in Decision Ex I/3. This amount is adjusted from the 9,777,288 kilograms originally nominated by the U.S. government. The difference between the two amounts is accounted for by the following adjustments as determined by MBTOC, TEAP and the Parties to the Montreal Protocol: (a) The removal of methyl bromide for tobacco seedling float trays, totaling 1,323 kilograms, a use category that the Parties agreed did not meet the conditions for a critical use exemption, (b) a reduction of 53,328 kilograms to account for the market uptake of sulfuryl fluoride, a newly registered alternative for the fumigation of stored food items, (c) a reduction of 635,027 kilograms from strawberry field uses of methyl bromide due to further adoption of alternatives, in particular emulsified 1,3 dichloropropene formulations, (d) a reduction of 145,367 kilograms for turfgrass production to reflect lower application rates using mixtures with lower concentrations of methyl bromide, and (e) a small number of kilograms based on rounding adjustments. EPA seeks comment on the amount of methyl bromide the Agency has determined to be necessary to satisfy the critical uses authorized by the Parties for 2005. EPA refers commenters to the E-Docket where the U.S. nominations and additional responses to MBTOC are available. These are the technical documents which are the basis for the Parties and EPA's determination. At this time, EPA does not have additional information to indicate that it should adjust the amounts authorized by the Parties, but seeks comments on whether additional research and data is available with respect to the deployment of alternatives, the adoption of emission reduction technologies, and the other criteria listed in Decision IX/6.

Based on the review of the nominations discussed above, the Parties to the Montreal Protocol allowed the United States to permit up to 7,659 metric tons of newly produced and imported quantities of methyl bromide for the agreed critical uses set forth in Annex II.a of Decision Ex I/3 if this amount is determined by EPA to be necessary to satisfy the agreed critical uses. Supplies of methyl bromide for critical uses may be obtained by end users from available stocks of methyl bromide, or, new production or imports.

EPA is proposing to consider adjusting the authorized level of new production and consumption for critical uses by the amount of ''available'' stocks (consumption is defined as production plus imports minus exports). As recognized by the Parties, the level of existing stocks may differ from the level of available stocks. Under this approach, EPA will assess how much methyl bromide is available from existing inventories and then determine how much is available to meet market demand for critical uses. The Decisions by the Parties recognize that assessment

of existing inventory should account for inventory intended to meet the needs of developing countries. Decision Ex I/3 (2) further states, ''That a Party with a critical-use exemption level in excess of permitted levels of production and consumption for critical uses is to make up any such difference between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available.'' Thus, Decision IX/6 and Decision Ex I/3 recognize that not all existing stocks may be available to meet critical uses. The EPA has the authority to make this determination, and has developed an analysis for developing an estimate of available stocks which it believes is consistent with the Clean Air Act and with Decision Ex I/3.

EPA has solicited information on existing and available stocks from approved critical users and from producers, importers, and major distributors of methyl bromide in the United States through a combination of the critical use exemption applications and information request letters sent to entities pursuant to Section 114 of the Clean Air Act. In developing today's action for the 2005 compliance period, EPA believes it has sufficient information to make a preliminary assessment about the level of existing and available stocks. However, to update this information about existing and available stocks, EPA is publishing in today's **Federal Register** a Section 114 Information Request asking any person who has stocks of methyl bromide they hold for sale or transfer to another entity as of August 25, 2004, that are unrestricted (not for quarantine and preshipment and produced solely for export to Article 5 countries) and not under contract for delivery to a specific end-user to submit information to EPA by September 23, 2004. For years beyond 2005, EPA describes later in this proposed rulemaking annual reporting requirements that will provide the Agency with sufficient information to assess the level of existing and available stocks.

EPA proposes to use the following approach, based on reasoning described below in this section, to assess how much of the existing stocks are available for critical uses. EPA seeks comment on the proposed method and reasoning described in the following paragraphs. EPA proposes to use a top-down methodology which involves deducting the amounts of stocks that are unavailable (not available for critical uses) from the existing stocks. This methodology can be represented as follows: $AS = (ES + B) - E1 - E2 - C - N - D$, where AS = available stocks; ES = existing stocks or unrestricted total stocks held in the United States by producers, importers, distributors, and applicants in 2004; B = banked stocks of methyl bromide that were produced or imported with expended critical use allowances in a given year that were unused during that year; E1 = stocks not produced with Article 5 allowances held for export to developing countries; E2 = amounts held for export to developed countries in 2004; C = amounts held in catastrophic reserve; N = amounts held for transition management in non-critical use categories in 2005, and; D = the estimated drawdown of stocks by U.S. and international consumers in 2004. In this methodology, existing stocks (ES) do not include restricted stocks of methyl bromide that were produced under the exemptions for quarantine and preshipment and with expended Article 5 allowances to meet the basic domestic needs of Article 5 countries. The information, judgments, and assumptions we used to quantify each of the factors in the methodology described above are further elaborated below and also in a Technical Support Document that can be obtained following the specific instructions below.

Although the discussion of the methodology and factors above and below are specific to the proposed determination of available stocks for 2005, EPA is proposing this methodology as part of the regulatory framework that EPA will use in each control period after 2005 for the U.S. determinations of available stocks.

Export is an important global consideration in determining the level of available stocks for domestic critical uses. The U.S. faces different circumstances from many other Parties because it is a methyl bromide producer country as well as a user country. Unlike the majority of the Parties that have authorized critical uses for 2005, the U.S. has stocks of methyl bromide to meet global demands in 2004 for methyl bromide not just for developing countries but for developed countries as well. Therefore, particularly in the case of the U.S., stocks held by U.S. companies are not necessarily available for U.S. users. This is a different case from Parties that satisfy their demand for methyl bromide strictly through imports. Any stocks available in the distribution chain of an importing country are presumably imported for the express purpose of meeting the demands of domestic end users. EPA believes that an accurate accounting of available stocks must take into account the global demand for the product in both developed (E2) and developing (E1) countries as authorized under the Protocol.

Furthermore, the U.S. is the world's largest supplier of methyl bromide. In the event of an unforeseen catastrophe such as the destruction of a production plant, EPA believes that a strategic buffer should be held in reserve in order to meet real time global demand for methyl bromide. Since U.S. companies supply a significant portion of the world, a catastrophe in the U.S. would not only affect U.S. users but would affect those users who have authorized critical uses in developed countries as well as the users in developing countries who have not yet phased out methyl bromide. EPA estimates that a catastrophic plant incident that resulted in unforeseen shutdown could result in a three month supply disruption and that a catastrophic buffer (C) equal to the amount of methyl bromide produced for both domestic and overseas markets for transformation, quarantine and preshipment, and critical uses for that period of time is necessary to prevent a significant impact on many industrial sectors using methyl bromide as a feedstock, on global trade that relies on methyl bromide to protect the introduction of invasive species, and on agricultural sectors globally that have recognized critical needs to fumigate with methyl bromide.

In addition, some entities in the U.S. did not apply for a critical use exemption because they intend to meet their small, limited needs through existing U.S. inventories of methyl bromide. EPA therefore would set aside an amount (N) from the existing stockpile to meet the needs of end users who did not apply for an exemption but who are still using methyl bromide during their transition to alternatives.

Finally, stocks in the United States will continue to be sold and used by domestic and international consumers throughout the 2004 calendar year, in advance of the January 1, 2005 phaseout date. This drawdown (D) should be considered in determining the amount of stocks available for critical uses in 2005.

EPA is proposing to use the methodology described above to develop an estimate of the portion of existing stocks available for critical uses. In Decision Ex. I/3, the Parties agreed that for 2005 the United States had demonstrated a level of critical use of 8,942,214 kilograms of methyl bromide. However, the Parties only authorized the United States to produce up to 7,659,000 kilograms of methyl bromide for critical uses in 2005 with the understanding that the United States

would likely have stocks available. EPA is proposing to issue critical use allowances (CUAs) for new production and import for the agreed critical-use categories at a level not to exceed any amounts of methyl bromide authorized by the Parties to be produced and imported to satisfy critical uses. In the event that EPA determines that the available stocks are greater than the difference between critical use levels and authorized production, EPA is proposing to adjust the CUAs issued by the additional amount of available stocks relative to the level of production and import authorized by the Parties.

As discussed in the Technical Support Document, this methodology (AS = (ES + B) − E1 − E2 − C − N − D), yields a range of methyl bromide available from existing stocks from 5 percent to 9 percent of U.S. consumption baseline (1,283,214 to 2,326,000 kilograms). Therefore EPA proposes to allocate critical use allowances (CUAs) authorizing 7,659,000 to 6,616,214 kilograms of new methyl bromide production or import for the agreed critical-use categories in 2005. This proposed quantity of new production or import is the difference between the total amount of methyl bromide use authorized by the Parties for the agreed critical-use categories in Decision Ex I/3, an amount of 8,942,214 kilograms, and the amount of available stocks of 1,283,214 to 2,326,000 kilograms. Since EPA is proposing a range of available stocks equal to or greater than 1,283,214 kilograms, which is equal to five percent of the U.S. baseline, final action may allocate somewhat less than the full amount of new production and import that was authorized by the Parties in Ex I/3.

In making the proposed determination of available stocks described above, EPA derived the total amount of existing stocks (ES) from information that EPA currently has on the amount of methyl bromide stocks held by a small number of companies in the United States as of the end of 2003. As described above, EPA is seeking to update its information on existing stocks (ES). Because no methyl bromide has been produced to date under the critical use exemption, the quantity of banked critical use methyl bromide (B) is zero in 2005.

The majority of the information EPA currently has on existing stocks was obtained through responses to Section 114 requests that EPA sent to a small group of companies. However, each of these companies claimed their responses to EPA's request to be Confidential Business Information. As a result, EPA is not authorized to release this information until it completes the process for evaluating these claims prescribed by the Agency's CBI regulations at 40 CFR part 2, subpart B. EPA is currently evaluating the merits of these claims in accordance with these procedures and expects to make a final determination on the CBI claims prior to finalizing the proposed critical use exemption regulation. Pending the completion of the process required under 40 CFR part 2, subpart B, EPA is treating the companies' methyl bromide stockpile information as CBI. In addition, EPA is treating the aggregate total of the stocks held by these companies as CBI because of concerns that publication of the aggregate amount could allow the small number of producers, imports, and distributors who know the size of their own holdings to calculate the amounts claimed as CBI by their competitors.

Because EPA has not yet completed its review of these CBI claims regarding methyl bromide stocks, this notice does not include the total amount of existing stocks (ES) and other quantitative values that EPA derived to determine available stocks using the methodology set forth above. EPA is concerned that the amount of existing stocks (ES) could be revealed by simple arithmetic if EPA were to publish its methodology for determining available stocks and quantify all the values used to derive the amount of available stocks except for the amount of existing stocks.

However, to provide the public with a meaningful opportunity to comment on its approach, EPA has published the estimated amount of available stocks in this notice and described the methodology used to derive this figure. EPA has also prepared a detailed Technical Support Document which elaborates on the reasoning and methodology that EPA used in developing estimates for each of the factors described above. Interested parties may find a copy of this document within EPA's electronic docket, Electronic Air Docket ID No. OAR–2003–0230, and EPA's paper docket, Air Docket ID No. A–2000–24. If, in accordance with the procedures set forth in 40 CFR part 2, subpart B, EPA determines that all or part of the information on existing stocks of methyl bromide stocks may be released to the public, EPA will place this information in the docket and quantify the other values in the formula.

To implement this limitation on total methyl bromide use in critical use categories on a national basis in 2005, EPA proposes to prohibit entities holding stocks of methyl bromide from selling or distributing such material to critical use categories for which new production and import is authorized under Decision Ex I/3, unless that entity holds a ''critical stock allowance'' allocated by EPA. EPA proposes to allocate ''critical stock allowances'' (CSAs) in an amount between 1,283,214 to 1,987,000 kilograms estimated by EPA to be available from stocks for the agreed critical-use categories. In the event that market forces reveal that EPA has under-predicted the amount of material available from stocks, EPA proposes that holders of critical use allowances (CUAs) may retire such allowances in exchange for additional critical stock allowances (CSAs) which would be issued by EPA.

The Agency seeks comment on an additional option for making the determination regarding the amount of methyl bromide available from existing stocks and seeks comments on this option and the proposal. For the 2005 calendar year, the Agency could make a determination that the amount of methyl bromide available from existing stocks is simply based on the difference between the limit on methyl bromide for critical uses (8,942 metric tons) and the limit on new production and import (7,659 metric tons) in the Decision Ex. I/3. This approach would reflect the fact that the Decision anticipates that each Party will determine how to take into account methyl bromide available from existing stocks.

EPA seeks comment on the amounts of critical use allowances (CUAs) and critical stock allowances (CSAs) proposed for allocation under the critical use exemption framework. EPA also seeks comment on its methodology for quantifying available stocks for 2005. In particular, EPA requests comment on whether it should employ the methodology for identifying available methyl bromide from existing stocks in a more qualitative than quantitative manner.

B. What Is the Proposed Regulatory Framework for Implementing the Critical Use Exemption and What Is a Critical Use Allowance (CUA) and a Critical Stock Allowance (CSA)?

EPA proposes to implement the critical use exemption by using an allowance system.

EPA believes an allowance system that regulates the production and import of critical use methyl bromide, as opposed to regulating the actual users of methyl bromide, is the simplest and most transparent method available for ensuring U.S. compliance with Protocol obligations. There are relatively few entities that produce and import methyl bromide that EPA regulates under the CAA and these entities are already

providing high quality reporting data to EPA that is verifiable and easy to track. In accordance with Protocol obligations and CAA requirements the EPA primarily regulates production and consumption (defined as production plus imports minus exports) of ozone-depleting substances. Given that the universe of producers and importers is considerably smaller than the universe of end users, and that producers and importers generally have more infrastructure for regulatory compliance than end users, this method of regulation is proven to be cost effective for ensuring U.S. compliance with obligations under the Montreal Protocol and requirements under the CAA.

Thus, EPA proposes to create critical use allowances (CUA) which would entitle the allowance holder (producer or importer) to produce or import 1 kilogram of methyl bromide for the exclusive purpose of satisfying the needs in agreed critical-use categories during the 2005 control period (calendar year). A CUA holder would expend one allowance for producing or importing one kilogram of methyl bromide.

In addition, in order to implement its obligations under the Protocol to control the amount of methyl bromide used in 2005 in the agreed critical use categories, EPA is also proposing to create critical stock allowances (CSAs). A CSA would entitle the allowance holder (producer, importer, distributor or applicator) to sell 1 kilogram of methyl bromide of available stockpiled material to an approved critical user. For example, a distributor with 100 CSAs may sell 100 kilograms of stockpiled methyl bromide to an approved critical user for use in an agreed critical use category of fumigation. EPA is proposing to prohibit the sale of methyl bromide stocks to an approved critical user for critical uses without a critical stock allowance. Thus, EPA would control the total amount of stocks that can be sold or distributed to the critical use categories authorized by the Parties through the allocation of a limited number of critical stock allowances.

The issuance of critical stock allowances (CSAs) does not obligate holders of stocks to make these quantities available to critical uses if they choose for practical or business reasons not to sell or distribute stocks to critical uses. However, EPA believes that these firms will respond to market conditions.

The CSA would be expended upon the sale of methyl bromide to an approved critical user, which would include instances where an approved critical user contracts with a distributor to provide fumigation services. A CSA would not be expended upon the transfer of methyl bromide from producers or importers to a distributor. See the additional discussion below on transfers of CSAs.

EPA seeks comments on the proposed allowance allocation framework for implementing the ''double cap'' agreed to in Decision Ex I/3 by the Parties to the Protocol

C. How Will Critical Use Allowances (CUAs) Be Distributed?

With today's action, EPA is proposing to allocate critical use allowances (CUAs) to producers and importers of methyl bromide on a pro-rata basis based on their 1991 consumption baseline levels. EPA proposes using historic 1991 baseline levels of consumption allowances to allocate CUAs because it is consistent with the method of allocation currently in place under the phaseout of methyl bromide and because EPA has easily verifiable baseline data for 1991.

EPA is proposing to use consumption baselines and not production baselines because critical use methyl bromide can be legally sourced in the U.S. through either domestic production or import. A critical use allowance (CUA), as described in Section VI..B. of this proposed rule, entitles the allowance holder either to produce or to import one (1) kilogram of methyl bromide. Therefore, EPA believes that the production baseline would be inappropriate to use since it would exclude importers from meeting the needs of critical uses.

