

rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: October 15, 2009.

**Ira W. Leighton,**

*Acting Regional Administrator, EPA-New England.*

[FR Doc. E9-27819 Filed 11-20-09; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[EPA-HQ-OAR-2009-0351; FRL-8982-7]

RIN 2060-AP62

### Protection of Stratospheric Ozone: The 2010 Critical Use Exemption From the Phaseout of Methyl Bromide

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing uses that qualify for the 2010 critical use exemption and the amount of methyl bromide that may be produced, imported, or supplied from existing pre-phaseout inventory for those uses in 2010. EPA is taking action under the authority of the Clean Air Act to reflect a recent consensus decision taken by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer at the Twentieth Meeting of the Parties. EPA is seeking comment on the list of critical uses and on EPA's determination of the amounts of methyl bromide needed to satisfy those uses.

**DATES:** Comments must be submitted by December 23, 2009. Any party

requesting a public hearing must notify the contact person listed below by 5 p.m. Eastern Standard Time on November 30, 2009. If a hearing is requested it will be held on December 8, 2009 and comments will be due to the Agency January 7, 2010. EPA will post information regarding a hearing, if one is requested, on the Ozone Protection Web site <http://www.epa.gov/ozone/strathome.html>. 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. EPA-HQ-OAR-2009-0351, by one of the following methods:

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

- E-mail: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov).

- Fax: 202-566-1741.

- Mail: Docket EPA-HQ-OAR-2009-0351, Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mail code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- Hand Delivery: Docket EPA-HQ-OAR-2009-0351, Air and Radiation Docket at 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. EPA-HQ-OAR-2009-0351. 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.regulations.gov>, 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 [www.regulations.gov](http://www.regulations.gov) or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, 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 [www.regulations.gov](http://www.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 the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**FOR FURTHER INFORMATION CONTACT:** For further information about this proposed rule, contact Jeremy Arling by telephone at (202) 343-9055, or by e-mail at [arling.jeremy@epa.gov](mailto:arling.jeremy@epa.gov) or by mail at 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 Stratospheric Protection Division at <http://www.epa.gov/ozone/strathome.html> for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and related topics.

#### SUPPLEMENTARY INFORMATION:

This proposed rule concerns Clean Air Act (CAA) restrictions on the consumption, production, and use of methyl bromide (a Class I, Group VI ozone-depleting substance) for critical uses during calendar year 2010. Under the Clean Air Act, methyl bromide consumption (consumption is defined under the CAA as production plus imports minus exports) and production was phased out on January 1, 2005, apart from allowable exemptions, such as the critical use exemption and the quarantine and preshipment exemption. With this action, EPA is proposing and seeking comment on the uses that will qualify for the 2010 critical use exemption as well as specific amounts of methyl bromide that may be produced, imported, or sold from pre-phaseout inventory for proposed critical uses in 2010.

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## I. General Information

### Regulated Entities

Entities potentially regulated by this proposed action are those associated with the production, import, export, sale, application, and use of methyl bromide covered by an approved critical use exemption. Potentially regulated categories and entities include producers, importers, and exporters of methyl bromide; applicators and distributors of methyl bromide; users of methyl bromide, e.g., farmers of vegetable crops, fruits and nursery stock; and owners of stored food commodities and structures such as grain mills and processors.

This list is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this proposed action. To determine whether your facility, company, business, or organization could be 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 section.

### What Should I Consider When Preparing My Comments?

1. *Confidential Business Information.* Do not submit confidential business information (CBI) to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, 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 claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## II. 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 CAA 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 variety of pests such as insects, weeds, rodents, pathogens, and

nematodes. Information on methyl bromide can be found at <http://www.epa.gov/ozone/mbr> and <http://www.unep.org/ozone>.

Methyl bromide is also regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and other statutes and regulatory authority, as well as by States under their own statutes and regulatory authority. Under FIFRA, methyl bromide is a restricted use pesticide. Restricted use pesticides are subject to Federal and State requirements governing their sale, distribution, and use. Nothing in this proposed rule implementing the Clean 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. Entities affected by provisions of this proposal 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 regulations in this proposed action are intended only to implement the CAA restrictions on the production, consumption, and use of methyl bromide for critical uses exempted from the phaseout of methyl bromide.

## III. What Is the Background to the Phaseout Regulations for Ozone-Depleting Substances?

The regulatory requirements of the stratospheric ozone protection program that limit production and consumption of ozone-depleting substances are in 40 CFR part 82, subpart A. The regulatory program was originally published in the **Federal Register** on August 12, 1988 (53 FR 30566), in response to the 1987 signing and subsequent ratification of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). The Montreal Protocol is the international agreement aimed at reducing and eliminating the production and consumption of stratospheric ozone-depleting substances. The U.S. was one of the original signatories to the 1987 Montreal Protocol and the U.S. ratified the Protocol on April 12, 1988. Congress then enacted, and President George H.W. Bush signed into law, the Clean Air Act Amendments of 1990 (CAAA of 1990) which included Title VI on Stratospheric Ozone Protection, codified as 42 U.S.C. Chapter 85, Subchapter VI, to ensure that the United States could

satisfy its obligations under the Protocol. EPA issued regulations to implement this legislation and has since amended the regulations as needed.

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 Montreal Protocol (Parties) agreed that each industrialized country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing a freeze in the level of methyl bromide production and consumption for industrialized countries. EPA published a final rule in the **Federal Register** on December 10, 1993 (58 FR 65018), listing methyl bromide as a Class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 baseline level of 25,528,270 kilograms, and setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until 2001, when the complete phaseout would occur. This phaseout date was established in response to a petition filed in 1991 under Sections 602(c)(3) and 606(b) of the CAAA of 1990, requesting that EPA list methyl bromide as a Class I substance and phase out its production and consumption. This date was consistent with Section 602(d) of the CAAA of 1990, which for newly listed Class I ozone-depleting substances provides that "no extension [of the phaseout schedule in section 604] 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."

At the Seventh Meeting of the Parties (MOP) in 1995, 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 that time, the U.S. continued to have a 2001 phaseout date in accordance with Section 602(d) of the CAAA of 1990. At the Ninth MOP in 1997, the Parties agreed to further adjustments to the phaseout schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phaseout.

#### **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?**

In October 1998, the U.S. Congress amended the CAA to prohibit the termination of production of methyl bromide prior to January 1, 2005, to require EPA to bring the U.S. phaseout of methyl bromide in line with the schedule specified under the Protocol, and to authorize EPA to provide certain exemptions. 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, 42 U.S.C. 7671c. The amendment that specifically addresses the critical use exemption appears at Section 604(d)(6), 42 U.S.C. 7671c(d)(6). EPA revised the phaseout schedule for methyl bromide production and consumption in a direct final rulemaking on November 28, 2000 (65 FR 70795), which allowed for the phased reduction in methyl bromide consumption specified under the Protocol and extended the phaseout to 2005. EPA again amended the regulations to allow for an exemption for quarantine and preshipment (QPS) purposes on July 19, 2001 (66 FR 37751), with an interim final rule and with a final rule on January 2, 2003 (68 FR 238).

On December 23, 2004 (69 FR 76982), EPA published a final rule (the "Framework Rule") that established the framework for the critical use exemption; set forth a list of approved critical uses for 2005; and specified the amount of methyl bromide that could be supplied in 2005 from stocks and new production or import to meet the needs of approved critical uses. EPA subsequently published rules applying the critical use exemption framework to the 2006, 2007, 2008, and 2009 control periods. Under authority of section 604(d)(6) of the CAA, this action proposes the uses that will qualify as approved critical uses in 2010 and the amount of methyl bromide that may be produced, imported, or supplied from inventory to satisfy those uses.

This proposed action reflects Decision XX/5, taken at the Twentieth Meeting of the Parties in November 2008. In accordance with Article 2H(5), the Parties have issued several Decisions pertaining to the critical use exemption. These include Decisions IX/6 and Ex. I/4, which set forth criteria for review of proposed critical uses. The status of Decisions is addressed in *NRDC v. EPA*, (464 F.3d 1, D.C. Cir. 2006) and in EPA's

"Supplemental Brief for the Respondent," filed in *NRDC v. EPA* and available in the docket for this action. In this proposed rule, EPA is honoring commitments made by the United States in the Montreal Protocol context.

#### **V. What Is the Critical Use Exemption Process?**

##### *A. Background of the Process*

The critical use exemption is designed to permit the production and import of methyl bromide for uses that do not have technically and economically feasible alternatives and for which the lack of methyl bromide would result in significant market disruption (40 CFR 82.3). On May 8, 2003, the Agency published its first notice in the **Federal Register** (68 FR 24737) announcing the availability of the application for a critical use exemption and the deadline for submission of the requisite data. Applicants were informed that they 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 that establish a critical need for methyl bromide). EPA has repeated this process annually since then.

The criteria for the exemption initially appeared in Decision IX/6. In that Decision, the Parties agreed 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 public health and are suitable to the crops and circumstances of the nomination." These criteria are reflected in EPA's definition of "critical use" at 40 CFR 82.3.