Although EPA is proposing to distribute allowances to producers and importers based on the 1991 baseline, EPA recognizes an option of allocating allowances to producers and importers based on the volume of material marketed over a previous historic period, such as the immediate past four years. EPA does not have adequate data to create a new baseline of marketed material for methyl bromide producers and importers. EPA believes that acquiring sufficient, credible data of this nature would require the Agency to review all transaction records for each sale made by a methyl bromide producer or importer to a distributor, other supplier, or directly to end users. The Agency is concerned that it would take a long time to compile, receive and analyze such detailed information. In addition, such a process of compiling and submitting the information to make a new baseline determination would impose additional burden on the regulated community. This burden would likely be annual since the volumes of marketed material would not remain static from year-to-year after 2005.

EPA also recognizes another allocation method that would equally divide the number of allowances amongst those entities with historic production and consumption. EPA believes that this would be the simplest approach to allocating allowances. However, a simple division of the critical use allowances (CUAs) based on the number of entities involved would grossly distort historic and current relative market shares of the regulated entities; some would receive far more than their historic production and consumption and others would receive far less. Allocating allowances based on volume of recently marketed material may more closely reflect current market shares for each company, but, for reasons involving the annual burden on industry and government discussed above, this is not a desirable distributional mechanism. Therefore, EPA is proposing to allocate allowances based on the 1991 historic baseline that has been used for more than a decade in the U.S. to determine relative market shares among producers and importers. Allocating CUAs based on each company's 1991 baseline allowances (on a pro-rata basis) is a better reflection of market share than simply dividing the number of allowances by the total number of entities, and would be less burdensome than conducting a detailed recent historical market share analysis on a an annual basis. Using the 1991 historic baseline method for distributing CUAs is consistent with how EPA has allocated methyl bromide production and consumption allowances for the past decade under the methyl bromide phaseout.

During stakeholder meetings prior to development of this rule, one stakeholder suggested that EPA give the allowances to a third party not-for-profit entity who would in turn auction the allowances to the producers, importers, and distributors. After the producer, importer and distributor purchased the requisite number of allowances, these entities could then expend the allowances as described in Sections VI.B. and VI.N. of this proposed rule. The revenue derived from the auction would be used by the not-for-profit entity to fund transitions to alternatives where the alternatives are technically available but not economically feasible and research into alternatives to methyl bromide where no technically feasible alternatives exist to date. Under the allowance auction approach, no additional activities would be required of the end users but they would receive

a substantial benefit in the form of the transition fund described above in this paragraph. One of the economic benefits of the auction would be the redistribution of windfall profits that the producers and importers of methyl bromide currently receive under the phaseout of methyl bromide and that will be extended under the proposed critical use exemption. There are relatively few producers and importers of methyl bromide and the regulatory-induced scarcity created by the Protocol and CAA means higher prices can be charged and the additional profits are then received and kept by the producer and importer companies. Under an auction however, producers and importers would pay for the right to produce or import methyl bromide, thereby decreasing their windfall profits. Apart from a small amount of money to maintain operations of the not-for-profit entity, in theory the revenues derived from the auction could be transferred to end users of methyl bromide to ease the economic burden of their phaseouts.

A second stakeholder commented that an auction could be established as follows. EPA would distribute allowances to producers and importers as described in this NPRM which would entitle the companies to take two actions (a) produce and import kilograms of methyl bromide up to the number of allowances held, or (b) auction the allowances to critical end users. The end users would then turn in their allowances to the methyl bromide supplier at the time of purchase.

A similar allocation method that would address the windfall profit issue is as follows. EPA would distribute CUAs to end users. The users would then sell the allowances to producers and importers who would then be able to produce or import critical use methyl bromide. This distribution system would allow windfall profits to be captured by the users. Problems with this system are the same ones discussed with distributing allowances to a not-for profit entity as described in the preceding paragraph.

EPA seeks comments on today's proposed method for allocating critical use allowances (CUAs) and the many other options for allocating CUAs described above, as well as the magnitude of burden associated with any of the options that would adjust existing baselines.

D. How Are Critical Stock Allowances (CSAs) Distributed?

EPA proposes to allocate CSAs on a pro-rata basis between each of the identified entities that holds stocks. EPA will pro-rate the total amount of stocks that the Agency has determined are available between each known entity relative to the percentage of the total existing stocks they hold. For example, if company A holds one percent of all existing stocks and EPA determines that 1,000 kilograms of stocks are available, EPA will issue that company 10 critical stock allowances (CSAs). EPA believes this is the most equitable and least arbitrary method available for allocating CSAs.

Based on information currently available, EPA proposes to issue CSA's to the small group of companies that had stocks of methyl bromide in 2003. The amount allocated to each of these companies (and any other company that may come forward) will be determined in the final rule on the basis of comments and additional information collected by EPA. EPA proposes to allocate critical stock allowances (CSAs) on a pro-rata basis to the companies based on the amount of stocks held by each entity and the Agency's assessment of the available methyl bromide from stocks for critical uses.

In today's **Federal Register**, EPA is requesting additional information on the amount of available stocks in the United States. Elsewhere in today's **Federal Register** EPA is publishing a notice under Section 114 of the CAA calling for every entity to submit to EPA by September 23, 2004, information on their stocks of methyl bromide that are unrestricted (not for quarantine and preshipment and produced solely for export to Article 5 countries). An entity that does not submit information to EPA regarding stocks of methyl bromide they hold for sale or transfer to another entity as of August 25, 2004, will not receive critical stock allowances (CSAs) in the allocation made in the final rule. Such entities will not, therefore, be able to sell methyl bromide to any of the approved critical users in the 16 agreed critical-use categories defined in Decision Ex I/3 by the Parties to the Protocol.

As noted above, EPA is currently evaluating (in accordance with the procedures in 40 CFR part 2, subpart B) whether the inventory amounts held by individual entities are entitled to be withheld from the public as confidential business information. If EPA makes a final determination that the amount of stocks held by each entity is not confidential business information, then the final rule will contain the specific amounts of CSAs allocated to each entity on the basis of the information submitted to EPA. However, if EPA determines that individual company holdings of methyl bromide stocks are CBI, then the final rule will list the names of the entities issued CSAs without including the amounts. EPA would then confidentially inform each party of amount of CSAs allocated to them for 2005. Alternatively, EPA might be able to allocate CSAs on a pro-rata basis without revealing the amount of existing stocks held by each party. This is because the CSA allocation would be a pro-rata percentage of ''available'' stocks, which may be a lesser amount than the aggregate of existing stocks held by all the companies, and therefore would not reveal the actual amount held by each of the companies.

E. Are Allowances To Be Allocated on a Sector-Specific Basis or as One Lump Sum for All Sectors?

Decision Ex I/3 (4) states that, ''Parties should endeavor to allocate quantities of methyl bromide'' in accordance with the recommendations made by the Technology and Economic Assessment Panel (TEAP) as listed in agreed critical-use categories. EPA is therefore requesting comment on a sector-based allocation of allowances, as well as several other more flexible methods for making allocations.

1. Sector-Specific Allocation

EPA seeks comments on a sector-specific allocation of critical-use allowances (CUAs) and also a sector-specific allocation of critical stock allowances (CSAs). Under a sector-specific option, in 2005 EPA would create and allocate 16 different types of CUAs, one type for each critical use category authorized by the Parties. End users of methyl bromide made applications to EPA for an exemption and the U.S. government created a nomination of uses with similar circumstances to be considered by the Parties. The nomination aggregated similar circumstances of methyl bromide use into sectors. In a sector-specific allocation scheme, each producer and importer of methyl bromide would be allocated 16 different types of CUAs on a pro-rata basis in relation to their overall 1991 consumption baseline. For example, assume producer A has a consumption baseline that equals 50% of total allowable U.S. consumption. If the Parties authorized new production of 100 kilograms of methyl bromide for tomatoes and 20 kilograms of methyl bromide for flower nurseries, EPA would allocate 50 tomato critical use allowances (tomato CUAs) and 10 flower nursery critical use allowances (flower nursery CUAs) to company A. *See* Section VI.F. below for the proposed sector-specific allocation of

CUAs to individual producers and importers. The methyl bromide produced or imported with a tomato CUA could only be sold and used for growing tomatoes by an approved critical user that has the limiting critical conditions cited as the basis for the critical methyl bromide need in the nomination that was subsequently authorized by the Parties.

EPA recognizes that not all allowance holders (producer/importers) may want or need allowances of all types. For example, some allowance holders may supply only certain geographic markets or certain sectors. If EPA were to implement an allocation scheme, such as a sector-specific system, that is more restrictive than the current market, EPA would permit allowance trading amongst allowance holders. For instance, a tomato CUA holder in Region A would be able to trade with a tomato CUA holder in Region B; however, a tomato CUA holder would not be allowed to trade with a strawberry CUA holder in Regions A and B. Section 607 of the CAA allows for trading in part to encourage rationalization in the industry. It would be difficult for EPA to know exactly which company services which particular group of end users. However, the market-based mechanisms (transfers of allowances) described later in this preamble may rectify such issues under a sector-specific allocation scheme.

EPA believes that an allocation scheme that is more restrictive than the ''lump sum'' approach described below, such as the sector-or applicant-specific allocation, would provide greater assurance to each sector or group of applicants that some defined amount of methyl bromide would be available for that particular user group. However, under a sector-or applicant-specific system, if the user group did not use its entire allowable amount of methyl bromide, it would not be available for other approved critical users. So too, if a group needed more methyl bromide because they had a particularly bad pest infestation or demand for their product suddenly increased, the group would not be able to secure additional quantities without first seeking approval from the Parties during the annual nomination process and obtaining a higher allocation through EPA's subsequent notice-and-comment rulemaking which is resource and time intensive. A more restrictive sector-or applicant-specific allocation provides more certainty to each group but at the cost of flexibility.

2. Lump Sum Allocation

EPA requests comment on the option of creating one pool of CUAs and one pool of CSAs that can be used to supply critical use methyl bromide across sectors in what is known as a ''lump sum'' or ''universal'' approach. This means that critical use methyl bromide produced or imported with CUAs could be used for any of the agreed critical-use categories. Likewise, with a lump sum allocation of critical stock allowances (CSAs), the limited inventory that is available for sale into the critical use market would be for any of the agreed critical-use categories.

Under a universal allocation system, EPA anticipates that the actual critical use will closely follow the sector breakout listed by the TEAP and incorporated into Decision Ex I/3. The TEAP recommendations are based on data submitted by the U.S. which in turn are based on recent historic use data under the current methyl bromide phaseout market which is a ''universal'' system. In other words, the TEAP recommendations agreed to by the Parties are based on current use and the current uses are taking place in a marketplace where all methyl bromide users compete for the lump sum. Thus, EPA expects that 2005 use under a universal approach will look similar to the TEAP recommendations and annex II a in Decision Ex I/3. To the extent that any discrepancies between expected and actual use in 2005 occurs, a later section of today's proposed rulemaking describes tracking and reporting requirements that will help verify actual use by sector and help refine future U.S. nominations for critical use exemptions by highlighting differences between amounts nominated for a sector, recommended by TEAP, and agreed by the Parties and the actual use by that sector during the 2005 control period.

EPA would like to note that currently the methyl bromide market under the phaseout reductions (since 1994) operates as a ''universal'' or ''lump sum'' system. All end users of methyl bromide compete in the same marketplace for methyl bromide under the phaseout regulations. EPA believes that no critical user will face a situation where they cannot access approximately the same levels of methyl bromide that they have historically been able to access during the years of the phaseout because the U.S. government used recent historic data (1997–2001) in determining how much to nominate for each sectors critical use and this use data is based on amounts of methyl bromide obtained under a universal market.

In addition to the logistic and administrative reasons for implementing a universal allocation scheme, there are significant economic reasons to implement such a lump sum approach. The more restrictive the methyl bromide caps are, the less efficient the distribution of methyl bromide one would expect in the market. According to economic theory, under a universal cap, methyl bromide would go to those users with the highest marginal cost of substitution who would set the price of methyl bromide. This price of methyl bromide would lead those users with marginal costs of substitution lower than the price of methyl bromide to move instead to an alternative that may not have been previously economically feasible, thus resulting in a comparatively more efficient distribution of material and an overall lower cost of compliance for the regulated community as a whole. EPA estimates that the cost savings to the regulated entities of an illustrative sector-specific approach may be between $20 to $27 million when compared to a complete phase out of methyl bromide; the cost savings under an illustrative universal approach may be $22 to $31 million (see section VII a for more information on this analysis). Thus, the universal approach results in a greater cost savings to the regulated entities overall. A full discussion of this cost estimate may be found in the docket for today's rulemaking.

3. Applicant-Specific Allocation

EPA requests comment on making allowances specific to critical use exemption applicants. Under this option, in 2005 EPA would create and allocate 51 different types of CUAs and 51 different types of CSAs, one for each authorized critical use exemption applicant. Again, these allowances would be distributed to producers and importers in a pro-rated fashion and would be tradable amongst them. EPA recognizes that the more types of allowances we create, the more administratively and logistically complex the regulation becomes for the regulated community. With added administrative complexity generally comes a higher cost of implementation which may include costs associated with generating more specific information and greater inflexibility in the market.

4. Hybrid Allocation Options

EPA also is requesting comment on a hybrid approach that would create sector- or applicant-specific CUAs and universal or ''lump sum'' CSAs. EPA realizes that stocks may be held by

distributors and applicators. Unlike producers and importers whom EPA has historically regulated, some of these entities are smaller or more specialized. For example, EPA is aware of a distributor and custom applicator based on the East Coast that only services customers in the eastern part of the U.S. It is unlikely that this East Coast distributor and applicator will have any customers from the California fruit tree nursery sector that was authorized for critical use methyl bromide, since this is a region the distributor and applicator does not service. Thus, an allocation of fruit tree nursery CSAs would be of little practical use to this company. If the allocation were sector-specific, the company could trade its fruit tree nursery CSAs with one of the distributor/applicator companies that operate in California. However, if the company on the east coast was allocated only a small number of fruit tree nursery CSAs, it may not be worth the time and cost to find a suitable trading partner and engage in the trade. Therefore, EPA recognizes a hybrid option that would allocate sector-specific or even applicant-specific CUAs, but universal CSAs. The universal CSAs would alleviate problems associated with dividing small quantities of inventories scattered throughout the distribution system into many different types of end uses that may be of little use to a distributor in a specific geographic location. In addition, the universal CSAs would provide some flexibility to the end user community in the event that unanticipated market forces drive up demand in a particular commodity area or pest outbreaks in a particular crop are unusually high in a particular growing season.

EPA recognizes that another option would be to make CUAs and CSAs universal but require distributors and others who sell methyl bromide directly to end users to ''endeavor'' to make quantities of critical use methyl bromide available to their customers as prescribed in Decision Ex I/3 annex IIA. This option would rely on entities at the point of sale to ration methyl bromide to their customers the same way they have been doing under the phaseout—based on each client's historical purchases—in essence giving each sector (customer) the right of first refusal to a specific quantity of methyl bromide. However, under a scheme where distributors endeavor to make the critical use methyl bromide available in accordance with the quantities associated with specific-sectors in annex IIA of Decision Ex I/3, the methyl bromide, whether from CUAs or CSAs would still be ''universal,'' and distributors would have the flexibility to move quantities of critical use methyl bromide from one sector that does not need their full amount, to another sector that may have higher than anticipated need.

Finally, regarding the allocation of critical use allowances (CUAs) for new production and import of methyl bromide after the January 1, 2005, phaseout, EPA recognizes another hybrid option that would allocate a percentage on a sector-specific basis and a percentage on a universal, lump sum basis. This option of allocating a percentage of the CUAs as sector-specific and a percentage of CUAs as universal would provide some measure of assurance for each applicant as well as providing flexibility if a few of the sectors faced greater need for methyl bromide in the 2005 control period.

EPA wishes to note that the circumstances that are the basis for the U.S. sector nominations and the TEAP recommendations for specific sectors may have changed since that data was submitted. However, since EPA will not issue allowances for more critical use methyl bromide than the amount authorized by the Parties, this proposed rulemaking provides stakeholders with the opportunity to request flexibility in how allowances are distributed to accommodate changes in the marketplace that have transpired since the TEAP review. This NPRM represents part of EPA's endeavor to allocate methyl bromide in accordance with TEAP's recommendations. Thus, EPA seeks comment on the universal, sector-specific, applicant-specific, and hybrid methods for allocating CUAs and CSAs. In addition, for the hybrid approaches, EPA also requests comment on the portion of the authorized quantity that should be made sector- or applicant-specific, if any, and what portion should be made universal. EPA will evaluate and reconcile these comments and then publish a final rule that describes how allowances will be distributed.