In response to the annual requests for critical use exemption applications published in the **Federal Register**, applicants provide data on the technical and economic feasibility of using alternatives to methyl bromide. Applicants also submit data on their use of methyl bromide, research programs into the use of alternatives to methyl bromide, and efforts to minimize use and emissions of methyl bromide.

EPA's Office of Pesticide Programs reviews the data submitted by applicants, as well as data from governmental and academic sources, to establish whether there are technically and economically feasible alternatives available for a particular use of methyl

bromide, and whether there would be a significant market disruption if no exemption were available. In addition, EPA reviews other parameters of the exemption applications such as dosage and emissions minimization techniques and applicants' research or transition plans. This assessment process culminates in the development of a document referred to as the critical use nomination (CUN). The U.S. Department of State submits the CUN annually to the United Nations Environment Programme (UNEP) Ozone Secretariat. The Methyl Bromide Technical Options Committee (MBTOC) and the Technology and Economic Assessment Panel (TEAP), which are independent advisory bodies to Parties to the Montreal Protocol, review the CUNs of the Parties and make recommendations to the Parties on the nominations. The Parties then take Decisions to authorize critical use exemptions for particular Parties, including how much methyl bromide may be supplied for the exempted critical uses. As required in Section 604(d)(6) of the CAA, for each exemption period, EPA consults with the United States Department of Agriculture and other departments and institutions of the Federal government that have regulatory authority related to methyl bromide, and provides an opportunity for public comment on the amounts of methyl bromide that the Agency is proposing as necessary for critical uses and the uses that the Agency is proposing to approve as critical uses.

On January 24, 2008, the U.S. Government (USG) submitted the sixth *Nomination for a Critical Use Exemption for Methyl Bromide for the United States of America* to the Ozone Secretariat of the UNEP. This nomination contained the request for 2010 critical uses. In February 2008, MBTOC sent questions to the USG concerning technical and economic issues in the 2010 nomination. The USG transmitted responses to MBTOC on April 10, 2008. The USG provided additional written responses on April 16, 2009, to questions asked at MBTOC's meeting in Tel Aviv. These documents, together with reports by the advisory bodies noted above, are in the public docket for this rulemaking. The proposed critical uses and amounts reflect the analysis contained in those documents.

#### *B. How Does This Proposed Rule Relate to Previous Critical Use Exemption Rules?*

The December 23, 2004, Framework Rule (69 FR 76982) established the

framework for the critical use exemption program in the U.S., including definitions, prohibitions, trading provisions, and recordkeeping and reporting obligations. The preamble to the Framework Rule included EPA's determinations on key issues for the critical use exemption program.

Since publishing the Framework Rule, EPA has annually promulgated regulations to exempt from the phaseout of methyl bromide specific quantities of production and import for each control period (each calendar year) and to indicate which uses meet the criteria for the exemption program for that year. See 71 FR 5985 (calendar year 2006), 71 FR 75386 (calendar year 2007), 72 FR 74118 (calendar year 2008), and 74 FR 19878 (calendar year 2009).

Today's action proposes critical uses for 2010 and the amounts of Critical Use Allowances (CUAs) and Critical Stock Allowances (CSAs) to be allocated for those uses. The uses that EPA is proposing to qualify as 2010 critical uses are the uses which the USG included in the sixth CUN, and which were approved by the Parties in Decision XX/5.

EPA is utilizing the existing regulatory framework for critical uses, and is therefore not reopening for comment either the provisions in the 2004 Framework Rule or the approach to determining the level of available stocks finalized in the 2008 CUE rule (published December 28, 2007), with two exceptions. EPA is proposing to ensure that upon applying the existing framework, the level of new production and import does not increase from one year to the next, barring an unforeseeable change in circumstances (e.g., withdrawal or significant change in registration status of an alternative). EPA is accepting comment on this addition to the existing framework as well as on the specific means of assessing the drawdown of pre-2005 methyl bromide.

#### *C. Proposed Critical Uses*

In Decision XX/5, taken in November 2008, the Parties to the Protocol agreed "to permit, for the agreed critical use categories for 2010 set forth in table C of the annex to the present decision for each Party, subject to the conditions set forth in the present decision and decision Ex.I/4 to the extent that those conditions are applicable, the levels of production and consumption for 2010 set forth in table D of the annex to the present decision which are necessary to satisfy critical uses \* \* \*."

The following uses are those set forth in table C of the annex to Decision XX/5 for the United States:

- Commodities
- NPMA food processing structures (cocoa beans removed)<sup>1</sup>
- Mills and processors
- Dried cured pork
- Cucurbits
- Eggplant—field
- Forest nursery seedlings
- Nursery stock—fruit, nut, flower
- Orchard replant
- Ornamentals
- Peppers—field
- Strawberries—field
- Strawberry runners
- Tomatoes—field
- Sweet potato slips

The Decision XX/5 critical use level for U.S. critical uses in 2010 is 3,233,456 kilograms (kg) overall. This is equivalent to 12.7% of the U.S. 1991 methyl bromide consumption baseline of 25,528,270 kg. The maximum amount of allowable new production and import for U.S. critical uses in Table D of Decision XX/5 is 2,763,456 kg (10.8% of baseline), minus available stocks.

EPA is proposing a total critical use allowance in 2010 of 2,966,179 kg (11.6% of baseline) with new production or import of methyl bromide for critical uses up to 2,275,715 kg (8.9% of baseline), and with 690,464 kg (2.7% of baseline) coming from pre-phaseout inventory (i.e., stocks).

EPA is also proposing to modify 40 CFR part 82, subpart A, appendix L to reflect the agreed critical use categories identified in Decision XX/5. Additionally, the Agency is amending the table of critical uses based on the technical analysis contained in the 2010 U.S. nomination.

EPA is seeking comment on the technical analysis contained in the U.S. nomination (available for public review in the docket to this rulemaking), and seeks information regarding changes to the registration or use of alternatives that have transpired after the 2010 U.S. nomination was written. EPA recognizes that as the market for alternatives evolves, the thresholds for what constitutes "significant market disruption" or "technical and economic feasibility" change. For example, the adoption of methyl iodide in the southeast U.S. could transform the circumstances under which these analyses occur.

Comments on the technical data contained in the nomination or new information could potentially alter the Agency's analysis on the uses and amounts of methyl bromide qualifying for the critical use exemption. The

<sup>1</sup> NPMA, National Pest Management Association, includes both food processing structures and processed foods.

Agency may, in response to new information, reduce the proposed quantities of critical use methyl bromide, or decide not to approve uses authorized by the Parties. However, the Agency will not increase the quantities

or add new uses in the final rule beyond those authorized by the Parties. Therefore, if there has been a change in registration of an alternative that results in that alternative no longer being available for a use, the user should

notify EPA that it requests that the U.S. nominate its use for a critical use exemption in 2011.

EPA is proposing to amend Table I: Approved Critical Uses in 40 CFR part 82, subpart A, appendix L, as follows:

TABLE I—APPROVED CRITICAL USES

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation
<b>PRE-PLANT USES</b>		
Cucurbits .....	(a) Growers in Delaware, Maryland, and Michigan (b) Growers in Georgia and Southeastern U.S. limited to growing locations in Alabama, Arkansas, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia.	Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe root knot nematode infestation.
Eggplant .....	(a) Florida growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(b) Georgia growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe pythium collar, crown and root rot. Moderate to severe southern blight infestation. Restrictions on alternatives due to karst topographical features.
Forest Nursery Seedlings .....	(c) Michigan growers .....	Moderate to severe soilborne disease infestation.
	(a) Growers in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation.
	(b) International Paper and its subsidiaries limited to growing locations in Alabama, Arkansas, Georgia, South Carolina, and Texas.	Moderate to severe yellow or purple nutsedge infestation.
	(c) Government-owned seedling nurseries in Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, Ohio, Pennsylvania, West Virginia, and Wisconsin.	Moderate to severe soilborne disease infestation. Moderate to severe weed infestation including purple and yellow nutsedge infestation. Moderate to severe Canada thistle infestation. Moderate to severe nematode infestation.
	(d) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, and South Carolina.	Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation.
	(e) Weyerhaeuser Company and its subsidiaries limited to growing locations in Oregon and Washington.	Moderate to severe soilborne disease infestation. Moderate to severe nematode or worm infestation.
	(f) Michigan growers .....	Moderate to severe yellow nutsedge infestation. Moderate to severe soilborne disease infestation.
Orchard Nursery Seedlings .....	(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in Washington, and members of the California Association of Nursery and Garden Centers representing Deciduous Tree Fruit Growers.	Moderate to severe soilborne disease infestation. Moderate to severe Canada thistle infestation. Moderate to severe nutsedge infestation. Moderate to severe nematode infestation.
	(b) California rose nurseries .....	Moderate to severe nematode infestation. Medium to heavy clay soils. Local township limits prohibiting 1,3-dichloropropene.
Orchard Replant .....	(a) California stone fruit, table and raisin grape, wine grape, walnut, and almond growers.	Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Replanted orchard soils to prevent orchard replant disease. Medium to heavy soils. Local township limits prohibiting 1,3-dichloropropene.