F. How Many Critical Use Allowances (CUAs) and Critical Stockpile Allowances (CSAs) Will Producers, Importers and Distributors Be Allocated?

EPA proposes using one of the options described in the immediately preceding sections of this rulemaking notice to allocate critical use allowances and critical stock allowances to producers, importers, and distributers. We described two basic options for making the allocation of critical use allowances (CUAs)—a sector-specific allocation or a universal allocation—and hybrids of these two options. In addition, we propose a universal allocation of critical stock allowances (CSAs).

The Tables immediately below are illustrative examples of how a CUA allocation would appear under a universal allowance allocation scheme (Table I) as compared to a sector-specific allowance allocation scheme (Table II). For purposes of this illustration, we assumed an overall allocation of critical use allowances equal to 7,285,414 kilograms, which is approximately the middle of the range that we are proposing. When we take final action on this proposal, the individual allocations reflected in the following tables may increase or decrease by a proportionate amount depending on whether the total amount of critical use allowances that we issue is on the higher or lower end of the proposed range. Likewise, the amounts in the tables would differ if we were to employ one of the hybrid options to allocate allowances. In addition, the Agency is still collecting information in a Section 114 Information Request being published concurrently with today's action, so the final rule will take into account updated data on the amount of inventory that is available for critical uses.

The distribution of CUAs to specific producers and importers of methyl bromide for a universal allocation may appear as in Table I. The distribution of CUAs to specific producers and importers of methyl bromide for a sector-specific allocation may appear as in Table II. The proposed distribution of CSAs would be as follows for a universal allocation (Table III).

TABLE I.—CRITICAL USE ALLOWANCE ALLOCATION FOR THE CALENDAR YEAR 2005 (UNIVERSAL)

Company/universal allocation	Number of critical use allowances (kilograms)
Great Lakes Chemical Corporation	4,427,693
Albemarle Corporation	1,820,736
AmeriBrom, Inc.	1,005,814
Trical, Inc.	31,171
Total	7,285,414

TABLE II.—CRITICAL USE ALLOWANCE ALLOCATION FOR THE CALENDAR YEAR 2005 (SECTOR SPECIFIC)

Sector-specific allocation approved critical-use sectors	Number of critical use allowances (kilograms) for each company for each sector			
	Great Lakes Chemical Corporation	Albemarle Corporation	AmeriBrom, Inc.	Trical, Inc.
Chrysanthemum cuttings—rose plants	14,563	5,989	3,308	103
Curcurbits—field	588,133	241,850	133,603	4,141
Dried fruit, beans and nuts	42,955	17,664	9,758	302
Eggplant—field	36,423	14,978	8,274	256
Forest tree nurseries	95,323	39,198	21,654	671
Fruit tree nurseries	22,678	9,325	5,152	160
Ginger production—field	4,555	1,873	1,035	32
Mills and processors	239,155	98,344	54,327	1,684
Orchard replant	349,660	143,785	79,430	2,462
Peppers—field	537,381	220,979	122,074	3,783
Smokehouse ham	449	185	102	3
Strawberry fruit—field	908,020	373,392	206,269	6,393
Strawberry runners	27,227	11,196	6,185	192
Sweet potato— field	40,023	16,458	9,092	282
Tomato—field	1,418,739	583,408	322,287	9,988
Turfgrass	102,409	42,112	23,264	721
Total	4,427,693	1,820,736	1,005,814	31,173

TABLE III.—CRITICAL STOCK ALLOWANCE ALLOCATION

Company	Number of critical stock allowances (kilograms)
Company A	Reserved, pending resolution of CBI claim and Section 114 request.
Company B	Reserved, pending resolution of CBI claim and Section 114 request.
Total	1,656,800

G. What Are the Tracking Requirements for a Sector- or Applicant-Specific Allocation?

In the event that EPA puts in place a final rule that issues sector- or applicant-specific allowances, EPA must devise a system that would ensure compliance with the sector/applicant level caps. EPA believes that tracking types of allowances expended (*e.g.* pepper CUAs) in order to ensure compliance with a sector cap is essentially an accounting question and therefore describes a system that controls production and import at a sector- or applicant-level through different types of CUAs. EPA is proposing a system where entities in the supply chain such as producers, importers, and distributors would create and keep an on-going log of the amount and, if the final rule allocates on a sector- or applicant-specific basis, the type of critical use methyl bromide (*i.e.*, eggplant CUAs), on a per kilogram basis, acquired and sold during the year. In addition, entities that acquire critical use methyl bromide from a supplier would sign a self certification form indicating that they understand they are taking possession of a certain number of kilograms of critical use methyl bromide of a specific type. EPA believes that it is the responsibility of the distributor or other supplier to place orders with producers or importers for critical use methyl bromide of the appropriate type to meet the needs of their customers which means that a distributor may have to call more than one company to find the correct type of material in sufficient quantity to meet demand (*see* Sections VI.L. and VI.M. for more information on record keeping and reporting requirements).

During the public meetings on potential allocation framework options held during the summer of 2003, a participant suggested that EPA require the use of a database system to track critical use methyl bromide. Currently, a real time database system is being used in the state of California to track the use of 1,3-dichloropropene and ensure that the township caps are not exceeded. Under this option, EPA would require registrants to populate the database with information on the allowable critical uses, the approved critical users, and the amount of critical use methyl bromide produced, imported or available from critical stockpiles. Distributors and applicators would consult the database and reserve a specific amount of critical use methyl bromide when an order is placed for the material or for fumigation with critical use methyl bromide. The reservation would freeze the amounts of critical use methyl bromide for 14 days—at which point the company that made the reservation would lose its reservation unless it indicated that the material had already been used in a fumigation. This database could be created by EPA through a contractor or EPA could require regulated entities to utilize existing commercial database programs. EPA believes that producers, importers, distributors, and applicators would likely have to make some capital expenditures to be able to use the database for tracking purposes. EPA believes that the database approach would provide high quality use data on critical use of methyl bromide and that it could be used under a sector specific or applicant specific approach to ensure that distributors and other points of sale do not exceed total allowable amounts of critical use methyl bromide for that particular use. EPA seeks comment on the use of a commercially available database system to track the sale of critical use methyl bromide.

H. How Do ''Approved Critical Users'' Acquire Methyl Bromide Under Today's Proposal?

With today's action, EPA is proposing that approved critical users (end users) within an agreed critical-use sector, that also have the ''limiting critical conditions'' for their specific circumstances of use, acquire methyl bromide following a system nearly identical to the existing procedures under the quarantine and preshipment exemption (QPS) to the phaseout of methyl bromide (68 FR 237 (January 2, 2003)). The phrases ''approved critical user'' and ''limiting critical condition'' are further discussed below in Sections I. and K., respectively. EPA proposes that approved critical users of methyl bromide who wish to acquire critical use methyl bromide, or who contract for

fumigation with critical use methyl bromide, will self certify that they are approved critical users at the time of purchase. The certification requirement would be part of the reporting and recordkeeping requirements set forth in section 82.13 of its regulation.

To implement this regulation, EPA will create a form that an approved critical user will complete with basic information about the user (name, location of fumigation, consortium, etc), the number of kilograms to be purchased and the area to be treated, the agreed critical-use category (*i.e.* tomatoes, bean storage, etc.), and a check list of the applicable limiting critical conditions approved by EPA and the Parties (*e.g.* karst topography, heavy to moderate nutsedge infestation). The form would be signed by the approved critical user (purchaser) of the methyl bromide and given to the supplier of methyl bromide to indicate that the purchaser is acquiring exempted critical use methyl bromide from the supplier to use in accordance with the exemption and bears the full penalty of law for providing false information or for use that is not in accordance with the critical use exemption regulations.

EPA is proposing that producers, importers, and distributors will be prohibited from selling methyl bromide in critical use categories without obtaining a self-certification from an approved critical user. If an approved critical user seeks methyl bromide from stocks existing prior to 2005, then the user must find a supplier who holds a sufficient amount of critical stock allowances (CSAs) to sell methyl bromide to an agreed critical-use category. To obtain methyl bromide produced or imported in 2005 under the exemption, the approved critical user must go to a supplier who has methyl bromide newly produced or imported through expended 2005 critical use allowances (CUAs).

I. Who Is an Approved Critical User?

An approved critical user is entity who obtains the benefit of acquiring newly produced or imported methyl bromide that is dedicated for use in those use categories that have been agreed to be critical. Such users benefit under the critical use exemption because they have certainty that methyl bromide will be available for their critical needs because this newly produced and imported methyl bromide cannot be used for other purposes or by non-critical users. However, a condition for obtaining the benefit of this dedicated supply of methyl bromide after the phaseout date is that approved critical users will see their access to existing, previously unrestricted stocks of methyl bromide limited when necessary to ensure that total use of methyl bromide in critical use categories does not exceed the overall critical use cap established in Decision Ex. I/3.

EPA is proposing to define an ''approved critical user'' as an entity whose circumstance of methyl bromide use is covered by an application that is included in the U.S. nomination and subsequently authorized by a Decision of the Parties to the Montreal Protocol for a critical use exemption and then determined, through this EPA notice-and-comment rulemaking, to be eligible for exempted critical use methyl bromide (see Section A. of this notice of proposed rulemaking). Thus, EPA proposes to define an ''approved critical user'' as a person meeting the following two criteria:

(1) The user, for the applicable control period, applied to EPA for a critical use exemption or is a member of a consortium that applied for a critical use exemption for a use and location of use that was included in the U.S. nomination, authorized by a Decision of the Parties to the Montreal Protocol, and then finally determined by EPA in a notice-and-comment rulemaking to be a critical use in that location, AND

(2) The user has an area in the applicable location of use that requires methyl bromide fumigation because the area is subject to a limiting critical condition.

To summarize, EPA proposes that in order to qualify as an approved critical user, you must satisfy the following conditions: (1) You must have submitted or belong to a group that submitted an application to EPA for a critical use exemption for the specific control period; (2) the use and circumstances of use included in your application must have been nominated by the U.S. for a critical use exemption; (3) the Parties to the Protocol must agree in a Decision that your use and circumstance is a critical use and then, (4) through this notice-and-comment rulemaking EPA must identify your use as a critical use and your circumstance as a limiting critical condition. EPA requests comment on the proposed criteria for being an ''approved critical user'' described above and, in particular, comment that addresses these criteria in the context of the language of Decision IX/6 and Decision Ex I/3.

The Agency recognizes there may be other ways of defining an ''approved critical user'' in the context of Decision IX/6 and Decision Ex I/3, such as the following: (1) Not including criterion number two above (the limiting critical condition); (2) not including criteria numbers one and two above and instead defining approved critical user broadly to include any user in one of the agreed critical-use categories in Annex II.A. of Decision Ex I/3. We request comment on whether such an alternative definition of ''approved critical user'' would be more appropriate and consistent with Decisions IX/6 and Ex. I/3.

J. Can New Market Entrants or New Consortia Members Be Approved Critical Users?

EPA proposes that an approved critical user can include a member of a consortium during the control period even if the user was not a member at the time the application was submitted to EPA. In today's proposal, EPA is defining consortium as an organization representing a group of methyl bromide users that has collectively submitted an application for a critical use exemption on behalf of all members of the group. The members of a consortium would be determined by the rules established by the consortium. Members could either be required to formally join the consortium (*i.e.*, by submitting an application or paying dues) or may automatically become members upon meeting particular criteria (*i.e.* a grower of a specific crop in a particular region). EPA does not believe that it is up to the Agency or to distributors and third party applicators of methyl bromide to discern between different types of consortium members.

For example, the Southern Forest Nursery Management Cooperative consists of a certain number of forest seedling nursery operators. The Cooperative made an application to EPA for a critical use exemption that only included its members. Therefore, only members of the Cooperative would qualify as approved critical users pursuant to the consortium's application. However, if a company that was not a member of the Cooperative at the time of the application in 2002 decided to join the cooperative in 2004, EPA is proposing that the company be eligible to access critical use methyl bromide available to members of the consortium once the exemption takes effect in 2005 since the company would be a member of the Cooperative during the control period.

A second example is the California Strawberry Commission, which made an application to EPA to cover all strawberry growers in the state of California. Because the initial application was made on behalf of all growers in that state, any strawberry grower in California regardless of the

date when he first entered the market is considered by EPA to be a member of the consortium. Thus, a new strawberry grower who enters the market in California in 2005 and who meets the limiting critical condition for the agreed critical-use category would be able to access the critical use methyl bromide under the framework set forth in today's proposal.

In summary, EPA proposes that an approved critical user may include an entity who newly enters the market of a crop/use that has a limiting critical condition; an entity who switches to a crop/use that has a limiting critical condition; an entity who increases production of a crop/use that has a limiting critical condition; or an entity who switches production of a crop/use with a limiting critical condition from one physical location to another. In each instance, such an entity would need to meet the limiting critical condition and qualify as a member of consortium that applied for and obtained a critical use exemption.

Under the second example described above, any consortium that applied for an exemption for a broad geographic group of users may in fact be encouraging free riders. However, EPA believes that those consortia that applied on behalf of an entire state or region in their initial application believe that all users in that location need a critical use exemption based on technical and economic criteria. Therefore, if a new user enters the market place in that same location, EPA believes that the user would have automatically become a member of the consortium as if he had entered the market at the time the application was made. Therefore, the only remaining relevant question is whether or not the new market entrant in the geographic area meets the limiting critical condition and therefore may be an approved critical user.

In public meetings, EPA received a suggestion from the affected community which called for allowing critical use exemptions to only be made available to those users who are ''users of record.'' A user of record was suggested to be an approved critical user who was engaged in production of a crop or commodity in a critically-exempted sector immediately prior to the control period. The effect of such a provision would be to require any entity that was not a user of record to use an alternative to methyl bromide for the first year it engages in crop or commodity production. After the first year, the new market entrant would become a user of record and would be able to avail himself of critical use methyl bromide. EPA believes that this system may provide an incentive for new entrants to try alternatives to methyl bromide. However, this system would be difficult to administer outside of the state of California where such information is already tracked by state regulators. In addition, critical use methyl bromide will only be available for those users who do not have any technically and economically feasible alternatives available to them; therefore, a requirement such as the one suggested would foreclose any new entrants altogether.

EPA believes that in order to accommodate the ever shifting marketplace, growers and other users of methyl bromide should be allowed to increase or move production as needed so long as total U.S. production and import of methyl bromide for use in a given sector remains under the limits authorized by the Parties and determined to be a critical use in the U.S. through notice-and-comment rulemaking. Therefore, EPA is proposing an option in today's notice that allows for shifts in the marketplace (market entry and exit, and rotation into new production areas) while still ensuring fairness to those groups who applied for a CUE. It is important to note that the amount of methyl bromide that may be supplied for critical uses in a calendar year (control period) will not increase even if the number of users or treated area increases. The only way the amount of methyl bromide available for critical uses will be increased is if the Parties authorize such an increase and EPA incorporates the increase into its phaseout regulation through notice-and-comment rulemaking.

Under the proposed framework outlined in this section, users who have the limiting critical condition but who are not users or members of a group of users that submitted an application to EPA, are not eligible critical users. For example, a consortium applied on behalf of certain raspberry nurseries in California and Washington. This use was determined by EPA to qualify for an exemption because of the limiting critical condition that there are no technically feasible alternatives which provide adequate control of pests for raspberry nursery propagative stock. If a raspberry nursery operator in California met the limiting critical condition but was not a member of the consortium and needed to buy methyl bromide, under the proposed option, they would not be an approved critical user because the application that was made to EPA was not on behalf of all growers in California, only certain identified companies. EPA did consider allowing such a person to acquire critically exempted material. EPA decided not to propose this option in order to discourage free riders who did not invest the time and effort to apply for an exemption or even join a consortium that submitted an application. EPA understands that users who applied for an exemption sometimes spent hundreds of hours preparing an application for a critical use exemption. EPA recommends that users who did not submit an application or are not part of a consortium, consult with USDA or EPA immediately to determine if they could be included in the next U.S. nomination of critical users. Such users should also consider contacting any consortium that applied for an exemption for their use category. EPA is seeking comment on this manner of treating new market entrants and users of methyl bromide that were not part of the consortia or companies that submitted applications for critical use exemptions.