TABLE I—APPROVED CRITICAL USES—Continued

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation
Ornamentals .....	(a) California growers .....	Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene.
	(b) Florida growers .....	Moderate to severe weed infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(c) Michigan herbaceous perennial growers .....	Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Moderate to severe yellow nutsedge and other weed infestation.
	(d) New York growers .....	Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation.
Peppers .....	(a) Alabama, Arkansas, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia growers.	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe pythium root, collar, crown and root rots.
	(b) Florida growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(c) Georgia growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation, or moderate to severe pythium root and collar rots. Moderate to severe southern blight infestation, crown or root rot. Restrictions on alternatives due to karst topographical features.
	(d) Michigan growers .....	Moderate to severe soilborne disease infestation.
Strawberry Fruit .....	(a) California growers .....	Moderate to severe black root rot or crown rot. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene. Time to transition to an alternative.
	(b) Florida growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Carolina geranium or cut-leaf evening primrose infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(c) Alabama, Arkansas, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, and Virginia growers.	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe black root and crown rot.
Strawberry Nurseries .....	(a) California growers .....	Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation.
	(b) Florida growers .....	Moderate to severe nematode infestation.
Sweet Potato Slips .....	(a) California growers .....	Local township limits prohibiting 1,3-dichloropropene.
Tomatoes .....	(a) Michigan growers .....	Moderate to severe soilborne disease infestation. Moderate to severe fungal pathogen infestation.

TABLE I—APPROVED CRITICAL USES—Continued

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation
	(b) Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia growers.	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Restrictions on alternatives due to karst topographical features and, in Florida, soils not supporting seepage irrigation.
	(c) Maryland growers .....	Moderate to severe fungal pathogen infestation.
<b>POST-HARVEST USES</b>		
Food Processing .....	(a) Rice millers in the U.S. who are members of the USA Rice Millers Association.  (b) Pet food manufacturing facilities in the U.S. who are members of the Pet Food Institute.  (c) Members of the North American Millers' Association in the U.S.  (d) Members of the National Pest Management Association treating processed food, cheese, herbs and spices, and spaces and equipment in associated processing and storage facilities.	Moderate to severe beetle, weevil, or moth infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative. Moderate to severe beetle, moth, or cockroach infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative. Moderate to severe beetle infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative. Moderate to severe beetle or moth infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.
Commodities .....	(a) California entities storing walnuts, beans, dried plums, figs, raisins, and dates (in Riverside county only) in California.	Rapid fumigation required to meet a critical market window, such as during the holiday season.
Dry Cured Pork Products .....	(a) Members of the National Country Ham Association and the Association of Meat Processors, Nahunta Pork Center (North Carolina), and Gwaltney and Smithfield Inc.	Red legged ham beetle infestation. Cheese/ham skipper infestation. Dermeest beetle infestation. Ham mite infestation.

The critical uses and limiting critical conditions in Table I are proposed to be modified from the 2009 CUE as follows. First, EPA is proposing to add ornamental growers in New York that are subject to moderate to severe soilborne disease or nematode infestations. This reflects a new application submitted for the production of *Anemone coronaria* in greenhouses and approved as part of the U.S. nomination of ornamentals. Greenhouse-grown anemones in New York are facing a similar situation to other crops in this sector. EPA anticipates the usage of methyl bromide will be very limited, and has nominated only 272 kg for this use. Second, EPA is proposing to remove North Carolina and Tennessee strawberry nursery growers because although the U.S. nominated this use it was not authorized by the Parties in Decision XX/5. MBTOC did not recommend this use when it recommended the other critical uses for 2010. Iodomethane is

registered for use on strawberry nurseries in these states and the MBTOC concluded that this substitute is a technologically and economically feasible methyl bromide alternative suitable to these crops and circumstances. In September 2010, MBTOC accepted the USG's supplemental request and agreed that time is required to conduct commercial scale up of iodomethane in this sector. MBTOC has recommended 2,018 kg for this use in 2010. The Parties have not yet authorized this crop as a critical use but will address the issue at the 21st MOP in November 2009. EPA will consider the decision taken by the Parties on this issue in the final rule. Third, EPA is proposing to remove curcubit growers and pepper growers in Mississippi. These two uses were not part of the CUN and therefore the Parties have not authorized them as critical uses for 2010. Fourth, EPA is proposing to remove bakeries, as they have also transitioned to methyl

bromide alternatives and thus did not submit an application for the 2010 control period. Fifth, EPA is proposing to remove "export to countries which do not allow the use of sulfuryl fluoride" as a limiting critical condition for commodities. This limiting critical condition was established for the first time in the 2009 CUE rule as a few countries that import commodities treated with sulfuryl fluoride were still in the process of establishing maximum residue levels (MRLs) for sulfuryl fluoride. All countries to which the U.S. exports such commodities have now established MRLs. Therefore, EPA no longer believes this to be a limiting critical condition. EPA seeks comment on these proposed changes to the critical uses and their limiting critical conditions.

EPA is not proposing other changes to the table but is repeating the following clarifications made in previous years for ease of reference. The "local township limits prohibiting 1,3-dichloropropene"

are prohibitions on the use of 1,3-dichloropropene products in cases where local township limits on use of this alternative have been reached. In addition, “pet food” under subsection B of Food Processing refers to food for domesticated dogs and cats. Finally, “rapid fumigation” for commodities is when a buyer provides short (two working days or fewer) 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.

Since the critical use exemption was first established, many critical users have transitioned to alternatives and a variety of sectors that were once critical uses no longer are. These uses include ginger, golf courses and turf production, tobacco, cocoa beans, pistachios, and now bakeries.

#### *D. Proposed Critical Use Amounts*

Section V.C. of this preamble explains that Table C of the annex to Decision XX/5 lists critical uses and amounts agreed to by the Parties to the Montreal Protocol. When added together, the authorized critical use amounts for 2010 total 3,233,456 kilograms (kg), which is equivalent to 12.7% of the U.S. 1991 methyl bromide consumption baseline of 25,528,270 kg as defined at 40 CFR 82.3. However, the maximum amount of authorized new production or import as set forth in Table D of the annex to Decision XX/5 is 2,763,456 kg (10.8% of baseline).

EPA is proposing to exempt limited amounts of new production and import of methyl bromide for critical uses for 2010 in the amount of 2,275,715 kg (8.9% of baseline) as shown in Table III. EPA is also proposing to allow sale of 690,464 kg (2.7% of baseline) of existing pre-phaseout inventory for critical uses in 2010. EPA is seeking comment on the proposed total levels of exempted new production and import for critical uses and the amount of material that may be sold from pre-phaseout inventory for critical uses. The sub-sections below explain EPA's reasons for proposing the above critical use amounts for 2010.

##### *1. Background of Proposed Critical Use Amounts*

The 2004 Framework Rule established the provisions governing the sale of pre-phaseout inventories for critical uses, including the concept of Critical Stock Allowances (CSAs) and a prohibition on the sale of pre-phaseout inventories for critical uses in excess of the amount of CSAs held by the seller. In addition, EPA noted that pre-phaseout inventories were further taken into account through the trading provisions that allow CUAs

to be converted into CSAs. EPA is not proposing changes to these CSA provisions for calendar year 2010.

Paragraph 5 of Decision XX/5 further addresses pre-phaseout inventory of methyl bromide. The Decision 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 differences between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available.” In the Framework Rule (69 FR 52366), EPA issued CSAs in an amount equal to the difference between the total authorized CUE amount and the amount of new production or import authorized by the Parties.

In the 2006, 2007, 2008, and 2009 CUE Rules, EPA allocated CSAs in amounts that represented not only the difference between the total authorized CUE amount and the amount of authorized new production and import but also an additional amount to reflect available stocks. In the 2006 CUE Rule, EPA issued a total of 1,136,008 CSAs, equivalent to 4.4% of baseline. For 2006, the difference in the Parties' decision between the total CUE amount and the amount of new production and import was 3.6% of baseline. In the 2007 rule, EPA added to the minimum amount (6.3% of baseline) an additional amount (1.2% of baseline) for a total of 1,914,600 CSAs (7.5% of baseline). In the 2008 rule, EPA added to the minimum amount (3.0% of baseline) an additional amount (3.8% of baseline) for a total of 1,729,689 CSAs (6.8% of baseline). In the 2009 rule, EPA added to the minimum amount (1.2% of baseline) an additional amount (6.3% of baseline) for a total of 1,919,193 CSAs (7.5% of baseline). After determining the CSA amount, EPA reduced the portion of CUE methyl bromide to come from new production and import in each of the 2006–2009 control periods such that the total amount of methyl bromide exempted for critical uses did not exceed the total amount authorized by the Parties for that year.