K. What Uses and ''Limiting Critical Conditions'' Are Permitted Access to the Methyl Bromide Under the Critical Use Exemption?

A ''limiting critical condition'' is the basis on which the critical need for methyl bromide is demonstrated and authorized. The limiting critical condition placed on a use category reflects certain regulatory, technical or economic factors that either prohibit the use of feasible alternatives or represent the lack of a technically or economically feasible alternative for that use or circumstance. For example, EPA may determine that a critical use exemption for tomatoes is only necessary for areas of tomato production in karst topography even if the EPA received applications for all of U.S. fresh market tomato production. In this example, not all tomato growers would be eligible to acquire exempted critical use methyl bromide. Only those growers with production in an area with the limiting critical condition of karst topography would have access to the methyl bromide under the critical use exemption. Another example is as follows: EPA received applications for exemptions for all U.S. grain milling companies that are members of the North American Milling Association (NAMA). The Parties authorized the exemption because grain milling companies have a critical need for methyl bromide because the alternatives can not be used, in part, due to corrosivity to electronic equipment. Thus, one of the limiting critical conditions for this critical use category is the presence of sensitive electronic equipment subject to corrosivity from

fumigation with the alternative. All grain mills that are members of NAMA that have sensitive electronic equipment would be able to acquire and use critical use methyl bromide.

Some approved critical users have limiting critical conditions that are contingent. These ''contingent critical uses'' are those uses of methyl bromide which qualify as an approved critical use only if a specified condition has been met. For example, a number of potential critical use needs for methyl bromide in California currently use the alternative 1,3-Dichloropropene (1,3–D) in various formulations. This chemical is regulated by the state of California so that specific townships have limits on the amount of 1,3-D that can be used over a given time period. Certain of the agreed critical-use categories in Decision Ex I/3 may have a contingent need for critical use methyl bromide in the event that the township cap for 1,3–D has been reached or exceeded.

EPA proposes that producers and importers be allowed to produce and import critical use methyl bromide for contingent uses at any time during the control period. However, EPA is proposing that unused methyl bromide produced or imported for such contingent purposes will be deducted from the total number of CUAs that EPA makes available for the following control period (as it would be included in the consideration of inventory as factor B, because the unused methyl bromide would be considered in the estimation of available stocks for the subsequent control period).

Below EPA proposes the ''limiting critical conditions'' for each of the agreed critical-use categories in Decision Ex I/3 and refers commenters to the E-Docket where the U.S. nominations, additional responses to MBTOC, and a memo describing the determination process are available. EPA wishes to note that while we may, in response to comments, reduce the types and conditions of a critical use compared to what has been authorized by the Parties, EPA will not increase the quantities, and sectors, beyond those authorized by the Parties. Section 2H(5) of the Protocol limits the critical use exemption to those uses agreed upon by the Parties. The agreed critical uses for 2005 are reflected in Decision Ex I/3.

EPA based the proposed ''limiting critical conditions'' on the data submitted by critical use exemption applicants, as well as public and propriety data sources. The U.S. government, in developing the nomination, defined the limiting critical conditions for which exempted methyl bromide was being sought. The U.S. government used this data to determine if (a) the lack of availability of methyl bromide for a particular use would result in significant market disruption, and (b) if there were any technically and economically feasible methyl bromide substitutes available to the user. The analysis was conducted and described in the U.S. nomination of critical uses. This nomination was then sent to the Parties to the Protocol, and the Parties used this information as the basis for the decision which authorized critical uses.

Based on the data described above, EPA determined that the following uses with the limiting critical conditions specified below qualify to obtain and use critical use methyl bromide.

EPA proposes, based on the determination described in the U.S. nomination and its supporting documents, that users who are in a specific geographic location, identified below, or who are members of a specific industry consortia, identified below, or companies specifically identified below, are approved critical users provided that such users are subject to the specified limiting critical condition.

Pre-Plant Uses

Cucurbits

(a) Michigan growers with moderate to severe fungal pathogen infestation;

(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers with moderate to severe yellow or purple nutsedge infestation.

Eggplant

(a) Georgia growers with one or more of the following limiting critical conditions: Moderate to severe yellow or purple nutsedge infestation, moderate to severe nematode infestation and/or moderate to severe fungal pathogen infestation;

(b) Florida growers with limiting critical conditions: Moderate to severe yellow or purple nutsedge infestation and/or moderate to severe nematode infestation and/or moderate to severe fungal pathogen infestation and/or karst topography.

Forest Seedlings

Approved critical users listed below with one or more of the following limiting critical conditions: Moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, and/or moderate to severe disease infestation.

(a) Members of the Southern Forest Nursery Management Cooperative limited to growing locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia;

(b) International Paper and its subsidiaries limited to growing locations in Arkansas, Alabama, Georgia, South Carolina and, Texas;

(c) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, South Carolina, Oregon and, Washington;

(d) Public (government owned) seedling nurseries in the states of California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia and, Wisconsin;

(e) Members of the Nursery Technology Cooperative limited to growing locations in Oregon and Washington; and

(f) Michigan seedling nurseries.

Ginger

(a) Hawaii growers with the limiting critical condition of moderate to severe nematode infestation and/or moderate to severe bacterial wilt infestation.

Orchard Nursery Seedlings

Approved critical users listed below with one or more of the following limiting critical conditions: Moderate to severe nematode infestation, medium to heavy clay soils, and/or a prohibition on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative;

(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in California and Washington (Driscoll's raspberries and their contract growers in California and Washington).

(b) Members of the California Association of Nurserymen-Deciduous Fruit and Nut Tree Growers.

(c) Members of the California Association of Nurserymen-Citrus and Avocado Growers.

Orchard Replant

Approved critical users listed below with one or more of the following limiting critical conditions: Replanted (non-virgin) orchard soils to prevent orchard replant disease, and/or medium to heavy soils, and/or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.

(a) California stone fruit growers.

(b) California table and raisin grape growers.

(c) California walnut growers.

(d) California Almond growers.

Ornamentals

(a) Yoder Brothers Inc. for use in chrysanthemum production.

(b) California rose nurseries prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached;

Peppers

(a) California growers with the limiting critical conditions of moderate to severe fungal pathogens, and/or moderate to sever disease infestation, and/or moderate to sever nematode infestation, and/or moderate to severe yellow or purple nutsedge infestation, and/or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached;

(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, and/or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less;

(c) Florida growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, and/or karst topography;

Strawberry Nurseries

(a) California growers with one or more of the following limiting critical conditions: moderate to severe black root rot or crown rot, moderate to severe nematode infestation, and/or moderate to severe yellow or purple nutsedge infestation;

(b) North Carolina and Tennessee growers with the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less;

Strawberry Fruit

(a) California growers with one or more of the following limiting critical conditions: moderate to severe black root rot or crown rot, moderate to severe nematode infestation, moderate to severe yellow or purple nutsedge infestation, a prohibition of the use of 1,3-dichloropropene products because local township limits for this alternative have been reached;

(b) Florida growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge, and/or karst topography;

(c) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, Virginia, Ohio and, New Jersey growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge, and/or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less;

Sweet Potatoes

(a) California growers with the contingent limiting critical condition of a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached;

Tomatoes

(a) Michigan growers with moderate to severe disease and/or fungal pathogens;

(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, and/or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less;

(c) Florida growers with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, and/or karst topography;

Turfgrass

(a) U.S. turfgrass sod nursery producers for the production of industry certified pure sod.

(b) U.S. golf courses establishing sod in the construction of new golf courses or the renovation of putting greens, tees, and fairways.

Post-Harvest Uses

Food Processing

Approved critical users listed below with one or more of the following limiting critical conditions: older structures that can not be properly sealed to use an alternative to methyl bromide, and/or the presence of sensitive electronic equipment subject to corrosivity;

(a) Rice millers in Arkansas, California Louisiana, Florida, Missouri, and Mississippi.

(b) Pet food manufacturing facilities in the U.S.

(c) Kraft Foods.

(d) Members of the North American Millers' Association.

Commodity Storage

(a) Smokehouse ham curing in facilities owned by Gwaltney of Smithfield.

(b) Entities storing walnuts, beans, dried plums, and pistachios in California with one or more of the following limiting critical conditions: rapid fumigation is required to meet a critical market window, such as during the holiday season, rapid fumigation is required when a buyer provides short (2 days or less) notification for a purchase, and/or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.

L. What Are the Reporting Requirements?

In today's action, EPA is proposing that producers and importers of critical use methyl bromide submit quarterly reports to EPA on the number of kilograms of critical use allowances (CUAs) expended and unexpended. In addition, those entities that sell critical use methyl bromide to end users shall report to EPA on an annual basis, the total amount of methyl bromide sold to each sector during the control period. For example, a distributor would submit an annual report to EPA that he sold 1,000 kilograms of critical use methyl bromide for pre-plant tomato fumigation and 500 kilograms of critical use methyl bromide for pre-plant strawberry fumigation. EPA is proposing this reporting on sale of methyl bromide to end-users on a sector-by-sector basis regardless of whether the final rule makes CUA and CSA allocations on a lump sum or sector-specific basis, because the Agency believes the sector-specific sales information will help improve the quality of data in future U.S. nominations for critical use exemptions. EPA is also proposing that data on sales be reported on a sector-specific basis to ease the burden for future applicants for critical use exemptions and to simplify U.S. government efforts to assemble and verify data concerning the amount of methyl bromide used in a sector and/or geographic region. EPA is further proposing that producers, importers, distributors and applicators allocated critical stock allowances (CSAs) file quarterly reports to EPA on the number of expended and unexpended CSAs based on the amount of methyl bromide stocks sold during the quarter to an approved critical user (from whom a self-certification was received).

Information collection as proposed above is authorized under Sections 603(b), 603(d) and 614(b) of the CAAA. EPA believes the reporting requirements outlined above are necessary in order to meet U.S. reporting obligations under Article 7 of the Protocol and CAAA reporting requirements to Congress under Section 603(d).

M. What Are the Record-Keeping Requirements?

EPA proposes that producers, importers, and distributors of critical

use methyl bromide maintain self certification records from buyers (typically wholesale buyers) for 3 years, along with other transactional records such as invoices and order forms. EPA proposes that distributors, third party applicators, and any other entities that directly sell critical use methyl bromide or fumigation services to approved critical users, keep self-certification records signed by the buyer of the critical use methyl bromide (whether from expended CUAs or from expended CSAs) on file for 3 years, along with other transactional records such as invoices and order forms.

EPA believes that mandatory record keeping requirements create a disincentive for the illegal traffic of controlled ozone depleting substances (ODS). In some instances, the phaseout of other chemicals regulated under Subchapter VI of the Clean Air Act (CAA) has resulted in a vigorous black market for the illegal sale of ODSs. The United States is in close proximity to developing countries who have not yet phased out of methyl bromide and who therefore may have supplies of methyl bromide available to them at a lower price than methyl bromide in the U.S. This price disparity between physically nearby markets could result in an incentive to illegally re-import methyl bromide into the United States. Unlike other ODS, the shipment, sale, and use of methyl bromide is tightly controlled under other statutes such as FIFRA making such activities not only dangerous but difficult to undertake. Therefore, EPA does not anticipate that a significant black market will develop in the United States for illegally produced or imported methyl bromide. Stringent record-keeping requirements under the CAAA that bear stiff penalties for violation on the creation, import, and sale of methyl bromide for critical uses will, EPA believes, further dampen interest in the illegal trade of methyl bromide. EPA seeks comment on the ways to discourage the development of a significant black market through record-keeping activities.

N. How Often Will Critical Use Allowances (CUAs) Be Distributed and How Are Allowances Expended?

EPA proposes to allocate critical use allowances (CUAs), through notice-and-comment rulemaking, on an annual basis (calendar year) consistent with authorizations by the Parties and Section 604(d)(6)of the CAAA. To the extent that the Parties continue to identify a need for controls on available stocks, the Agency will also allocate critical stock allowances (CSAs) on an annual basis. EPA proposes to allow producers and importers to expend their critical use allowances (CUAs) for production and import of methyl bromide at any time during the control period (calendar year) so as to avoid disruptions in the supply of methyl bromide. However, as with other allowances under EPA's phaseout program for ozone-depleting substances, EPA is proposing that companies would only be able to expend CUAs during the specified control period (calendar year)—for today's proposed action that would be during 2005. In other words, there would not be any banking of unused critical use allowances (CUAs) from control period to control period. If the Parties' decision authorizing 2006 critical use exemptions is specific about controls of available stocks, then the Agency would discuss such a control in its notice-and-comment rulemaking for the 2006 allocations.

In developing today's action, EPA also recognizes other options for addressing concerns about the need for mid-year adjustments in allocations of CUAs and CSAs. One option would issue half of the allowances at the beginning of the control period and then the remainder of the allowances six months into the control period, or, some other percentage split for two separate allocations. Under this option, EPA would publish an annual rulemaking before the start of the control period indicating how many allowances of each type could be expended in the first two quarters of the year and how many allowances of each type could be expended in the later two quarters of the year. EPA also notes that complete information on stocks of methyl bromide held on December 31st for a given year would not be reported to the Agency until 45 days after December 31st, which might mean the determination of available stocks could be designed as a two-step process that could result in mid-year allocations for a control period. In this second allocation of the remainder of allowances, EPA could, if necessary, adjust the relative percentages of critical use allowances and critical stock allowances to ensure that critical needs are satisfied for the control period if EPA's initial projection of available stocks is later found to be inaccurate. The combined total of critical use allowances issued for the control period would not exceed the cap on new production and consumption set forth in a Decision of the Parties. Another option would be to allocate both CSAs and CUAs at the beginning of a control period but the CSAs would expire in a short time frame and the unexpended CSAs would, through rulemaking, be allocated as additional CUAs up to the limit for new production and import authorized by the Parties. EPA notes there are many steps in publishing rulemakings, many of which can be time consuming. Publishing two rulemakings to allocate allowances for a given year might result in a lapse in available allowances and therefore a disruption in supply. Publishing two rulemakings for each calendar year would also introduce much greater uncertainty into the market. The Agency recognizes that an alternative approach might be to base the determination of available stocks on a ''fiscal'' year from September 31st to September 31st, and then publish a single allocation rulemaking for the subsequent calendar year. EPA requests comment on these options and whether any of them address concerns regarding the availability of sufficient critical use methyl bromide that were raised by entities in sectors who fumigate later in the calendar year and other issues regarding the supply chain for methyl bromide and the data available for subsequent allocation rulemakings.

EPA proposes to allow producers and importers to expend (use) their allowances for production and import of methyl bromide at any time during the control period so as to avoid disruptions in the supply of methyl bromide (*see* Section VI B. above regarding ''expending'' allowances). However, EPA also recognizes an option that would permit allowances to be expended only when an order for methyl bromide had been placed by a distributor or some other purchaser of methyl bromide, making a so-called ''redeemable'' allowance system (*see* Section VII. on a redeemable allowance system). However, EPA believes that such an approach is unlikely to result in significantly less critical use methyl bromide production, importation and stockpile draw down, and would be more disruptive to the methyl bromide market.

EPA is proposing to allow producers, importers, distributors, applicators, and other entities that hold critical stock allowances (CSAs) to expend their stockpile allowances by selling a corresponding amount of methyl bromide stocks, at any point during the control period. Likewise, the Agency is proposing that producers and importers allocated critical use allowances (CUAs) would be able to expend their allowances to produce or import methyl bromide for the agreed critical-use categories at any time during the control period (calendar year). This approach is preferred because producers and importers need a certain amount of time

to actually manufacture, and bring to market, quantities of methyl bromide. Furthermore, producers and importers need to make business decisions regarding manufacturing and marketing well before an order is actually placed in order to efficiently batch their production and import operations. EPA will allocate CUAs and CSAs before the control period and the allowances, under today's proposal, may be expended at any point during the one year control period. On December 31st of the pertinent year, unexpended CUAs and CSAs disappear and the companies must be re-allocated allowances for the subsequent calendar year (control period). EPA seeks comments on today's proposal and the other options described above regarding when allowances are allocated and when allowances can be expended.