As established in the earlier rulemakings, EPA views the inclusion of these additional amounts in the calculation of the year's overall CSA level as an appropriate exercise of discretion. The Agency is not required to allocate the full amount of authorized new production and consumption. The Parties only agree to “permit” a particular level of production and consumption; they do not—and cannot—mandate that the U.S. authorize this level of production and consumption domestically. Nor does the CAA require EPA to allow the full

amount permitted by the Parties.

Section 604(d)(6) of the CAA does not require EPA to exempt any amount of production and consumption from the phaseout, but instead specifies that the Agency “may” create an exemption for critical uses, providing EPA with substantial discretion.

When determining the CSA amount for a year, EPA considers what portion of existing stocks is “available” for critical uses. As discussed in prior CUE rulemakings, the Parties to the Protocol recognized in their Decisions that the level of existing stocks may differ from the level of available stocks. For example, Decision IX/6 states that “production and consumption, if any, of methyl bromide for critical uses should be permitted only if \* \* \* methyl bromide is not available in sufficient quantity and quality from existing stocks.” Decision XX/5, as well as earlier decisions, refers to use of “quantities of methyl bromide from stocks that the Party has recognized to be available.” Thus, it is clear that individual Parties have the ability to determine their level of available stocks. Decision XX/5 further reinforces this concept by including the phrase “minus available stocks” as a footnote to the United States' authorized level of production and consumption in Table D. Section 604(d)(6) of the CAA does not require EPA to adjust the amount of new production and import to reflect the availability of stocks; however, as explained in previous rulemakings, making such an adjustment is a reasonable exercise of EPA's discretion under this provision.

EPA employs the concept of “available stocks” in determining whether to allocate additional CSAs beyond the minimum stock amount stipulated by the Parties. In response to stakeholder questions about how EPA derived its CSA amounts, the 2008 CUE rule established a refined approach for determining the amount of existing methyl bromide stocks that is “available” for critical uses. The approach uses a tool called the Supply Chain Factor (SCF). The SCF is EPA's technical estimate of the amount of methyl bromide inventory that would be adequate to meet the need for critical use methyl bromide after an unforeseen domestic production failure. The SCF recognizes the benefit of allowing the private sector to maintain a buffer in case of a major supply disruption. However, the SCF is not intended to set aside or physically separate stocks as an inventory reserve.



## 2. Calculation of Available Pre-Phaseout Inventory

For 2010, EPA proposes to calculate the amount of “available” stocks as follows, using the formula adopted in the 2008 CUE rule:  $AS_{2010} = ES_{2009} - D_{2009} - SCF_{2010}$ , where  $AS_{2010}$  is the available stocks on January 1, 2010;  $ES_{2009}$  is the existing pre-phaseout stocks of methyl bromide held in the United States by producers, importers, and distributors on January 1, 2009;  $D_{2009}$  is the estimated drawdown of existing stocks during calendar year 2009; and  $SCF_{2010}$  is the supply chain factor for 2010. Using this formula, EPA calculates that there will be no pre-phaseout stocks of methyl bromide “available” on January 1, 2010.

**Existing Stocks.** In the above formula, “ $ES_{2009}$ ” refers to pre-phaseout inventory—methyl bromide that was produced before the January 1, 2005 phaseout date but is still held by domestic producers, distributors, and third-party applicators.  $ES_{2009}$  does not include critical use methyl bromide that was produced after January 1, 2005 and carried over into subsequent years. Nor does it include methyl bromide produced (1) under the quarantine and preshipment (QPS) exemption, (2) with Article 5 allowances to meet the basic domestic needs of Article 5 countries, or (3) for feedstock or transformation purposes. EPA considers all pre-phaseout inventory to be suitable for both pre-plant and post harvest uses. Similarly, EPA considers inventory methyl bromide to be available to all users, including users in California and the Southeastern United States. These assumptions are discussed in the 2009 CUE rule (74 FR 19887).

**Supply Chain Factor.** The SCF represents EPA’s technical estimate of the amount of pre-phaseout inventory that would be adequate to meet a need for critical use methyl bromide after an unforeseen domestic production failure. As described in the 2008 CUE rule, and the Technical Support Document contained in the docket to this rule, EPA estimates that it would take 15 weeks for significant imports of methyl bromide to reach the U.S. in the event of a major supply disruption. Consistent with the regulatory framework used in the 2008 and 2009 rules, the SCF for 2010 conservatively reflects the effect of a supply disruption occurring in the peak period of critical use methyl bromide production, which is the first quarter of the year. While this 15-week disruption is based on shipping capacity and does not change year to year, other inputs to EPA’s analysis do change each year including the total U.S. and global

authorizations for methyl bromide and the average seasonal production of critical use methyl bromide in the U.S. Using updated numbers, EPA estimates that critical use production in the first 15 weeks of each year (the peak supply period) currently accounts for approximately 63% of annual critical use methyl bromide demand. EPA, therefore, estimates that the peak 15-week shortfall in 2010 could be 2,035,000 kg (63%  $\times$  3,233,456 kg).

As EPA stated in the 2008 and 2009 CUE Rules, the SCF is not a “reserve” or “strategic inventory” of methyl bromide but is merely an analytical tool used to provide greater transparency regarding how the Agency determines CSA amounts. Its use in the equation above demonstrates that for 2010 no “additional” stocks are available to allocate beyond what is required by the Parties. Further general discussion of the SCF is in the final 2008 CUE rule (72 FR 74118) and further detail about the analysis used to derive the value for the 2010 supply chain factor is provided in the Technical Support Document available on the public docket for this rulemaking.

**Estimated Drawdown.** In the 2008 CUE rule, EPA estimated the drawdown of existing stocks (the  $D_{2009}$  term in the above equation) by using a simple linear fit estimation of inventory data from all available years. In the 2009 CUE proposed rule, however, EPA estimated drawdown using an exponential model. The Agency did so because it appeared that the rate of drawdown was slowing and because EPA believed that the exponential estimate provided a more reasonable reflection of market conditions than the linear estimate. The end-of-year data for 2008, which EPA received in February 2009, however, were contrary to that trend and showed that the use of inventory in 2008 increased rather than continued to decrease. Ultimately, EPA did not need to estimate the drawdown because it had end-of-year data. These new data suggest that EPA should reconsider the use of the exponential model and instead use a linear model as was done for 2008.

Commenters on the 2009 CUE rule suggested two other forecasting techniques: Time series forecasting (extrapolating past behavior into the future) and change-point detection methods (change-point detection is the identification of abrupt changes in the generative parameters of sequential data—looking at data and calculating when it changes its slope). EPA is not proposing to use these methods because they would require more data than the six data points that EPA currently has

on annual inventory levels. EPA welcomes comment on these techniques for forecasting future drawdown amounts.

EPA also welcomes comment on whether the estimate should be limited to a statistical analysis of past inventory levels or whether EPA should collect additional data or consider other factors. For example, one commenter on the 2009 proposed rule suggested that EPA collect information on pre-phaseout inventory levels near the end of the calendar year before the final rule is issued instead of in February. The Methyl Bromide Industry Panel (MBIP) voluntarily collected such data in early December 2008 in support of its comment on the 2009 CUE Rule. EPA could estimate the drawdown in the proposed rule and then collect the actual data on stocks near the end of the calendar year through EPA’s information gathering authority under section 114 of the Clean Air Act. Alternatively, EPA could revise the regulations to add a reporting requirement to facilitate the early collection of this information in future years. If EPA did collect actual data on stocks before the end of the calendar year, the Agency would still need to estimate stock drawdown for the remaining portion of the year in order to calculate the total drawdown for 2009. For example, in November 2009 EPA could collect data on the first three quarters of the year and use those data to estimate fourth quarter drawdown. EPA requests comment on the feasibility, accuracy, and burden imposed by such an approach.

EPA is proposing to estimate the drawdown of inventory in 2009 based on a linear projection. Using this method, EPA projects that the pre-phaseout methyl bromide inventory, which was 4,271,226 kg on January 1, 2009, will be drawn down by 2,834,226 kg during 2009. This will result in a pre-phaseout inventory of 1,437,000 kg on January 1, 2010. EPA’s proposed methodology for estimating the inventory drawdown is described in more detail in the Technical Support Document available in the public docket for this rulemaking.

## 3. Approach for Determining Critical Use Amounts

In developing this proposed rule, EPA applied the approach described in Section V.D.2 above, as it did for 2008 and 2009, to calculate “available stocks.” EPA has calculated that in 2010 there will no longer be an amount of pre-phaseout inventory that meets the definition of “available stocks.” EPA recognized in the 2008 rule that its

formula for calculating “available” stocks would in some future rulemaking yield a number less than the minimum effectively stipulated by the Parties (the difference between the total authorized critical use amount and the authorized amount of new production and imports). In the preambles to the 2008 and 2009 rules, EPA indicated that when that occurred, it would issue CSAs equal to the minimum amount stipulated by the Parties. However, for the 2010 control period there is an additional circumstance not discussed in prior CUE rulemakings. If EPA were to issue CSAs equal to the minimum amount stipulated by the Parties, and issue CUAs for the remaining amount of the total critical need, then new production and import in 2010 could exceed the previous year’s level.