O. Can Allowances Be Traded?

In accordance with CAAA section 607, EPA proposes that producers and importers allocated critical use allowances (CUAs) be permitted to trade or transfer those allowances. EPA is proposing that CUAs would be transferable as other allowances for controlled ozone-depleting substances can be traded under existing regulatory provisions of the 40 CFR part 82, subpart A. Section 607 of the CAAA governs the allocation of allowances for the production and consumption of class I and class II ozone depleting substances and the transfers (trades) of such allowances. Paragraph (c) of section 607 requires that such transfers of allowances result in a lower level of production than if the trade had not occurred. In accordance with the requirements of section 607 of the CAAA, EPA is proposing an offset of one tenth of one percent of the amount of CUAs being traded that would be deducted from the transferor's allowance balance at the time of a trade. A one tenth of one percent offset is consistent with the offset required for the transfer of essential use allowances under the phaseout program for class I controlled ozone-depleting substances, which, like critical use allowances, permit the exempted production or import of ozone-depleting substances beyond a phaseout date.

Critical stock allowances (CSAs) are not used in order to produce or import methyl bromide but rather are rights to allowance holders to sell pre-existing supplies of methyl bromide to the critical use market. Because CSAs govern the amount of existing material that can be sold, EPA is not proposing to require an offset associated with transfers of CSAs. If the holder of a CSA does not wish to sell his inventoried methyl bromide to the critical use market, he may sell his critical stock allowances (CSAs) to another CSA holder. The second CSA holder may then sell additional amounts of his methyl bromide inventory to the agreed critical-use categories specified in the rulemaking. There will be no offsets with trades of CSAs.

As noted earlier, a CSA is only expended when methyl bromide stocks are sold to an approved critical user. Thus, normal distribution of stocks of methyl bromide from a producer or importer to a distributor does not require a CSA. For example, if a producer sends a distributor 10,000 kilograms of methyl bromide stocks for sale to approved critical users, the producer would not need to expend CSAs to sell methyl bromide to a distributor. However, if the distributor intended to sell the methyl bromide to an approved critical user, the distributor would need to have sufficient CSAs to sell to a self-certifying approved critical user. If the distributor did not have sufficient CSAs, it might request that the producer transfer CSAs to the distributor as part of the sales transaction of stocks manufactured prior to January 1, 2005.

For consistency with the requirements governing other types of allowance transfers under the stratospheric ozone phaseout regulations, EPA proposes that the entity that is selling or giving allowances to another entity must file an allowance transfer form with EPA, which the existing regulation requires EPA process within 3 business days of receipt. The current regulation states that trades not processed by EPA in 3 working days are automatically approved. EPA established this short review period to encourage trading and ensure the Agency does not impede a fluid market. Today's action proposes that the information to be provided to EPA would include the total number of CUAs to be transferred and the name of the entity who is acquiring the allowances. *See* 40 CFR 82.9, 82.10 and 82.12 under the current regulations and below in the proposed regulatory text.

EPA is proposing an additional, special type of transfer for the methyl bromide critical use exemption program. EPA is proposing that a person holding critical use allowances (CUAs) could exchange them for additional critical stock allowances (CSAs) and this exchange would not require an offset. Under this option, the CUAs would be retired and EPA would issue additional CSAs in an amount equal to the amount of retired CUAs. This type of an exchange is consistent with Decision IX/6 and section 607 of the Clean Air Act because it results in use of more stocks and less production in a given control period. Because the Parties specified the maximum amount of critical use methyl bromide that may be derived from new production or import in Decision Ex I/3, EPA is proposing that CUAs may be converted into CSAs in this manner, but not vice versa. The Protocol and CAAA have no restriction on meeting more critical use needs from stocks. However, because Decision Ex I/3 limits the total amount of new production or import in 2005, there cannot be an exchange that would increase the number of CUAs.

EPA is seeking comments on the programs proposed for trading allowances and the options that are described above.

P. Are Allowances Bankable From One Year to the Next?

EPA proposes to prohibit banking of allowances (both CUAs and CSAs) from one year to the next because the controls under the Montreal Protocol and the Clean Air Act are calendar year ''control periods''. The U.S. has obligations under the Montreal Protocol and the Clean Air Act to control the production and consumption of ozone-depleting ''controlled substances'' on an annual, calendar year basis. To date, the authorization for exempted production and import of methyl bromide for agreed critical-use categories (Decision Ex I/3) is only for the 2005 calendar year. For the 2005 calendar year (control period), methyl bromide production and import is prohibited, except where otherwise exempted. In addition, the controls on the use of stocks by critical use sectors are also limited to only the 2005 calendar year.

The Parties may allow for multiple year exemptions in the future which may possibly allow for banking of allowances from one year to the next so long as it is within the duration of the exemption authorized by the Parties. In addition, it is not clear whether future Decisions on the critical use exemption will employ the double cap concept and effectively limit the amount of material that may be obtained from stocks for critical uses. EPA will revisit the issue of banking allowances under a multi-year scenario to reflect any framework changes agreed to by the Parties in future decisions.

Q. How Is Unused Critical Use Methyl Bromide Treated at the End of the Compliance Period?

The critical use exemption is currently an annual exemption program. The amount of new production and

import authorized by the Parties for 2005 must be produced or imported during that calendar year (control period) and not beyond December 31st of the pertinent year. However, methyl bromide produced or imported under the authorized exemption for a given year may still be unused at the end of the compliance control period, and could be used in subsequent years for critical uses. In the event there are inventories of methyl bromide produced or imported with CUAs remaining at the end of the control period, EPA proposes to include these quantities in the calculation of available stocks (factor B) in the determination of total CUAs to be allocated for the subsequent year.

EPA is proposing that if critical use allowances (CUAs) are allocated on a sector-specific basis, and the methyl bromide is produced or imported but unused in the control period, the material could be used only for the approved critical uses in the subsequent control period. This proposal would mean quantities produced or imported with expended CUAs not used in the relevant control period would, as stated in today's proposal, be taken into account in the calculation of available stocks for determining the level of new production or import for the subsequent control period (factor B in the algorithm discussed in Section VI.A. above). EPA proposes including unused critical use methyl bromide in the calculation of available stocks for the subsequent year. EPA also proposes restricting the use of critical use methyl bromide produced or imported with expended sector-or applicant-specific allowances, if allocated in that manner in the final rule, so that it could only be used in the sector for which it was allocated. For example, if methyl bromide was produced in a given year with expended eggplant CUAs, EPA could limit the use of unused quantities to only approved critical use eggplant uses in the subsequent control period. EPA seeks comments on the proposed method for accounting for unused critical use methyl bromide and the other options discussed above.

R. What Are the Enforcement Provisions Governing Critical Uses?

Section 113 of the CAAA controls enforcement activities for violations of requirements under Title VI. Under the Stratospheric Ozone Program regulations, EPA has historically defined each kilogram of unauthorized production or importation of controlled substances to be a separate violation of its regulations. *See e.g.* 40 CFR 82.4(a)(1) (''Every kilogram of excess production constitutes a separate violation of this subpart.''). Likewise, for the restricted distribution under exemption programs of controlled substances, the Stratospheric Ozone Program has also considered each kilogram of inappropriate sale for a use other than the designated specific exempted purpose to be a separate violation. To ensure U.S. compliance under the Montreal Protocol, EPA believes this approach remains justified for enforcement against producers, importers, and distributors of methyl bromide because these are large companies that have an ability to pay higher penalties and should face a substantial deterrent against producing, importing, and selling large quantities of controlled substances in excess of allowances or application limitations. In addition, these producers, importers and distributors are larger companies that typically have government affairs staff and retain legal counsel to advise them on their regulatory requirements. Thus, EPA will continue to define violations involving the unauthorized production, import, or sale of critical use methyl bromide on a per kilogram basis.

In the case of methyl bromide end-users, defining each violation on a per kilogram basis could mean a small farmer might face the potential of a very high penalty if she applied critical use methyl bromide in an unauthorized fashion. However, in assessing penalties under any enforcement action, the Agency takes into consideration the size of the violator, the economic benefit or advantage achieved from the violation and the ability of the violator to pay a penalty. Farmers in many of the agreed critical use categories typically use several hundred kilograms of methyl bromide to treat a single acre. If the Agency were to maintain that each kilogram that is wrongly used is a separate violation, then a farmer ordering and applying 3,000 kilogram in error to her 10 acre farm would face a potential maximum penalty of more than $97 million.

EPA recognizes that there is a difference in scale of possible violations and impact on compliance with U.S. obligations under the Protocol and is therefore proposing to define each single violation for the mis-use of critical use methyl bromide by an end-user differently than a violation by a holder of a CUA or CSA so it reflects the typical farm size and application rate of a person in the approved critical-use categories, and also reflects the economic benefit/advantage that accrues due to a mis-use violation by an end-user. EPA is proposing to define each violation associated with the improper use of critical use methyl bromide in increments of 200 kilograms. Taking the example of the farmer described above, who ordered and submitted a self-certification to use 3,000 kilograms of critical use methyl bromide in accordance with today's proposed restrictions, but then wrongfully applied the material, she would face 15 separate violations for this mis-use with a potential maximum penalty of $487,000. EPA wishes to note again that in assessing penalties, the Agency takes into account the circumstances of the violation, the size of the violator and their ability to pay. EPA believes it is important to retain a sizable potential maximum penalty so there is a deterrent against abuse of this exemption from the phaseout. EPA also notes that larger farms (that might be operated by sizable agricultural corporations) will also be ordering and certifying the proper use of large quantities of critical use methyl bromide and if the material were to be mis-used they should continue to face large potential maximum penalties. EPA requests comments on whether the proposed definition for an end-user's violation is appropriate for enforcement, especially in light of the fact that the person is self-certifying that they will use the critical use methyl bromide in accordance with today's proposed restrictions for the exemption.

Under today's action, EPA is not proposing to use the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorities or mechanisms to implement or enforce the critical use exemption. However, under today's action, nothing precludes parallel implementation and enforcement under FIFRA and other Federal, State, and local pesticide regulations.

VII. What Are Other Options on Which EPA Seeks Comment?

In the section below, EPA describes other options for creating and regulating the exemption for critical use methyl bromide beyond the phaseout through the allocation of ''permits'' directly to end-users of methyl bromide, in contrast to today's proposal to distribute critical use allowances (CUAs) to producers and importers, and critical stock allowances (CSAs) to all suppliers of methyl bromide. These permits, hereafter referred to as ''critical user permits'' (CUPs) would differ from the critical use allowances in the following manner. Critical user permits would be redeemed to buy one (1) kilogram of methyl bromide for an approved critical use whereas a critical use allowance (CUA) would be an allowance for the production or import of one (1) kilogram

of methyl bromide by a manufacturer or importer of methyl bromide.

EPA believes that the options described in Section VII of this proposed rulemaking would create a new burden on approved critical users of methyl bromide. A full analysis of the burden associated with providing permits to end users is described in the supporting analytical documents that accompany this rule. The supporting analysis primarily analyzed two options for who could hold critical use allowances, producers and importers or end users. Under a system that creates permits distributed to methyl bromide end-users, EPA estimated that the annual burden would be about $6.4 million per year. In contrast, a system designed to provide allowances only to producers and importers would cost about $2.2 million. For a more complete discussion of the supporting analysis, please see Section VIII.A of this proposal.

In conducting the analysis, in some cases EPA made only qualitative assessments due to uncertainty about the future price of methyl bromide and other unknown factors. In other instances, it was difficult to create a direct quantitative comparison on the de-regulatory benefit of one option compared to the other. EPA believes the options in Section VII would be substantially more burdensome for approved critical users (end-users) than the proposed option in Section VI. At the stakeholder meetings held over the previous year EPA received public comment to this effect. To the degree that not all potentially interested parties were able to attend these stakeholder meetings, EPA requests comment on these options to better understand if the benefits of these options outweigh the additional regulatory burden.

A. Distribution of Critical User Permits (CUPs) to End Users of Methyl Bromide?

Under the option of regulating downstream distribution of critical use methyl bromide through the allocation of critical user permits (CUPs) to methyl bromide end-users there are two options for initial distribution of CUPs.

One option, similar to the method used in Canada under their phaseout of methyl bromide, would involve the distribution of permits to end users. The second option would employ an auction system whereby the allowances would be sold to the user with the highest bid.

The first option, would involve distributing CUPs to end users based on historical information and would require individual farms and companies to provide data to EPA (see Section VIII.E for more detail on distribution of permits). EPA would then examine the data and would write an additional notice-and-comment rulemaking to distribute permits to each entity. This process would take between one and two years to complete, due the large number of critical use methyl bromide end-users (approximately 2,000 farmers or companies), so permits would not be available to end users until after the phaseout takes effect. In such a scenario, EPA would implement the CUPs beginning in 2007 and rely on an upstream system as described in Section VI as an interim control measure until 2007.

The second method to distribute CUPs would be an auction; which would circumvent the burden and time involved with directly distributing permits to end-users based on historitical data. However, the auction of CUPs, similar to a method where EPA uses historical data to distribute CUPs, would impose more requirements on end users than the proposed option. End users under the auction would be required to familiarize themselves with auction procedures, participate in the auction, keep records of all auction and CUP activities for three years, and report to EPA annually on the use of CUPs acquired. Under the proposed option, end users would not have any reporting or recordkeeping obligations except self-certification when placing a purchasing order. Again, similar to using historical data to distribute CUPs, there are timing concerns regarding the auction. The time taken to implement an auction would cause an implementation delay past January 2005.

In stakeholder meetings held by EPA over the summer of 2003, stakeholders universally commented that they wanted a simple regulation and one that would impose minimum burden on end users. This comment was regularly made in association with the two end-user permit options (CUP options), which stakeholders viewed as presenting significant burden on end-users without sufficient accompanying benefits.

Under either CUP scenario, EPA would abide by the parameters set by the Parties in the authorization of critical use exemptions. Decision Ex I/3 requests that Parties endeavor to allocate critical use permits according to the use categories recommended by the TEAP. The two types of auctions for distribution of CUPs could be an auction where all critical users would vie for permits or it could be separate sector-level auctions by approved critical use category. EPA may propose to be more restrictive than required under the Protocol, as interpreted by the Parties, but not less.

B. What Is a Critical User Permit (CUP) and Can It Be Traded?

A critical user permit (CUP) is a permit which would entitle the holder to obtain one kilogram of methyl bromide for use for approved critical uses. Once a user acquires an initial allocation of permits, whether through rulemaking or auction, EPA would allow the user to either redeem the permit to buy methyl bromide, hold that permit unredeemed until the end of the control period when it would expire, or sell the permit to another entity.

Although only approved critical users would be given CUPs initially, EPA could restrict the type of entity to whom approved critical users could sell permits. Allowing end-users to trade CUPs with brokers, trading firms, citizen groups and others might affect the methyl bromide market.

EPA has identified three additional ways that trades of CUPs might be governed: (1) Allowing trades only within a sector (only allowing a tomato trade with a tomato grower), (2) allowing trades of CUPs across sectors (a tomato CUP for a strawberry CUP), or not allowing end-users to trade their CUPs after the initial allocation (resulting in a more command and control approach).

C. Who Is Eligible To Receive an Initial Allocation of CUPs and Who May Use CUPs?

There are two options for who can receive an initial allocation of CUPs. The first option would only allow those entities included in an application to EPA to receive an initial allocation of CUPs. The second option would allow those users not explicitly covered by an application but who have the limiting critical condition to receive an initial allocation. Once an entity receives its CUP allocation, it can either use it to acquire critical use methyl bromide, or it can simply hold it (holding a CUP is addressed in Section VII. D below). There are also two options for who can use a CUP to acquire critical use methyl bromide, namely only allowing those entities included in an application to EPA to participate, or allowing those users not explicitly covered by an application but who have the limiting critical condition to redeem a CUP for methyl bromide.

EPA believes that it would be unfair to those groups that invested the resources in applying to EPA for an exemption if EPA adopted an option that would make an initial allocation of permits available to users who meet the

limiting critical condition but are not covered by an application. However, EPA believes that a hybrid approach which allows any user who meets the limiting critical condition to buy permits after the initial allocation would be reasonable in that the right of first refusal has already been given to those that applied for the exemption.

D. Who May Hold a CUP?

Even though only approved critical users would be able to obtain methyl bromide under the critical use exemption, EPA could allow any entity to hold permits. For example, EPA could allow citizen groups and brokers to hold permits, but not give such entities an initial allocation and not allow them to use or redeem the CUPs.

E. Methods for Distribution of Critical User Permits: Distribution Based on Data

EPA recognizes several methods for distributing CUPs to the end user community using entity-level historic use and/or operational information. One method would use entity-level historic methyl bromide use data to create a baseline against which CUPs would be allocated. Under this option, individual end users would have to provide 3 years of historic use data and documentation to EPA which would include total quantity (kilograms) of methyl bromide used in each year, the hectares or cubic meters treated annually, the formulation rates, and data on efforts to minimize use and emissions. Using these data, EPA would establish a straight average baseline and would pro-rate amounts of methyl bromide available to the sector by the total treated area requested by entities that submitted the additional data.

If a user has not been a historic grower or owner of the commodity for which he seeks an exemption but is now a member of a covered consortium, EPA is considering having that user submit documentation to support his plans to treat the specified acreage/volume. Alternatively, a new entrant might not be given an initial allocation but be allowed to buy and use CUPs from a willing seller so long as the entity met the limiting critical condition.

Another method for distributing CUPs would involve economic considerations for each entity. For example, EPA could distribute permits to those users with the highest cost, in other words to those end users with the greatest economic need. Alternatively, EPA is considering distributing permits to end users with the lowest cost, who would then be inclined to sell their permits to users who have a higher cost. In order for EPA to make a determination as to how to distribute permits under a scenario using cost criteria, individual entities would have to submit historic use data to EPA and individual entity cost data.

F. Submitting Individual Entity Data To Obtain Critical User Permits (CUPs)

Under an option involving the distribution of CUPs, users would be required to submit the additional data for baseline determination either with the annual critical use application or under separate cover to EPA. Each year, beginning in 2002, users interested in a critical use exemption have been required to submit a detailed application to EPA between August and September. A small number of users applied only on behalf of their operations alone and therefore for these users, EPA has sufficient use data on a per entity basis in order to create a historic baseline of methyl bromide use for a few entities.

Most users however applied for a critical use exemption as groups of similar users (*e.g.* all of tomato growers in Michigan). In these instances, EPA does not have the bulk of the baseline data needed to create per entity historic baselines of methyl bromide use.

Due to the amount of time it would take (a) for users to submit additional data and documentation to EPA and (b) for EPA to analyze the data and write a notice-and-comment regulation allocating baseline allocations, EPA would implement the CUPs beginning in 2007 and relying on an upstream system as described in Section VI of this proposal an interim control measure until 2007.

G. Methods for Distribution of Critical User Permits: Distribution Using Auctions

EPA notes that an auction could be used for distributing critical use permits (CUPs) to operations (users) that meet the critical use criteria. EPA understands that affected entities have expressed a strong preference for a simple regulatory mechanism for the critical use exemption. EPA believes that of all the options, an auction may be by far the most complex to design, would be unlikely to be in place in time for the beginning of the critical use exemption, and may impose a steep learning curve on affected entities.

EPA does not have statutory authority to set a price for methyl bromide under the Clean Air Act. Therefore, to implement an auction, EPA could only consider an option that did not have the government set a minimum or maximum price for material under the critical use exemption. EPA therefore is only considering auctions using a sealed bid method with no set minimum bid. Other bid options which EPA did not consider include the ascending bid or English auction and the declining bid or Dutch auction.

In a sealed bid auction, each bidder discloses the maximum bid they would offer and the number of permits they are seeking. The auctioneer then opens all of the bids and awards the permits to the highest bidders until there are no more permits left. The price of the last permit awarded could be used to set the price of all of the bids awarded (clearing price) or the price could be determined by the bid set by the bidder (''pay as you bid''). In an ascending auction bid, the auctioneer offers a losing bidder the chance to increase his/her bid. When the bidding has ended, the permits are distributed to the highest bidders. In a declining bid auction, the auctioneer sets a price for the permit at the high end of the spectrum. Bidders can then accept the price and buy permits or can wait and see if the price comes down. EPA believes that it only has authority for a ''pay as you bid'' auction.

To submit a bid, a user would first have to establish an account via a letter of credit or similar mechanism with the auctioneer or would have to submit a certified check for their maximum bid amount with their bid form. Information on the bid form would include name of bidder, contact information for bidder, name and contact information of the authorized representative if applicable, number of kilograms the bidder wishes to purchase at a given price, type of permits if applicable, location to be fumigated, a description of other crops or uses that would benefit from the fumigation (*e.g.* a double crop of peppers), and a certification form that any methyl bromide obtained will be used only for critical use purposes.

The bid price could be structured to include just the cost of the permit (the bid premium) or the cost of the permit plus the price of the actual methyl bromide purchased. In the former, the bidder only obtains the right to buy methyl bromide at a price to be set by the supplier; in the latter option, the price paid by the successful bidder includes the right to buy methyl bromide and the cost of the methyl bromide. However, since EPA does not have the authority to redistribute revenues from the auction, EPA only considered a bid price that covers the cost of the CUP (the right to buy methyl bromide) alone.

All revenues from the auction would be sent to the U.S. Treasury since EPA does not have statutory authority to capture the revenue for other purposes.

EPA is considering running the auction in house, having another federal entity run the auction, or allowing a third party to administer the auction. Each of these implementation schemes for operating the bidding process would award the CUPs simply on the basis of price. In the event that a third party were to run the auction, EPA examined the options of having the party run the auction either for a fee or as a gratuitous service to the government. If the auction would be run as the latter, the third-party would then be able to charge a reasonable administration fee from those in the user community that elected to participate in the auction.

H. Frequency of Auctions and Set Asides

In order to make the auction feasible, EPA believes that two auctions a year would be required, one shortly before the beginning of the control period and one three to four months after the new control period begins. The second, later auction would be required in order to ensure that quantities of methyl bromide authorized by the Parties to the Protocol in their meeting only two months before the control period and approved through rulemaking during the early part of the compliance period could be allocated to users

EPA recognizes that it could create a set-aside program to hold back CUPs from an auction and that there are options for the amount that could be held for the subsequent auction(s), and the numbers of times and dates during a year for subsequent auctions. Under such a program, between 10% and 50% of the total allowable amount, would be held in reserve for a second annual auction in order to accommodate those users who typically acquire methyl bromide later on in the season.

I. Other Methods for Distributing CUPs

Other options for distributing critical use permits (CUPs) would not entail EPA giving permits directly to end users of methyl bromide, such as giving the CUPs to the consortium that applied for an exemption. The consortium could then determine how they would like to distribute allowances to individual users, either through use of data or through an auction. However, there are several consortia that do not have any infrastructure to receive and distribute the permits and some consortia are not even legally incorporated entities. Alternatively, EPA is considering giving allowances to State governments to re-distribute using a method of their choosing. However, due to concerns about the possibility of creating an unfunded mandate, EPA has decided not to further consider such an option.

J. Tracking Permits

EPA is evaluating the feasibility of developing a web-enabled database program to allow for the tracking and trading of CUPs. Since almost 10 million CUPs could be issued based on the number of kilograms requested by the U.S. government for critical uses in the 2003 nomination, EPA believes that a new tracking system would have to be developed to facilitate the trading and tracking of CUPs. Each entity that applies for an initial allocation of CUPs would be required to create an account in the web-enabled database as well as entities that sell or distribute methyl bromide to end users and entities who acquire permits through trading. Once allocated, EPA would place CUPs in the account of the end user. All accounts would be frozen on an annual basis on December 31st for the annual true-up period during which time no transactions could take place.

K. Redeeming CUPs for Methyl Bromide

A CUP holder may redeem his permit with a methyl bromide supplier such as a custom applicator or distributor by transferring his permits to the supplier's account. To transfer the permits, EPA would require the permit holder to electronically transfer his permits to the supplier's account indicating the number of acres/square feet to be treated, location of area to be treated (address, coordinates, parcel ID number) and whether a second crop will benefit from the fumigation. The permit holder would then transfer the permits electronically to the supplier's account, at which point the permits would be deactivated automatically by the system. Automatically, an electronic mail notification would be sent to the supplier notifying him that the specified CUPs have been transferred to his account. The user would then print out a certification form that the material would only be used for the specific critical use, sign it and send it to the supplier before he or she could receive the methyl bromide. A supplier or end user would have ten business days to dispute the transaction with EPA in the event that an error was made by the permit holder in the transfer of permits.

L. Reporting Requirements for CUP Holders

CUP holders would be required to annually reconcile their accounts by submitting a written form to EPA no later than 15 days after the end of the control period, *i.e.* December 31st or the date when all unredeemed permits would expire. The form would be created by EPA and available on the EPA's methyl bromide website. CUP holders would be required to indicate how much critical use methyl bromide bought during the year has not been used and/or remains held in inventory for future use.

M. Interaction Between CUPs and CUAs

EPA could implement the CUP program as a stand alone program or in conjunction with a CUA and CSA program. If the CUP program were to be implemented as a stand alone program, CUP holders would sell their permits to producers and importers of methyl bromide at a time of their choosing. The producers and importers would not be able to produce or import methyl bromide until they held sufficient CUPs to match their production or import decisions. EPA believes that under such a system, it is likely that producers and importers would solicit CUPs early in the year in order to bundle them for planning the year's production or import. Producers and importers might be likely to pay more for permits they obtain early in the year since they seek certainty on the amounts they will be able to produce and import during the year.

Under the stand alone CUP program, EPA is considering two options for how permit holders would obtain methyl bromide. Under the first option, the permit holder would be entitled to receive 1 kilogram of methyl bromide for each permit sold. EPA believes that under this scenario, the price producers and importers would be willing to pay is likely to be lower than under the second option. Under the second option, a permit holder would sell his permit to a producer or importer and would then purchase methyl bromide at a later date through his normal supplier as a separate transaction following the procedures proposed in today's notice-and-comment rulemaking.

Under the stand alone CUP program, the reporting and recordkeeping requirements for producers, importers, distributors, custom applicators and fumigators would be required as described in Sections VI of this preamble. EPA understands that creating a stand alone CUP system for the creation of exempted methyl bromide could place some strain on the methyl bromide production system unless producers and importers were able to buy CUPs from permit holders several months in advance of the control period. However, due to the time it would take to allocate CUPs through a notice-and-comment rulemaking, it would be unlikely that sufficient time

would be available before the control period for producers and importers of methyl bromide to have sufficient certainty to make production decisions.

Under a combined option, in which EPA might allocate CUPs, as well as CUAs, and CSAs (as in the program described in Section VI of today's notice) the tracking requirements on usage and sector-specific limitations on CUAs and/or CSAs by sector might be able to be eliminated since these requirements, in part, are designed to ensure that the U.S. does not exceed the recommended amounts for each sector.

VIII. What Conforming Amendments Is EPA Proposing With Respect to Essential Use Allowances?

To make it easier for the public to read and EPA to update the allocation of critical use allowances and critical stock allowance each year, EPA proposes to create a new regulation at 40 CFR 82.8. This section number is currently reserved. EPA proposes to place the list of critical use allowance and critical stock allowance allocations in this section.

In addition, to be consistent with this improved formatting for the critical use exemption regulations, EPA also proposes to include the essential use allowance allocations in section 82.8. Moving these essential use allowance allocations to section 82.8 requires certain conforming amendments to sections 82.3 and 82.4(n) as reflected in the proposed regulatory text below.

IX. Statutory and Executive Order Reviews

A. Executive Order No. 12866: Regulatory Planning and Review

Under Executive Order No. 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to 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 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.

OMB has notified EPA that it considers this a ''significant regulatory action'' under Executive Order No. 12866 and EPA has submitted it to OMB for review. We will document changes made in response to OMB suggestions or recommendations in the public record.

EPA conducted an economic impact analysis (Economic Impact Analysis for Methyl Bromide Allocation in the United States, hereafter EIA) that attempts to assess the effect of allowing critical use exemptions on the regulated entities. The analysis is conducted relative to the complete phaseout of methyl bromide production and consumption in 2005 (consumption is defined as production plus imports minus exports). Therefore, any change in the existing regulations that allows for continued production and import of methyl bromide may be considered de-regulatory in nature, and will likely result in overall cost savings to the regulated entities. Note that this analysis focuses only on the effects to the regulated entities.

EPA looked at three illustrative alternatives for implementing the critical use exemption: (1) An upstream cap and trade allowance system which would give critical use allowances to producers and importers of methyl bromide; (2) an upstream cap and trade system with a downstream permit trading system where the permits are distributed to end users and; (3) an upstream cap and trade system with a downstream permit trading system where the permits are initially obtained through an auction. Alternative 1 mirrors the Agency's proposal; Alternatives 2 and 3 mirror the CUP option.

Given the illustrative nature of these alternatives, many assumptions are invoked. One of the critical assumptions used to generate the analysis is the assumed phaseout schedule. The analysis assumes that in 2005, the CUE exemption would equal 39 percent of the 1991 U.S. baseline consumption. By 2018, the analysis assumes that methyl bromide production and consumption would be phased out completely

EPA also assumes that under a universal approach, 80 percent of the total available amount of methyl bromide would go to the two largest groups of end users, tomatoes and strawberries. Eighty percent was used to reflect the total amount of methyl bromide originally requested by these applicants as a proportion of the amount requested by other applicants. See EIA for more discussion.

The incremental cost savings estimated for today's proposed rule includes two general components: cost savings from the continued use of methyl bromide as compared to use of a more expensive substitute (under the baseline), and the economic benefit associated with the increased crop yield obtained through use of methyl bromide instead of a less effective substitute (under the baseline). The analysis also estimates the administrative costs associated with each option (*e.g.*, reporting and recordkeeping).

The estimated cost savings are approximately $19 million to $31 million on an annual basis and $380 million to $600 million on a Net Present Value basis depending on the particular option and discount rate used (EIA, p. 126).

TABLE I.—ANNUALIZED AND NET PRESENT VALUE OF PRIVATE SECTOR COMPLIANCE COSTS FOR ALTERNATIVE 1*

[In millions of dollars]

Discount rate	Annualized costs		Net present value costs	
	Sector specific approach	Illustrative universal approach	Sector specific approach	Illustrative universal approach
3%	−$19.5	−$21.9	−$616.6	−$695.6
7%	−26.8	−31.3	−382.7	−446.8

* Timeline: 2005–2018.

There are two factors which affect these estimates: the size of the cap (*i.e.* the amount of critical use methyl bromide exempted) and how the cap is constrained (*i.e.* if there is one ''universal'' amount of methyl bromide made available to all approved critical users or if there is a sub-cap for each sector/commodity group).

The EIA addresses the question of whether or not a framework option that would create either an upstream cap and trade system (Alternative 1) or a downstream tradable permit system (Alternative 2) is more economically efficient (Alternative 3, the auction approach for allocating allowances, was not quantitatively analyzed in this EIA). The EIA concluded that in fact who holds the allowances has relatively little impact on the efficiency of compliance costs per se and that such costs are impacted more by the size of the cap and constraints on the cap as identified in the preceding paragraphs. Under both options, methyl bromide is ultimately purchased by the user of methyl bromide with the highest willingness to pay. The main driver of efficiency is whether or not methyl bromide goes to the highest value use within a commodity sector or if it goes to the use with the highest value across sectors. According to Chapter 5 of the EIA, however, there are some factors that could affect whether or not the options produce the same result in terms of consumption of methyl bromide by end users and in control costs, namely how smoothly the market functions under either option. For more information on the qualitative factors that would impact either option for who holds the allowances, as well as a discussion of the limitations associated with the analysis, please refer to the EIA available in docket OAR–2003–0230.

While option two is better than option one in compensating end users who give up their *de facto* ''rights'' to methyl bromide, the drawback to option two is the additional complexity in both administering the system and in complying with the system. The EIA estimates that the administrative burden for the regulated community and EPA under options one and two as follows:

TABLE 2.—ADMINISTRATIVE BURDEN OF ALTERNATIVES 1 AND 2

	EPA burden	Industry burden
Alternative One	[1] $25 k [2] 15 k	[1] $2,200 [2] 86 k
Alternative Two	[1] 2,100 k [2] 53 k	[1] 6,400 k [2] 2,000 k

Source: EIA pages 102 and 117.
[1] Annual.
[2] One time.

Because the general methodological framework of the model used for the analysis of the 2000 Phaseout Rule was retained to calculate the costs for today's proposed rule, and because the phaseout model relies on an engineering approach, the EIA is not well suited to predict the distribution of methyl bromide. In addition to this limitation, the analysis does not take into account the full array of alternatives to methyl bromide that are under development. Also, due to the limited nature of the analysis, the EIA does not explore how the costs savings would pass through the economy, and who (consumers and/or regulated entities) will eventually realize the cost savings.

Further details regarding the de-regulatory benefits of the proposed critical use exemption and a discussion on the relative merits of the two main options are available in the EIA which is docketed with this proposed rulemaking.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

EPA submitted an ICR to OMB concurrent with today's proposed rule. In the ICR, EPA characterizes the paperwork burden that industry may face as a result of today's proposed action. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1432.23.