To ensure continued progress in reducing U.S. production and import of critical use methyl bromide, EPA is proposing to limit 2010 CUAs (i.e., production and import) to the same level as in 2009. EPA is proposing to make up the remaining critical need by using its discretion to increase the CSA allocation proportionately. EPA is proposing to allocate only the amount of CSAs necessary to make up the difference between the overall U.S. critical need and the CUA amount in the 2009 CUE rule and consistent with levels authorized by the Parties.

EPA’s proposed action continues to meet the needs of critical users. EPA is also limiting this proposal to the situation where the total need can continue to be met through a combination of newly-produced or -imported methyl bromide and stocks. Ascertaining which uses of methyl bromide in a control period are critical, and in which amounts, is integral to the critical use process. The USG submits an annual critical use nomination to the Ozone Secretariat that reflects rigorous EPA review of applications to ensure that the nomination identifies only those uses meeting the criteria of Decision IX/6. The nominated critical uses and amounts are refined further during evaluation by the Methyl Bromide Technical Options Committee (MBTOC), such that the authorization for a particular control period ultimately reflects the Parties’ best assessment of the actual critical need. EPA’s critical use rulemakings reflect the U.S. critical need identified by the Parties, with further adjustments only to account for carryover of unsold critical use methyl bromide from a previous year, new information regarding availability of alternatives, and (in some cases) research amounts.

Second, EPA’s proposed action continues U.S. progress in phasing down the production and import of critical use methyl bromide. The proposed 2010 allocations reflect the consistent trend that the allocation for newly-produced or -imported critical use methyl bromide has decreased each and every year since the start of the critical use exemption process in 2005. Not allowing an increase in production or import is appropriate given that this is the sixth year following the methyl bromide phaseout under the Montreal Protocol (i.e., the international goal for developed countries has been zero new production and import since 2005), and considering that the remainder of the U.S.’s 2010 critical need can be met from pre-phaseout stockpiles.

EPA recognizes that this approach would allocate more from stocks than the Agency indicated it would when describing the supply chain factor in the 2008 and 2009 CUE rules. However, even if EPA issued CSAs equal to what the Parties authorized, as was discussed in those rules, the pre-phaseout inventory levels would be less than the supply chain factor calculated for 2010. As stated in prior CUE rulemakings, the supply chain factor is neither a reserve nor a guarantee. EPA will continue to calculate the SCF to determine whether additional amounts should be taken from stocks and, if so, in what amounts. In this rule, EPA is proposing to allocate CSAs as described in the decision of the Parties plus an additional amount to prevent an increase in new production. In future rules, if EPA calculates available stocks to be less than the SCF amount, EPA will only issue CSAs in the amounts authorized by the Parties, provided that this level does not increase new production compared to a prior year. EPA is not revisiting the concept of allowing the private sector to maintain limited amounts of inventory. Nor is EPA proposing to allocate the entire remaining amount of the stockpile as CSAs in today’s proposed action.

The proposed reduction to the CUA level is greater than the reductions EPA would otherwise make based on the approach described in the 2008 and 2009 rules. Of the reductions described in the 2008 and 2009 rules—for carryover amounts, research amounts, and uptake of alternatives—EPA would make a reduction only for carryover amounts because the other two adjustments are not applicable to the 2010 control period. EPA would not propose to make reductions for research amounts, because, as discussed below, the USG did not nominate a separate, additional amount specifically for

research purposes. At this time EPA also would not propose adjustments to reflect uptake of alternatives, although the Agency may make adjustments in the final rule to reflect information obtained during the comment period, if such adjustments would exceed the reduction made to bring the 2010 CUA level down to the 2009 CUA level.

If EPA were to apply only the carryover reduction, the amount of CUAs for 2010 would be 236,150 kg (0.9% of baseline) higher than the CUA amount allocated in the 2009 CUE rule. Thus, new production in 2010 could exceed the level of new production in 2009. EPA does not believe that an increase in new production is merited when existing pre-phaseout inventory can be used. As discussed above, EPA estimates that there will be a pre-phaseout inventory of 1,437,000 kg on January 1, 2010. EPA therefore proposes to reduce the calculated CUA amount by 236,150 kg to maintain CUAs at the same level as in the 2009 CUE rule.

EPA considered two approaches to ensuring that the CUAs for one year do not exceed the CUA level adopted in the previous year’s CUE rule. The approach EPA is proposing would, for 2010, reduce the calculated level of CUAs by 236,130 kg so that the CUA allocation declines from 2,981,865 kg (11.7% of baseline) to 2,745,715 (10.8% of baseline) and increase the CSA amount to 690,464 kg so as to meet the overall level of proposed critical needs. Under the second approach, EPA considered maintaining the CSA level at 470,000 kg in order to allow private entities to maintain as much as possible of the supply chain factor amount. EPA prefers the first approach because it meets the overall U.S. CUE need and it appropriately gives greater importance to meeting the current authorized need than a hypothetical future need.

EPA is not addressing the circumstance in which existing inventory cannot make up the difference between the production amount and the total critical need. Rather, EPA is proposing that it not increase new production while there is sufficient existing inventory. When the inventory is depleted or reaches a negligible amount, EPA may revisit the issue of whether there are circumstances in which production could be allowed to increase.

Although EPA’s proposed 2010 CUEs reflect a policy goal of not allowing an increase in new production and import in 2010, EPA is also seeking comment on applying its existing approach (as described in the 2008 and 2009 CUE rules) without this modification. Under that approach, EPA would allocate

470,000 kg of CSAs to reflect the minimum amount from stocks stipulated in the Parties' decision, reduce the production level authorized by the Parties by the carryover amount of 251,591 kg (see the detailed discussion below), and allocate 2,511,865 kg of CUAs, which is a 236,150 kg increase over the 2009 CUA level. Although this is not the preferred policy option for 2010, EPA is seeking comment on whether it should continue to apply the 2008–2009 approach without modification. That approach would also enable the total critical need for 2010 to be met, but would do so in a way that allowed private entities to maintain a greater level of pre-phaseout inventory.

#### 4. Treatment of Carryover Material

As discussed in the Framework Rule, EPA does not permit the building of stocks of methyl bromide produced or imported after January 1, 2005, under the critical use exemption. Quantities of methyl bromide produced, imported, exported, or sold to end-users under the critical use exemption in a control period must be reported to EPA the following year. EPA uses the reported information to calculate the amount of methyl bromide produced or imported under the critical use exemption, but not exported or sold to end-users in that year. EPA deducts an amount equivalent to this “carryover,” whether pre-plant or post-harvest, from the total level of allowable new production and import in the year following the year of the data report. Carryover material (which is produced using critical use allowances) is not included in EPA's definition of existing stocks (ES) (which applies to pre-phaseout material) because this would lead to a double-counting of carryover amounts, and a double reduction of critical use allowances (CUAs).

In 2009, companies reported that 3,036,130 kg of critical use methyl bromide was acquired through production or import in 2008. The information reported to EPA is that 2,784,539 kg of critical use methyl bromide was exported or sold to end-users in 2008. EPA calculates that the carryover amount at the end of 2008 was 251,591 kg, which is the difference between the reported amount of critical use methyl bromide acquired in 2008 and the reported amount of exports or sales of that material to end users in 2008 ( $3,036,130 - 2,784,539 = 251,591$  kg). EPA's calculation of the amount of carryover at the end of 2008 is consistent with the method used in previous CUE rules, and with the method agreed to by the Parties in

Decision XVI/6, which established the Accounting Framework for critical use methyl bromide, for calculating column L of the U.S. Accounting Framework. The 2008 U.S. Accounting Framework is available in the public docket for this rulemaking. EPA notes that the carryover value in the Accounting Framework is higher by 17 MT due to additional reports received after EPA provided the Accounting Framework to UNEP. EPA may take into account additional reports received within a reasonable time in calculating the carryover amount for the final 2010 rule.

As discussed in the section above, if EPA were to apply only the carryover reduction, the amount of CUAs for 2010 would be 236,150 kg (0.9% of baseline) higher than the CUA amount allocated in the 2009 CUE rule. EPA is proposing not to authorize new production in 2010 at a level that could exceed the level of new production in 2009. Thus, while EPA has calculated the carryover amount, its value does not affect the new production level under the preferred option. If EPA were to apply the approach set forth in the 2008 CUE rule without making an adjustment to avoid an increase in new production, EPA would reduce the total level of new production and import for critical uses by 251,591 kg to reflect the total level of carryover material in existence at the end of 2008.

#### 5. Methyl Bromide Alternatives

EPA considers new data regarding alternatives that were not available at the time the U.S. Government submitted its Critical Use Nomination (CUN) to the Parties, and adjusts the allocation for new production accordingly. For 2010, EPA is not proposing to make further reductions in post-harvest or pre-plant critical use allowances to reflect the transition to alternatives because the 2010 CUN applied transition rates for all critical use sectors. The TEAP report of October 2008 included reductions in its recommendations for critical use categories based on the transition rates in the 2010 CUN. The TEAP's recommendations were then considered in the Parties' 2010 authorization amounts, as listed in Decision XX/5. Therefore, transition rates, which account for the uptake of alternatives, have already been applied for authorized 2010 critical use amounts.