The information collection under this rule is authorized under sections 603(b), 603(d) and 614(b) of the Clean Air Act (CAA).

The mandatory reporting requirements included in this rule are intended to:

(1) Satisfy U.S. obligations under the international treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol), to report data under Article 7;

(2) Fulfill statutory obligations under section 603(b) of Title VI of the Clean Air Act (CAA) for reporting and monitoring;

(3) Provide information to report to Congress on the production, use and consumption of class I controlled substances as statutorily required in section 603(d) of the CAA.

Information will be collected through quarterly reporting by producers and importers and annual reporting by distributors and third party applicators of methyl bromide. In addition, distributors and third party applicators would be required to provide quarterly updates on the availability of critical use exempted methyl bromide.

Collection activity	Number of respondents	Total number of responses	Hours per response	Total hours
Rule Familiarization	54	54	4	216
Report Inventory Data (one time)	54	54	2.5	135
Data Compilation (quarterly basis)	4	16	4	64
Data Compilation (annual basis)	50	50	8	400
Data Reporting (quarterly basis)	4	16	.5	8
Data Reporting (annual basis)	50	50	.5	25
Reporting on Allowance Trading Activities	4	16	.5	8
Self Certification Activities by Producers, Importers, and Distributors	54	100	.25	25
Self Certification Activities by End Users	2,000	2,500	.25	625
Total Burden Hours	.....	.....	18	1,505

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; process and maintain information; disclose and provide 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.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rule, which includes this ICR, under Electronic Docket ID number OAR–2003–0230. Submit any comments related to the rule ICR for this proposed rule to EPA and OMB. *See* **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503 attn: Desk Officer for EPA. Include the EPA ICR number (1432.23) in correspondence related to this ICR.

EPA informs respondents that they may assert claims of business confidentiality for any of the information they submit. Information claimed confidential will be treated in accordance with the procedures for handling information claimed as confidential under 40 CFR part 2, subpart B, and will be disclosed only to the extent, and by means of the procedures, set forth in that subpart. If no claim of confidentiality is asserted when the information is received by EPA, it may be made available to the public without further notice to the respondents (40 CFR 2.203).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small 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 is identified by the North American Industry Classification System (NAICS) Code in the Table below; (2) A small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less that 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Category	NAICS code	SIC code	NAICS Small business size standard (in number of employees or millions of dollars)
Agricultural production	1112—Vegetable and Melon farming. 1113—Fruit and Nut Tree Farming. 1114—Greenhouse, Nursery, and Floriculture Production. 0831—Forest Nurseries and Gathering of Forest Products.	0171—Berry Crops 0172—Grapes 0173—Tree Nuts 0175—Deciduous Tree Fruits (except apple orchards and farms) 0179—Fruit and Tree Nuts, NEC 0181—Ornamental Floriculture and Nursery Products	$0.75 million.
Storage Uses	..... 115114—Postharvest Crop activities (except Cotton Ginning). 311211–Flour Milling. 311212–Rice Milling.	2041—Flour and Other Grain Mill Products 2044—Rice Milling	$6 million.
	..... 493110—General Warehousing and Storage.	4221—Farm Product Warehousing and Storage	$21.5 million.

Category	NAICS code	SIC code	NAICS Small business size standard (in number of employees or millions of dollars)
	493130—Farm Product Warehousing and Storage.	4225—General Warehousing and Storage	

Agricultural producers of minor crops and entities that store agricultural commodities are categories of affected entities that contain small entities. This rule only affects entities that applied to EPA for a de-regulatory exemption. In most cases, EPA received aggregated requests for exemptions from industry consortia. On the exemption application, EPA asked consortia to describe the number and size distribution of entities their application covered. Based on the data provided, EPA estimates that there are 3,218 entities that petitioned EPA for an exemption. Since many applicants did not provide information on the distribution of sizes of entities covered in their applications, EPA estimated that between ¼ to ⅓ of the entities may be small businesses based on the definition given above. In addition, other categories of affected entities do not contain small businesses based on the above description.

After considering the economic impacts of today's proposed rule on small entities, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' (5 U.S.C. 603–604). Thus, an Agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves a regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Since this rule will make methyl bromide available for approved critical uses after the phaseout date of January 1, 2005, this is a de-regulatory action which will confer a benefit to users of methyl bromide. EPA believes the estimated de-regulatory value for users of methyl bromide is between $20 million to $30 million annually. We have therefore concluded that today's proposed rule will relieve regulatory burden for all small entities. 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), P.L. 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 by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a written statement is required under section 202, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or the selection of this alternative is inconsistent with law.

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

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more by State, local and tribal governments, in the aggregate, or by the private sector, in any one year. Today's proposed rule seeks to obtain comment on provisions authorized under the international treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer, as well as authorizations set forth by Congress in section 604(d)(6) of the Clean Air Act. Viewed as a whole, all of today's amendments do not create a Federal mandate resulting in costs of $100 million or more in any one year for State, local and tribal governments, in the aggregate, or for the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has also determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments; therefore, EPA is not required to develop a plan with regard to small governments under section 203. Finally, because this proposal does not contain a significant intergovernmental mandate, the Agency is not required to develop a process to obtain input from elected State, local, and tribal officials under section 204.

E. Executive Order No. 13132: Federalism

Executive Order No. 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.'' The phrase ''policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order No. 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct control costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct control costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that

preempts State law, unless the Agency consults with State and local officials early in the process of developing the regulation.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order No. 13132. Today's proposed rule is expected to primarily affect producers, suppliers, importers and exporters and users of methyl bromide. Thus, the requirements of Section 6 of the Executive Order do not apply to this proposed rule.

F. Executive Order No. 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order No. 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order No. 13175. Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. The proposed rule does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order No. 13175 does not apply to this proposed rule.

G. Executive Order No. 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order No. 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under Section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order No. 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order No. 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 rule does not pertain to any segment of the energy production economy nor does it regulate any manner of energy use. Therefore, we have concluded that this rule is not likely to have any adverse energy effects.

I. The National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 82

Environmental protection, Chemicals, Exports, Imports, Methyl bromide, Ozone, Production, Reporting and recordkeeping requirements, and Treaties.

Dated: August 11, 2004.

Michael O. Leavitt,

Administrator.

For the reasons stated in the preamble, 40 CFR part 82 is proposed to be 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 A—Production and Consumption Controls

2. Section 82.3 is amended as follows:

a. By adding definitions in alphabetical order for the terms, ''Approved critical use,'' ''Approved critical user,'' ''Consortium,'' ''Critical stock allowance,'' ''Critical stock allowance holder,'' ''Critical use,'' ''Critical use allowance,'' ''Critical use allowance holder,'' ''Critical use methyl bromide,'' ''End user,'' ''Limiting critical condition,'' ''Location of use,'' ''Sell to approved critical users,'' ''Third party applicator,'' ''Unexpended critical stock allowance,'' and ''Unexpended critical use allowance;''

b. By revising definition of ''Confer.''

§ 82.3 Definitions for class I and class II controlled substances.

* * * * *

Approved critical use(s) means those uses of methyl bromide listed in Appendix L to this subpart that have a limiting critical condition.

* * * * *

Approved critical user(s) means a person who:

(1) For the applicable control period, applied to EPA for a critical use exemption or is a member of a consortium that applied for a critical use exemption for a use and location of use that was included in the U.S. nomination, authorized by a Decision of the Parties to the Montreal Protocol, and then finally determined by EPA in a notice-and-comment rulemaking to be a critical use in that location; and

(2) Has an area in the applicable location of use that requires methyl bromide fumigation because the area is subject to a limiting critical condition.

* * * * *

Confer means to shift the essential-use allowances obtained under § 82.8 from the holder of the unexpended essential-use allowances to a person for the production of a specified controlled substance, or to shift the HCFC–141b exemption allowances granted under § 82.16(h) from the holder of the unexpended HCFC–141b exemption allowances to a person for the production or import of the controlled substance.

* * * * *

Consortium means an organization representing a group of methyl bromide

users that has collectively submitted an application for a critical use exemption on behalf of all members of the group. The members of a consortium shall be determined on the basis of the rules established by the organization. Members may either be required to formally join the consortium (*i.e.*, by submitting an application or paying dues) or may automatically become members upon meeting particular criteria (*i.e.* a grower of a specific crop in a particular region).

* * * * *

Critical stock allowance (CSA) means the privilege granted by this subpart to sell one (1) kilogram of methyl bromide to an approved critical user during the specified control period to the extent permitted by federal and state pesticide statutes and regulations other than the Clean Air Act and regulations in this part. A person's critical stock allowances are the total of the allowances obtained under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

Critical stock allowance (CSA) holder means an entity to which EPA allocates a quantity of critical stock allowances as reflected under § 82.8(c).

Critical use means a circumstance in which the following two conditions are satisfied:

(1) There are no technically and economically feasible alternatives or substitutes for methyl bromide available to end users that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances involved, and

(2) The lack of availability of methyl bromide for a particular use would result in significant market disruption in the United States.

Critical use allowance (CUA) means the privilege granted by this subpart to produce or import on (1) kilogram of methyl bromide for an approved critical user during the specified control period. A person's critical use allowances are the total of the allowances obtained under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

Critical use allowance (CUA) holder means an entity to which EPA allocates a quantity of critical use allowances as reflected in § 82.8(c).

Critical use methyl bromide means the class I, Group VI controlled substance produced and imported through expending a critical use allowance.

* * * * *

End user means a person that treats or fumigates commodities, crops, structures or land in his possession with methyl bromide or contracts with a third party applicator for such treatment or fumigation.

* * * * *

Limiting critical condition means the regulatory, technical, and economic circumstances listed in Appendix L to this subpart that establish conditions of critical use for methyl bromide in a fumigation area. Such conditions may include, but are not limited, to:

(1) The absence of technically and economically feasible alternatives to methyl bromide for a specific use;

(2) Regulatory restrictions that prohibit the use of available alternatives in a specific fumigation area;

(3) Terrain, soil, or climatological conditions that render use of available alternatives technically or economically infeasible in a specific fumigation area.

* * * * *

Location of use means the geographic area (such as a state, region, or the entire United States) covered by an application for a critical use exemption in which the limiting critical condition may occur.

* * * * *

Sell to approved critical users means to sell quantities of methyl bromide to an end user or to contract with an end user to provide treatment or fumigation services on commodities, structures, crops, or land in the possession of the end user.

* * * * *

Third party applicator means an applicator of critical use methyl bromide who fumigates or treats commodities, structures, crops, or land in the possession of an end user.

* * * * *

Unexpended critical stock allowances (CSA) means critical stock allowances against which methyl bromide has not yet been sold or distributed to approved critical uses. At any time in any control period a person's unexpended critical stock allowances are the total of the level of critical stock allowances the person has authorization under this subpart to hold at that time for that control period, minus the level of class I, Group VI controlled substances that the person has sold or distributed to approved critical users in that control period until that time.

* * * * *

Unexpended critical use allowances (CUA) means critical use allowances against which methyl bromide has not yet been produced or imported. At any time in any control period a person's unexpended critical use allowances are the total of the level of critical use allowances the person has authorization under this subpart to hold at that time for that control period, minus the level of class I, Group VI controlled substances that the person has produced or has imported solely for approved critical uses in that control period until that time.

* * * * *

3. Section 82.4 is amended by revising paragraphs (b), (d) and (n), and by adding paragraph (p) as follows:

§ 82.4 Prohibitions for class I controlled substances.

* * * * *

(b) 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 substance, and effective August 18, 2003, for any class I, Group VIII controlled 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 under this subpart, or the amount of unexpended critical use allowances allocated under this subpart, or the amount of unexpended Article 5 allowances as allocated under § 82.9, 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.

* * * * *

(d) 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 substance, and effective August 18, 2003, for any class I, Group VIII controlled substance, no person may import (except for transhipments or heels), at any time in any control period, (except for controlled substances that are transformed or destroyed) in excess of the amount of unexpended essential use allowances or exemptions, or unexpended critical use allowances, allocated in this subpart for that substance held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess importation (other than transhipments or heels) constitutes a separate violation of this subpart. It is a violation of this subpart to obtain unused class I controlled substances under the general laboratory exemption in excess of actual need and to recycle that material for sale into other markets.

* * * * *

(n) No person may use class I controlled substances produced or

imported under the essential use exemption for any purpose other than those set forth in this paragraph. Effective January 1, 1996, essential-use allowances are apportioned to a person under § 82.8(a) and (b) for the exempted production or importation of specified class I controlled substances solely for the purposes listed in paragraphs (n)(1)(i) through (iii) of this section.

(1) Essential-uses for the production or importation of controlled substances as agreed to by the Parties to the Protocol and subject to the periodic revision of the Parties are:

(i) Metered dose inhalers (MDIs) for the treatment of asthma and chronic obstructive pulmonary disease that were approved by the Food and Drug Administration before December 31, 2000.

(ii) Space Shuttle—solvents.

(iii) Essential laboratory and analytical uses (defined in Appendix G of this subpart).

(2) Any person acquiring unused class I controlled substances produced or imported under the authority of essential-use allowances or the essential-use exemption granted in § 82.8 to this subpart for use in anything other than an essential-use (*i.e.*, for uses other than those specifically listed in paragraph (n)(1) of this section) is in violation of this subpart. Each kilogram of unused class I controlled substance produced or imported under the authority of essential-use allowances or the essential-use exemption and used for a non-essential uses is a separate violation of this subpart. Any person selling unused class I controlled substances produced or imported under authority of essential-use allowances or the essential-use exemption for uses other than an essential-use is in violation of this subpart. Each kilogram of unused class I controlled substances produced or imported under authority of essential-use allowances or the essential-use exemption and sold for a use other than an essential-use is a separate violation of this subpart. It is a violation of this subpart to obtain unused class I controlled substances under the exemption for laboratory and analytical uses in excess of actual need and to recycle that material for sale into other markets.

* * * * *

(p) *Critical use exemption.* With respect to class I, Group VI substances (methyl bromide):

(1) No person shall sell critical use methyl bromide to an end user who is not an approved critical user. Every kilogram of critical use methyl bromide sold to an end user that is not an approved critical use constitutes a separate violation of this subpart.

(2) No person who acquires critical use methyl bromide may use such quantities for a use other than the specified critical use listed in Column A of Appendix L to this subpart. No person who acquires critical use methyl bromide produced under an allowance for a specific use sector listed in Appendix L to this subpart, if applicable, may use such quantities in a different use sector. No person who acquires critical use methyl bromide may use such material unless he meets a limiting critical condition listed in Appendix L to this subpart. No approved critical user shall take possession of quantities of critical use methyl bromide or acquire fumigation services using quantities of critical use methyl bromide without first certifying that they are approved critical users in accordance with the requirements in § 82.13. Every 200 kilograms of methyl bromide certified by an end user to be acquired for an approved critical use that is used for a use other than the specified critical use listed in Column A of Appendix L to this subpart constitutes a separate violation of this subpart .

(3) No person shall sell critical use methyl bromide to an approved critical user without first obtaining a signed certification form from the approved critical user. Every kilogram of critical use methyl bromide sold to an approved critical user without first obtaining certification constitutes a separate violation of this subpart.

(4) No person shall sell methyl bromide produced or imported before the phaseout date of January 1, 2005, to an approved critical user for a critical use and location of use listed in Appendix L to this subpart unless the person holds a critical stock allowance (CSA). Every kilogram of methyl bromide sold to an approved critical user for critical use in excess of the number of critical stock allowances held by the seller constitutes a separate violation of this subpart.

(5) No person shall sell methyl bromide produced or imported before the phaseout date of January 1, 2005, for a critical use listed in Column A to an end user listed in Column B of Appendix L to this subpart who is not an approved critical user because the end user does not have an area subject to the limiting critical condition in Column C of Appendix L.

* * * * *

4. Section 82.8 is added to read as follows:

§ 82.8 Grant of essential use allowances and critical use allowances.

(a) Effective January 1, 1996, persons in the following list are allocated essential-use allowances or exemptions for quantities of a specific class I controlled substance for a specific essential-use (the Administrator reserves the right to revise the allocations based on future decisions of the Parties).