Furthermore, the 2011 CUN, which represents the most recent analysis and the best available data for methyl bromide alternatives, does not conclude that transition rates should be increased for 2010. As the 2011 CUN reflects, the United States Government has not found new information that supports

changing the 2010 transition rates included in the 2010 CUN and applied by MBTOC. EPA continues to gather information about methyl bromide alternatives through the CUE application process, and by other means.

In the 2009 CUE rule, EPA took into consideration new information about iodomethane and Telone. Iodomethane transition rates were not included in the 2009 CUN due to a lack of registrations at the time the nomination was prepared. EPA estimated iodomethane uptake during the 2009 CUE rulemaking based on new information regarding federal and state registrations. EPA also took into consideration information regarding a shortage of Telone and concluded that it should not make a reduction for iodomethane in view of the decline in Telone production. EPA therefore did not adjust the amount of new production either upward or downward in the final 2009 CUE rule.

Unlike the 2009 CUN, the 2010 CUN did include transition rates for iodomethane, and as stated above, there is no new information that would suggest changing those rates. Currently, iodomethane is registered for use in 47 states. We note that California has not yet decided whether to register iodomethane for use in the state. EPA may adjust the proposed uptake of iodomethane if additional state registrations occur within a reasonable time prior to signature of the final rule. EPA is not proposing at this point any further adjustment based on iodomethane beyond those already incorporated into the nominated amounts. EPA specifically invites comments on the availability, uptake, and use of iodomethane as an alternative to methyl bromide.

EPA also does not intend to make any adjustments to account for the reduced production of Telone in 2009. EPA has been made aware that Dow AgroSciences is seeking to restore production of Telone to full levels by the end of 2009. EPA does not believe that the shortage will continue into 2010 and therefore sees no need to account for it in the 2010 CUE allocation. EPA also seeks comment on its assumption that Telone supply will return to pre-shortage levels by 2010.

Finally, EPA seeks comment on its proposal not to make further reductions in 2010 to account for the uptake of methyl bromide alternatives because the Agency has already accounted for these other alternatives' transition rates. EPA continues to support research and adoption of methyl bromide alternatives, and to request information about the economic and technical

feasibility of all existing and potential alternatives.

*E. The Criteria in Decisions IX/6 and Ex. I/4*

Paragraphs 2 and 7 of Decision XX/5 request Parties to ensure that the conditions or criteria listed in Decisions Ex. I/4 and IX/6, paragraph 1, are applied to exempted critical uses for the 2010 control period. A discussion of the Agency's application of the criteria in paragraph 1 of Decision IX/6 appears in sections V.A., V.C., V.D., and V.H. of this preamble. In section V.C. the Agency solicits comments on the technical and economic basis for determining that the uses listed in this proposed rule meet the criteria of the critical use exemption (CUE). The critical use nominations (CUNs) detail how each proposed critical use meets the criteria listed in paragraph 1 of Decision IX/6, apart from the criterion located at (b)(ii), as well as the criteria in paragraphs 5 and 6 of Decision Ex. I/4.

The criterion in Decision IX/6(1)(b)(ii), which refers to the use of available stocks of methyl bromide, is addressed in sections V.D., V.G., and V.H. of this preamble. The Agency has previously provided its interpretation of the criterion in Decision IX/6(1)(a)(i) regarding the presence of significant market disruption in the absence of an exemption, and EPA refers readers to the 2006 CUE final rule (71 FR 5989) as well as to the memo on the docket titled "Development of 2003 Nomination for a Critical Use Exemption for Methyl Bromide for the United States of America" for further elaboration.

The remaining considerations, including the lack of available technically and economically feasible alternatives under the circumstance of the nomination; efforts to minimize use and emissions of methyl bromide where technically and economically feasible; the development of research and transition plans; and the requests in Decision Ex. I/4(5) and (6) that Parties consider and implement MBTOC recommendations, where feasible, on reductions in the critical use of methyl bromide and include information on the methodology they use to determine economic feasibility, are addressed in the nomination documents.

The USG's approach to research changed slightly in the 2010 nomination. In previous years, while the nomination was broad enough to cover both research and non-research uses, the USG nominated a separate, additional amount specifically for research purposes. Decision XVII/9 requested that the Parties "endeavor to use stocks,

where available, to meet any demand for methyl bromide for the purposes of research and development." Therefore, when allocating allowances, EPA subtracted the separate research amount from the Parties' authorized production level. This in effect encouraged the use of stocks for research purposes. This year, the USG did not nominate a separate, additional amount specifically for research purposes; thus, EPA is not proposing to adjust the production level to subtract this amount. However, the nomination was again broad enough to cover both research and non-research uses. As discussed below, research continues to be a key element of the critical use process. EPA therefore proposes that research on the critical use crops shown in the table in Appendix L to subpart A remain a critical use of methyl bromide. The USG may or may not nominate additional amounts for research in future years.

EPA maintains that research is a critical use as research on critical use crops is fundamental to the critical use process. Decision IX/6, which sets forth the criteria for a "critical use" determination, requires ongoing research programs in order for a Party to receive critical uses:

(b) That production and consumption, if any, of methyl bromide for a critical use should be permitted only if: (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 consideration the circumstances of the particular nomination \* \* \*. Non-Article 5 Parties [e.g., the U.S.] must demonstrate that research programmes are in place to develop and deploy alternatives and substitutes \* \* \*.

Though the USG did not request an additional amount for 2010, the nomination remains consistent with past nominations both in discussing how current research affects the use and uptake of alternatives as well as the USG's efforts to conduct research. The nomination states, "As noted in our previous nomination, the USG provides a great deal of funding and other support for agricultural research, and in particular, for research into alternatives for methyl bromide. This support takes the form of direct research conducted by the Agricultural Research Service (ARS) of USDA, through grants by ARS and CSREES, by IR-4, the national USDA-funded project that facilitates research needed to support registration of pesticides for specialty crop vegetables, fruits and ornamentals, through funding of conferences such as MBAO, and through the land grant university system." Consistent with past practice,

EPA proposes that research be a critical use in 2010. EPA requests that researchers use pre-phaseout inventory when possible. EPA is seeking comment on this approach for addressing researching amounts in 2010.

Some of these criteria are evaluated in other documents as well. For example, the U.S. has further considered matters regarding the adoption of alternatives and research into methyl bromide alternatives, criterion (1)(b)(iii) in Decision IX/6, in the development of the National Management Strategy submitted to the Ozone Secretariat in December 2005 and in ongoing consultations with industry. The National Management Strategy addresses all of the aims specified in Decision Ex.I/4(3) to the extent feasible and is available in the docket for this rulemaking.

*F. Emissions Minimization*

Decision XX/5, paragraph 11 states that Parties shall request critical users to employ "emission minimization techniques such as virtually impermeable films, barrier film technologies, deep shank injection and/or other techniques that promote environmental protection, whenever technically and economically feasible." In the judgment of USG scientists, use of virtually impermeable film (VIF) tarps allows pest control with lower application rates in addition to minimizing emissions. The quantity of methyl bromide nominated by the USG reflects the lower application rates necessary when using tarps.

Users of methyl bromide should make every effort to minimize overall emissions of methyl bromide to the extent consistent with State and local laws and regulations. The Agency encourages researchers and users who are successfully utilizing such techniques to inform EPA of their experiences as part of their comments on this proposed rule and to provide such information with their critical use applications. In addition, the Agency welcomes comments on the implementation of emission minimization techniques and whether and how further emissions could be reduced further.

*G. Critical Use Allowance Allocations*

EPA is proposing to allocate 2010 critical use allowances for new production or import of methyl bromide up to the amount of 2,275,715 kg (8.9% of baseline) as shown in Table III below. EPA is seeking comment on the total levels and allocations of exempted new production or import for pre-plant and post-harvest critical uses in 2010. Each

critical use allowance (CUA) is equivalent to 1 kg of critical use methyl bromide. These allowances expire at the end of the control period and, as explained in the Framework Rule, are

not bankable from one year to the next. This proposal for allocating the following number of pre-plant and post-harvest CUAs to the entities listed below is subject to the trading

provisions at 40 CFR 82.12, which are discussed in section V.G. of the preamble to the Framework Rule (69 FR 76982):

TABLE III—PROPOSED ALLOCATION OF CRITICAL USE ALLOWANCES

Company	2010 Critical use allowances for pre-plant uses* (kilograms)	2010 Critical use allowances for post-harvest uses* (kilograms)
Great Lakes Chemical Corp., a Chemtura Company .....	1,282,653	100,299
Albemarle Corp .....	527,456	41,245
ICL-IP America .....	291,483	22,793
TriCal, Inc .....	9,076	710
Total** .....	2,110,668	165,047

\* For production or import of Class I, Group VI controlled substance exclusively for the Pre-Plant or Post-Harvest uses specified in appendix L to 40 CFR part 82.

\*\* Due to rounding, numbers do not add exactly.

Paragraph six of Decision XX/5 states “that Parties shall endeavor to license, permit, authorize or allocate quantities of critical-use methyl bromide as listed in tables A and C of the annex to the present decision.” This is similar to language in Decisions authorizing prior critical uses. The language from these Decisions calls on Parties to endeavor to allocate critical use methyl bromide on a sector basis.

The Framework Rule proposed several options for allocating critical use allowances, including a sector-by-sector approach. The Agency evaluated the various options based on their economic, environmental, and practical effects. After receiving comments, EPA determined that a lump-sum, or universal, allocation, modified to include distinct caps for pre-plant and post-harvest uses, was the most efficient

and least burdensome approach that would achieve the desired environmental results, and that a sector-by-sector approach would pose significant administrative and practical difficulties. For the reasons discussed in the preamble to the 2009 CUE rule (74 FR 19894), the Agency believes that under the approach adopted in the Framework Rule, the actual critical use will closely follow the sector breakout listed in the Parties’ decisions.

#### H. Critical Stock Allowance Allocations

EPA is proposing to allocate critical stock allowances (CSAs) to the entities listed below in Table IV for the 2010 control period in the amount of 690,464 kg (2.7% of baseline). As described previously, EPA’s calculations indicate that there are no “available stocks” for allocation in 2010, and thus EPA is

proposing to allocate only the amount of stocks stipulated by the Parties in Decision XX/5.

In 2006, the United States District Court for the District of Columbia upheld EPA’s treatment of company-specific methyl bromide inventory information as confidential. *NRDC v. Leavitt*, 2006 WL 667327 (D.D.C. March 14, 2006). EPA’s allocation of CSAs is based on each company’s proportionate share of the aggregate inventory. Therefore, the documentation regarding company-specific allocation of CSAs is in the confidential portion of the rulemaking docket and the individual CSA allocations are not listed in the table below. EPA will inform the listed companies of their CSA allocations in a letter following publication of the final rule.

TABLE III—PROPOSED ALLOCATION OF CRITICAL STOCK ALLOWANCES

<b>Company:</b> Albemarle Bill Clark Pest Control, Inc. Burnside Services, Inc. Cardinal Professional Products Chemtura Corp. Degesch America, Inc. Helena Chemical Co. Hendrix & Dail	Hy Yield Bromine ICL-IP America Industrial Fumigation Company Pacific Ag Pest Fog Sales Corp. Prosource One Reddick Fumigants	Royster-Clark, Inc. Trical Inc. Trident Agricultural Products UAP Southeast (NC) UAP Southeast (SC) Univar Western Fumigation
<b>Total—690,464 kilograms</b>		

#### I. Stocks of Methyl Bromide

An approved critical user may purchase methyl bromide produced or imported with CUAs as well as limited inventories of pre-phaseout methyl bromide, the combination of which constitute the supply of “critical use methyl bromide” intended to meet the

needs of agreed critical uses. The Framework Rule established provisions governing the sale of pre-phaseout inventories for critical uses, including the concept of CSAs and a prohibition on the sale of pre-phaseout inventories for critical uses in excess of the amount of CSAs held by the seller. It also

established trading provisions that allow critical use allowances (CUAs) to be converted into CSAs. EPA is not proposing to change these provisions.

The aggregate amount of pre-phaseout methyl bromide reported as being in inventory at the beginning of 2009 is 4,271,226 kg. EPA estimates that the

aggregate inventory on January 1, 2010, will be approximately 1,437 MT. Thus, while EPA calculates that there will be no "available stocks" in 2010, for purposes of determining whether and how to allocate additional amounts from stocks beyond the minimum stipulated in Decision XX/5, EPA does not mean that the pre-phaseout inventory will be zero in 2010. As in prior years, the Agency will continue to closely monitor CUA and CSA data. Further, as stated in the final 2006 CUE rule, safety valves continue to exist. If an inventory shortage occurs, EPA may consider various options including authorizing the conversion of a limited number of CSAs to CUAs through a rulemaking, bearing in mind the upper limit on U.S. production/import for critical uses. In sections V.D. and V.G. of this preamble, EPA seeks comment on the amount of critical use methyl bromide to come from stocks compared to new production and import.

As explained in the 2008 CUE final rule, the Agency intends to continue releasing the aggregate of methyl bromide stockpile information reported to the Agency under the reporting requirements at 40 CFR 82.13 for the end of each control period. EPA notes that if the number of competitors in the industry were to decline appreciably, EPA would revisit the question of whether the aggregate is entitled to treatment as confidential information and whether to release the aggregate

without notice. EPA is not proposing to change the treatment of submitted information but welcomes information concerning the composition of the industry in this regard. The aggregate information for 2003 through 2008 is available in the docket for this rulemaking.

## VI. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action proposes a "significant regulatory action." This action is likely to result in a rule that may raise novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### B. Paperwork Reduction Act

This action does not impose any new information collection burden. The application, recordkeeping, and reporting requirements have already been established under previous Critical Use Exemption rulemakings and this action does not propose to change any of those existing requirements. However, the Office of Management and

Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 82 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0482. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act

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

Category	NAICS code	SIC code	NAICS small business size standard (in number of employees or millions of dollars)
Agricultural production .....	1112—Vegetable and Melon farming. 1113—Fruit and Nut Tree Farming 1114—Greenhouse, Nursery, and Floriculture Production.	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. 0831—Forest Nurseries and Gathering of Forest Products.	\$0.75 million.
Storage Uses .....	115114—Postharvest Crop activities (except Cotton Ginning). 311211—Flour Milling .....  311212—Rice Milling ..... 493110—General Warehousing and Storage. 493130—Farm Product Warehousing and Storage.	2041—Flour and Other Grain Mill Products. 2044—Rice Milling ..... 4225—General Warehousing and Storage. 4221—Farm Product Warehousing and Storage.	\$7 million.  500 employees. 500 employees. \$25.5 million. \$25.5 million.
Distributors and Applicators .....	115112—Soil Preparation, Planting and Cultivating.	0721—Crop Planting, Cultivation, and Protection.	\$7 million.
Producers and Importers .....	325320—Pesticide and Other Agricultural Chemical Manufacturing.	2879—Pesticides and Agricultural Chemicals, NEC.	500 employees.

Agricultural producers of minor crops and entities that store agricultural commodities are categories of affected entities that contain small entities. This proposed rule will only affect entities that applied to EPA for an exemption to the phaseout of methyl bromide. 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. EPA estimated that 3,218 entities petitioned EPA for an exemption for the 2005 control period. EPA now estimates there to be 2,000 end users of critical use methyl bromide. Since many applicants did not provide information on the distribution of sizes of entities covered in their applications, EPA estimated that, based on the above definition, between one-fourth and one-third of the entities may be small businesses. In addition, other categories of affected entities do not contain small businesses based on the above description.

After considering the economic impacts of this proposed rule on small entities, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. 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 exempts methyl bromide for approved critical uses after the phaseout date of January 1, 2005, this action confers a benefit to users of methyl bromide. EPA believes the estimated value for users of methyl bromide is between \$20 million and \$30 million annually. We have therefore concluded that this proposed rule will relieve regulatory burden for all small entities.

#### *D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The

action imposes no enforceable duty on any State, local or tribal governments or the private sector. Instead, this action provides an exemption for the manufacture and use of a phased out compound and does not impose any new requirements on any entities. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, titled "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."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule is expected to primarily affect producers, suppliers, importers and exporters and users of methyl bromide. Thus, Executive Order 13132 does not apply to this proposed rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule does not significantly or uniquely affect the communities of Indian tribal governments nor does it impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

#### *G. Executive Order No. 13045: Protection of Children From Environmental Health and Safety Risks*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern

health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This proposed rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed 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 proposed rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

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

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

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs,

policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations, because it affects the level of environmental protection equally for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. Any ozone depletion that results from this proposed rule will impact all

affected populations equally because ozone depletion is a global environmental problem with environmental and human effects that are, in general, equally distributed across geographical regions.

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

Environmental protection, Ozone depletion, Chemicals, Exports, Imports.

Dated: November 12, 2009.

**Lisa P. Jackson,**  
*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.

2. Section 82.8 is amended by revising the table in paragraph (c)(1) and paragraph (c)(2) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

Company	2010 Critical use allowances for pre-plant uses* (kilograms)	2010 Critical use allowances for post-harvest uses* (kilograms)
Great Lakes Chemical Corp., a Chemtura Company .....	1,282,653	100,299
Albemarle Corp .....	527,456	41,245
ICL–IP America .....	291,483	22,793
TriCal, Inc .....	9,076	710
Total ** .....	2,110,668	165,047

\* For production or import of Class I, Group VI controlled substance exclusively for the Pre-Plant or Post-Harvest uses specified in appendix L to this subpart.

\*\* Due to rounding, numbers do not add exactly.

(2) Allocated critical stock allowances granted for specified control period. The following companies are allocated critical stock allowances for 2009 on a pro-rata basis in relation to the inventory held by each.