TABLE I.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2004

Company	Chemical	Quantity (metric tons)
(i) Metered Dose Inhalers (for oral inhalation) for Treatment of Asthma and Chronic Obstructive Pulmonary Disease		
Armstrong Pharmaceuticals	CFC–11 or CFC–12 or CFC–114	390.60
Aventis Pharmaceutical Products	CFC–11 or CFC–12 or CFC–114	48.40
Boehringer Ingelheim Pharmaceuticals	CFC–11 or CFC–12 or CFC–114	500.20
PLIVA Inc.	CFC–11 or CFC–12 or CFC–114	136.00
Schering-Plough Corporation	CFC–11 or CFC–12 or CFC–114	918.00
3M Pharmaceuticals	CFC–11 or CFC–12 or CFC–114	84.71
(ii) Cleaning, Bonding and Surface Activation Applications for the Space Shuttle Rockets and Titan Rockets		
National Aeronautics and Space Administration (NASA)/Thiokol Rocket	Methyl Chloroform	141.877

(b) A global exemption for class I controlled substances for essential laboratory and analytical uses shall be in effect through December 31, 2005 subject to the restrictions in Appendix G of this subpart, and subject to the record-keeping and reporting requirements at § 82.13(u) through (x). There is no amount specified for this exemption.

(c) Effective January 1, 2005, critical use allowances are apportioned as set forth in paragraph (c)(1) of this section for the exempted production and import of class I, Group VI controlled substances specifically for those approved critical uses listed in Appendix L to this subpart for the applicable control period. Every kilogram of production and import in excess of the total number and type of unexpended critical use allowances held for a particular type of use constitutes a separate violation of this subpart. Effective January 1, 2005, critical stock allowances of a specific number are apportioned as set forth in paragraph (c)(2) of this section, for those uses listed in Appendix L to this subpart for the applicable control period, for the sale to approved critical users of class I, Group VI controlled substances held in inventory that were produced or imported before the January 1, 2005 phaseout date. Every kilogram of sale to approved critical users in excess of the total number of unexpended critical stock allowances held constitutes a separate violation of this subpart.

(1) *Allocated critical use allowances for annual control period.* [Reserved]

(2) *Allocated critical stock allowances for annual control period.* [Reserved]

5. Section 82.12 is amended by revising paragraph (a)(1) introductory text, (a)(1)(i)(H), (a)(1)(ii) introductory text, and (a)(1)(iii), and by adding paragraph (e) to read as follows:

§ 82.12 Transfers of allowances for class I controlled substances.

(a) *Inter-company transfers.* (1) Until January 1, 1996, for all class I controlled substances, except for Group VI, and until January 1, 2005, for Group VI, any person (''transferor'') may transfer to any other person (''transferee'') any amount of the transferor's consumption allowances or production allowances, and effective January 1, 1995, for all class I controlled substances any person (''transferor'') may transfer to any other person (''transferee'') any amount of the transferor's Article 5 allowances. After January 1, 2002, any essential-use allowance holder (including those persons that hold essential-use allowances issued by a Party other than the United States) (''transferor'') may transfer essential-use allowances for CFCs to a metered dose inhaler company solely for the manufacture of essential MDIs. After January 1, 2005, any critical use allowance holder (''transferor'') may transfer critical use allowances to any other person (''transferee''). After January 1, 2005, any critical stock allowance holder (''transferor'') may transfer critical stock allowances to any critical stock allowance holder (''transferee'').

(i) * * *

(H) The one percent offset applied to the unweighted amount traded will be deducted from the transferor's production or consumption allowance balance (except for trades from transformers and destroyers to producers or importers for the purpose of allowance reimbursement). In the case of transferring essential use allowances, the amount of one tenth of one percent of the amount traded will be deducted from the transferor's allowance balance. In the case of transferring critical use allowances, the amount of one tenth of one percent of the amount traded will be deducted from the transferor's critical use allowance balance.

* * * * *

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous transfers and any production, allowable imports and exports of controlled substances reported by the transferor, indicate that the transferor possesses, as of the date the transfer claim is processed, unexpended allowances sufficient to cover the transfer claim (*i.e.*, the amount to be transferred plus, in the case of transferors of essential use allowances and critical use allowances, one tenth of one percent of the transferred amount). Within three working days of receiving a complete transfer claim, the Administrator will take action to notify the transferor and transferee as follows:

* * * * *

(iii) In the event that the Administrator does not respond to a transfer claim within the three working days specified in paragraph (a)(1)(ii) of this section the transferor and transferee may proceed with the transfer. EPA will reduce the transferor's balance of unexpended allowances by the amount to be transferred plus, in the case of transfers of production or consumption allowances, one percent of that amount, and in the case of essential use allowances and critical use allowances, one tenth of one percent of that amount. However if EPA ultimately finds that the transferor did not have sufficient unexpended allowances to cover the claim, the transferor and transferee will be held liable for any violations of the regulations of this subpart that occur as a result of, or in conjunction with, the improper transfer.

* * * * *

(e) *Exchange of critical use allowances for critical stock allowances.* (1) Critical use allowance holders may petition the Administrator to exchange a quantity of their unexpended critical use allowances for an equivalent amount of critical stock allowances provided they hold this equivalent amount of class I, Group VI controlled substance that was produced or imported in a prior control period either with production allowances and consumption allowances or critical use allowances. A person allocated critical stock allowances may not petition to exchange unexpended critical stock allowances for critical use allowances.

(2) [Reserved]

6. Section 82.13 is amended as follows:

a. By revising paragraphs (a), (f)(3)(iv) and (g)(4)(vii).

b. By adding paragraphs (f)(2)(xx) through (f)(2)(xxi), (f)(3)(xvi), (g)(1)(xx) through (g)(1)(xxi), (g)(4)(xviii), and (bb) through (dd).

§ 82.13 Recordkeeping and reporting requirements for class I controlled susntances.

(a) Unless otherwise specified, the recordkeeping and reporting requirements set forth in this section take effect on January 1, 1995. For class I, Group VIII controlled substances, the recordkeeping and reporting requirements set forth in this section take effect on August 18, 2003. For class I, Group VI critical use methyl bromide, the recordkeeping and reporting requirements set forth in this section take effect January 1, 2005.

(f) * * *

(2) * * *

(xx) For class I, Group VI controlled substances, dated records such as invoices and order forms, and a log of the quantity of controlled substances produced for critical use, by specified critical use if applicable as per Appendix L of this subpart, and the quantity sold for critical use, by specified critical use if applicable as per Appendix L of this subpart, and;

(xxi) Written certifications that quantities of class I, Group VI controlled substances produced for critical use were purchased by distributors, applicators, or end users to be used or sold only for critical use in accordance with the definitions and prohibitions in

this subpart. Certifications must be maintained by a producer for a minimum of three years.

(3) * * *

(iv) The producer's total of expended and unexpended production allowances, consumption allowances, Article 5 allowances, critical use allowances by specified critical use if applicable, critical stock allowances, and amount of essential-use allowances and destruction and transformation credits conferred at the end of that quarter;

* * * * *

(xvi) For critical uses of class I, Group VI controlled substances, an annual list of the total amount of critical use methyl bromide by specified critical use, if applicable as per Appendix L of this subpart, that was produced, bought, and sold as well as the amounts of critical use methyl bromide held in inventory by the reporting entity or held in inventory by the reporting entity on behalf of another entity.

(g) * * *

(1) * * *

(xx) For class I, Group VI controlled substances, dated records such as invoices and order forms, of the quantity of controlled substances imported for critical use, by specified critical use if applicable per Appendix L of this subpart, and the quantity sold for critical use, by specified critical use if applicable as per Appendix L of this subpart, and;

(xxi) Written certifications that quantities of class I, Group VI controlled substances imported for critical use were purchased by distributors, applicators, or end users to be used or sold only for critical use in accordance with the definitions and prohibitions in this subpart. Certifications must be maintained by an importer for a minimum of three years.

(4) * * *

(vii) The importer's total sum of expended and unexpended consumption allowances by chemical as of the end of that quarter and the total sum of expended and unexpended critical use allowances by specified critical use, if applicable, as per Appendix L of this subpart;

* * * * *

(xviii) For critical uses of class I, Group VI controlled substances, an annual list of the total amount of critical use methyl bromide by specified critical use if applicable, as per Appendix L of this subpart, that was imported, bought, and sold as well as the amounts of critical use methyl bromide held in inventory by the reporting entity or held in inventory by the reporting entity on behalf of another entity.

* * * * *

(bb) Every distributor of methyl bromide (class I, Group VI controlled substances) who purchases or receives a quantity of critical use methyl bromide must comply with recordkeeping and reporting requirements specified in this paragraph.

(1) Recordkeeping—Every distributor of critical use methyl bromide must certify to the producer or importer or other entity from which they are acquiring quantities of critical use methyl bromide that such quantities received will be sold or used only for approved critical use(s) in accordance with the definitions and prohibitions in this subpart.

(i) Every distributor of a quantity of critical use methyl bromide must receive from an applicator, or any other entity to whom they sell critical use methyl bromide, a certification of the quantity of critical use methyl bromide ordered, prior to delivery of the quantity, stating that the quantity will be sold or used only for approved critical uses in accordance with definitions and prohibitions in this subpart.

(ii) Every distributor of methyl bromide who receives a certification from an applicator or any other entity to which they sell critical use methyl bromide must maintain the certifications as records for 3 years.

(iii) Every distributor of a quantity of critical use methyl bromide must maintain invoice and order records related to the sale of such material for 3 years.

(2) Reporting—Every distributor of critical use methyl bromide must report to the Administrator annually, the following items:

(i) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide bought, organized by specified critical use if applicable as per Appendix L of this subpart, and;

(ii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide sold organized by specified critical use and;

(iii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide held by the reporting entity or held by the reporting entity on behalf of another entity, organized by specified critical use if applicable as per Appendix L of this subpart.

(cc) Every third party applicator of methyl bromide (class I, Group VI controlled substances) that purchases or receives critical use methyl bromide must comply with recordkeeping and reporting requirements specified in this paragraph.

(1) Recordkeeping—Every third party applicator of methyl bromide must certify to the producer or importer or other entity from whom they are acquiring quantities of critical use methyl bromide that such quantities received will be sold or used only for approved critical use in accordance with the definitions and prohibitions in this subpart.

(i) Every third party applicator of a quantity of critical use methyl bromide must receive from an end user or any other entity, to whom they sell critical use methyl bromide or for whom they fumigate an area, a certification that the quantity of class I, Group VI controlled substances ordered, prior to delivery of the quantity or prior to providing fumigation services, will only be sold or used for critical uses in accordance with definitions and prohibitions in this subpart.

(ii) Every third party applicator of methyl bromide who receives a certification from an entity to which they sell critical use methyl bromide must maintain the certifications as records for 3 years.

(iii) Every third party applicator of a quantity of critical use methyl bromide must maintain invoice and order records related to the sale of such material for three years.

(2) Reporting—Every third party applicator of critical use methyl bromide must report to the Administrator annually, the following items:

(i) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide bought, and from whom, organized by specified end use if applicable as per Appendix L of this subpart and;

(ii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide sold organized by specified end use and;

(iii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide held for the reporting entity or held by the reporting entity on behalf of another entity, organized by specified end use if applicable as per Appendix L of this subpart.

(dd) Every approved critical user purchasing an amount of critical use methyl bromide or purchasing fumigation services with critical use methyl bromide must, for each request,

certify knowledge of the requirements associated with the exemption for critical use in this subpart and provide such information that identifies the use as a critical use and the user as an approved critical user. The certification will state, in part: ''I certify, under penalty of law, knowledge of the requirements associated with the exempted critical use published in 40 CFR part 82, including the requirement that this letter cite basic information identifying the end use as an approved critical use and the end user as an approved critical user.''

7. Add Appendix L to subpart A to read as follows:

Appendix L to Subpart A of Part 82—Approved Critical Uses, and Limiting Critical Conditions for Those Uses for the 2005 Control Period

Column A—Approved critical use	Column B—End user and location of use	Column C—Limiting critical conditions
	Pre-Plant Uses	
Cucurbits	(a) Michigan growers	with moderate to severe fungal pathogen infestation.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers.	with moderate to severe yellow or purple nutsedge infestation.
Eggplant	(a) Georgia growers	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, moderate to severe nematode infestation, or moderate severe fungal pathogen infestation.
	(b) Florida growers	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, or moderate to severe nematode infestation, or moderate to severe fungal pathogen infestation, or karst topography.
Forest Seedlings	(a) Members of the Southern Forest Nursery Management Cooperative limited to growing locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(b) International Paper and its subsidiaries limited to growing locations in Arkansas, Alabama, Georgia, South Carolina and Texas.	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(c) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, South Carolina, Oregon, and Washington.	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(d) Public (government owned) seedling nurseries in the states of California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia and Wisconsin.	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(e) Members of the Nursery Technology Cooperative limited to growing locations in Oregon and Washington.	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(f) Michigan seedling nurseries	with one or more of the following limiting critical conditions: moderate to severe fungal pathogen infestation, moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
Ginger	Hawaii growers	with the limiting critical condition of moderate to severe nematode infestation, or moderate to severe bacterial wilt infestation.
Orchard Nursery Seedlings	(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in California and Washington (Driscoll's raspberries and their contract growers in California and Washington).	with one or more of the following limiting critical conditions: moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.
	(b) Members of the California Association of Nurserymen-Deciduous Fruit and Nut Tree Growers.	with one or more of the following limiting critical conditions: moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.
	(c) Members of the California Association of Nurserymen-Citrus and Avocado Growers.	with one or more of the following limiting critical conditions: moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.

Column A—Approved critical use	Column B—End user and location of use	Column C—Limiting critical conditions
Orchard Replant	(a) California stone fruit growers	with one or more of the following limiting critical conditions: replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(b) California table and raisin grape growers.	with one or more of the following limiting critical conditions: replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(c) California walnut growers	with one or more of the following limiting critical conditions: replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(d) California almond growers	with one or more of the following limiting critical conditions: replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
Ornamentals	(a) Yoder Brothers Inc. in Florida	for use in chrysanthemum production.
	(b) California rose nurseries	prohibited from using 1,3–dichloropropene products because local township limits for this alternative have been reached.
Peppers	(a) California growers	with the limiting critical conditions of moderate to severe fungal pathogens, or moderate to sever disease infestation, or moderate to sever nematode infestation, or moderate to severe yellow or purple nutsedge infestation, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers..	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less.
	(c) Florida growers	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, or karst topography.
Strawberry Nurseries	(a) California growers	with one or more of the following limiting critical conditions: moderate to severe black root rot or crown rot, moderate to severe nematode infestation, or moderate to severe yellow or purple nutsedge infestation.
	(b) North Carolina and Tennessee growers	with the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less.
Strawberry Fruit	(a) California growers	with one or more of the following limiting critical conditions: moderate to severe black root rot or crown rot, moderate severe nematode infestation, moderate to severe yellow or purple nutsedge infestation, a prohibition of the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(b) Florida growers	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge, or karst topography.
	(c) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, Virginia, Ohio and New Jersey growers.	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge, or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less.
Sweet Potatoes	California growers	with the contingent limiting critical condition of a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
Tomatoes	(a) Michigan growers	with moderate to severe disease, or fungal pathogens.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers.	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 76 meters of a grower's field the size of 100 acres or less.
	(c) Florida growers	with one or more of the following limiting critical conditions: moderate to severe yellow or purple nutsedge infestation, or karst topography.
Turfgrass	(a) U.S. turfgrass sod nursery producers	for the production of industry certified pure sod.
	(b) U.S. golf courses	for establishing sod in the construction of new golf courses or the renovation of putting greens, tees, and fairways.

Column A—Approved critical use	Column B—End user and location of use	Column C—Limiting critical conditions
	Post-Harvest Uses	
Food Processing	(a) Rice millers in Arkansas, California, Louisiana, Florida, Missouri, and Mississippi.	with one or more of the following limiting critical conditions: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity.
	(b) Pet food manufacturing facilities in the U.S.	with one or more of the following limiting critical conditions: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity.
	(c) Kraft Foods in the U.S	with one or more of the following limiting critical conditions: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity.
	(d) Members of the North American Millers' Association in the U.S.	with one or more of the following limiting critical conditions: older structures that can not be properly sealed to use an alternative methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity.
Commodity Storage	(a) Gwaltney of Smithfield in the U.S	for smokehouse ham curing facilities owned by the company.
	(b) California entities storing walnuts, beans, dried plums, and pistachios in California.	with one or more of the following limiting critical conditions: rapid fumigation is required to meet a critical market window, such as during the holiday season, rapid fumigation is required when a buyer provides short (2 days or less) notification for a purchase, or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.

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