Company:		
Albemarle Bill Clark Pest Control, Inc Burnside Services, Inc Cardinal Professional Products Chemtura Corp Degesch America, Inc Helena Chemical Co Hendrix & Dail	Hy Yield Bromine ICL–IP America Industrial Fumigation Company Pacific Ag Pest Fog Sales Corp Prosource One Reddick Fumigants	Royster-Clark, Inc. Trical Inc. Trident Agricultural Products. UAP Southeast (NC). UAP Southeast (SC). Univar. Western Fumigation.
<b>Total—690,464 kilograms</b>		

3. Appendix L to Subpart A of Part 82 is revised to read as follows:

#### Appendix L to Subpart A of Part 82— Approved Critical Uses and Limiting Critical Conditions for Those Uses for The 2010 Control Period

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation:
<b>PRE-PLANT USES</b>		
Cucurbits .....	(a) Growers in Delaware, Maryland, and Michigan (b) Growers in Georgia and Southeastern U.S. limited to growing locations in Alabama, Arkansas, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia.	Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe root knot nematode infestation.
Eggplant .....	(a) Florida growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation.



Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation:
	(b) Georgia growers .....	Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe pythium collar, crown and root rot. Moderate to severe southern blight infestation. Restrictions on alternatives due to karst topographical features.
Forest Nursery Seedlings .....	(c) Michigan growers .....	Moderate to severe soilborne disease infestation.
	(a) Growers in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation.
	(b) International Paper and its subsidiaries limited to growing locations in Alabama, Arkansas, Georgia, South Carolina, and Texas.	Moderate to severe yellow or purple nutsedge infestation.
	(c) Government-owned seedling nurseries in Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, Ohio, Pennsylvania, West Virginia, and Wisconsin.	Moderate to severe soilborne disease infestation. Moderate to severe weed infestation including purple and yellow nutsedge infestation. Moderate to severe Canada thistle infestation. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation
	(d) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, and South Carolina.	Moderate to severe yellow or purple nutsedge infestation.
	(e) Weyerhaeuser Company and its subsidiaries limited to growing locations in Oregon and Washington.	Moderate to severe soilborne disease infestation. Moderate to severe nematode or worm infestation.
	(f) Michigan growers .....	Moderate to severe yellow nutsedge infestation. Moderate to severe soilborne disease infestation.
Orchard Nursery Seedlings .....	(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in Washington, and members of the California Association of Nursery and Garden Centers representing Deciduous Tree Fruit Growers.	Moderate to severe soilborne disease infestation. Moderate to severe Canada thistle infestation. Moderate to severe nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe nematode infestation.
	(b) California rose nurseries .....	Medium to heavy clay soils. Local township limits prohibiting 1,3-dichloropropene.
Orchard Replant .....	(a) California stone fruit, table and raisin grape, wine grape, walnut, and almond growers.	Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Replanted orchard soils to prevent orchard replant disease. Medium to heavy soils. Local township limits prohibiting 1,3-dichloropropene.
Ornamentals .....	(a) California growers .....	Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene.
	(b) Florida growers .....	Moderate to severe weed infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation.
	(c) Michigan herbaceous perennial growers .....	Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation.
	(d) New York growers .....	Moderate to severe yellow nutsedge and other weed infestation.
Peppers .....	(a) Alabama, Arkansas, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia growers.	Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation.

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation:
Strawberry Fruit .....	(b) Florida growers .....	Moderate to severe pythium root, collar, crown and root rots. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(c) Georgia growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation, or moderate to severe pythium root and collar rot. Moderate to severe southern blight infestation, crown or root rot. Restrictions on alternatives due to karst topographical features.
	(d) Michigan growers .....	Moderate to severe soilborne disease infestation.
	(a) California growers .....	Moderate to severe black root rot or crown rot. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene. Time to transition to an alternative.
Strawberry Nurseries .....	(b) Florida growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Carolina geranium or cut-leaf evening primrose infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation.
	(c) Alabama, Arkansas, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, and Virginia growers. (a) California growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe black root and crown rot. Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation.
Sweet Potato Slips .....	(a) California growers .....	Local township limits prohibiting 1,3-dichloropropene.
Tomatoes .....	(a) Michigan growers .....	Moderate to severe soilborne disease infestation. Moderate to severe fungal pathogen infestation.
	(b) Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia growers. (c) Maryland growers .....	Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Restrictions on alternatives due to karst topographical features and, in Florida, soils not supporting seepage irrigation. Moderate to severe fungal pathogen infestation.
<b>POST-HARVEST USES</b>		
Food Processing .....	(a) Rice millers in the U.S. who are members of the USA Rice Millers Association.	Moderate to severe beetle, weevil, or moth infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.
	(b) Pet food manufacturing facilities in the U.S. who are members of the Pet Food Institute.	Moderate to severe beetle, moth, or cockroach infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.

Column A	Column B	Column C
Approved critical uses	Approved critical user and location of use	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation:
	(c) Members of the North American Millers' Association in the U.S.	Moderate to severe beetle infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.
Commodities .....	(d) Members of the National Pest Management Association treating processed food, cheese, herbs and spices, and spaces and equipment in associated processing and storage facilities.	Moderate to severe beetle or moth infestation. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.
Dry Cured Pork Products .....	(a) California entities storing walnuts, beans, dried plums, figs, raisins, and dates (in Riverside county only) in California. (a) Members of the National Country Ham Association and the Association of Meat Processors, Nahunta Pork Center (North Carolina), and Gwaltney and Smithfield Inc.	Rapid fumigation required to meet a critical market window, such as during the holiday season.  Red legged ham beetle infestation. Cheese/ham skipper infestation. Dermeest beetle infestation. Ham mite infestation.

[FR Doc. E9-27822 Filed 11-20-09; 8:45 am]  
BILLING CODE 6560-50-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Parts 440 and 441

[CMS-2261-WN]

RIN 0938-A081

#### Medicaid Program; Coverage for Rehabilitative Services; Withdrawal

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Withdrawal of proposed rule.

**SUMMARY:** This document withdraws a proposed rule that was published in the *Federal Register* on August 13, 2007. The proposed rule discussed our proposal to amend the definition of Medicaid "rehabilitative services." It also clarified the broad general language of the current regulation to ensure that rehabilitative services are provided in a coordinated manner, are limited to rehabilitative purposes, and are furnished by qualified providers.

**DATES:** Effective November 23, 2009, the proposed rule published on August 13, 2007 (72 FR 45201) is withdrawn.

**FOR FURTHER INFORMATION CONTACT:** Melissa Harris, (410) 786-3397.

**SUPPLEMENTARY INFORMATION:** On August 13, 2007, we published a proposed rule in the *Federal Register* entitled "Medicaid Program; Coverage for Rehabilitative Services" (72 FR 45201). The rule proposed to amend the definition of Medicaid "rehabilitative services" to include a requirement for a

person-centered written rehabilitation plan and maintenance of case records.

We received a total of 1,845 public comments in response to the August 13, 2007 proposed rule. In addition, following the publication of the proposed rule, in section 206 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, Public Law 110-173, the Congress enacted a moratorium on December 29, 2007 that included a prohibition on the Secretary taking any action, including publication of a final rule that was more restrictive with respect to coverage or payment for rehabilitative services than the requirements in place as of July 1, 2007. That moratorium was extended until April 1, 2009 by section 7001(a)(2) of the Supplemental Appropriations Act of 2008, Public Law 110-52.

Before the expiration of that congressional moratorium, the American Recovery and Reinvestment Act of 2009, Public Law 111-5, was enacted on February 17, 2009 and, at section 5003(d), stated that it was the "sense of Congress" that the Secretary should not promulgate as a final regulation the August 13, 2007 proposed regulation concerning rehabilitative services.

In light of the clear congressional concern indicated by the statutory moratorium and the resolution opposing issuance of a final rule based on the proposed rule, as well as the complexity of the underlying issues and of the public comments received, we have decided to withdraw the August 2007 proposed rule in order to assure agency flexibility in re-examining the issues and exploring options and alternatives with stakeholders.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: October 28, 2009.

**Charlene Frizzera,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: November 17, 2009.

**Kathleen Sebelius,**

*Secretary.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Part 89

RIN 0991-AB60

#### Organizational Integrity of Entities Implementing Leadership Act Programs and Activities

**AGENCY:** U.S. Department of Health and Human Services.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Health and Human Services (HHS) is issuing this Notice of Proposed Rulemaking (NPRM) to obtain input from stakeholders and other interested parties. This is a proposal to amend the rule governing the separation that must exist between a recipient of HHS funds to implement HIV/AIDS programs and activities under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 and an affiliate organization that engages in activities that are not consistent with a policy opposing prostitution and sex trafficking. The proposed rule relaxes the criteria for recipient—affiliate separation, and simplifies the process for compliance with the statutory requirement that recipients of HHS Leadership Act HIV/AIDS funds have a policy explicitly opposing prostitution and sex