

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** Pfizer, Inc., 235 East 42d St., New York, NY 10017-5755, filed a supplement to NADA 141-152 that provides for topical veterinary prescription use of REVOLUTION (selamectin) in dogs and cats. The supplemental NADA revises the minimum age of treatment from 6 weeks to 8 weeks for kittens. The supplemental NADA is approved as of April 6, 2009, and the regulations are amended in 21 CFR 524.2098 to reflect the approval.

Approval of these supplemental NADAs did not require review of additional safety or effectiveness data or information. Therefore, a freedom of information summary is not required.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

**List of Subjects in 21 CFR Part 524**

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 524 is amended as follows:

**PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS**

■ 1. The authority citation for 21 CFR part 524 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

**§ 524.2098 [Amended]**

■ 2. In § 524.2098, in the last sentence in paragraph (d)(2), remove "For dogs and cats 6 weeks of age and older" and in its place add "For dogs 6 weeks of age and older, and cats 8 weeks of age and older".

Dated: April 23, 2009.

**Steven D. Vaughn,**

*Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*  
[FR Doc. E9-9901 Filed 4-29-09; 8:45 am]

**BILLING CODE 4160-01-S**

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****33 CFR Part 165**

[Docket No. USCG-2009-0296]

**Security Zone; Portland Rose Festival on Willamette River**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce the Portland Rose Festival Security Zone on the Willamette River from 1 p.m. on June 3, 2009, until 10 a.m. June 8, 2009. This action is necessary to ensure the safety and security of maritime traffic, including the public vessels present, on the Willamette River during the Portland Rose Festival. During the enforcement period, entry into the security zone detailed in 33 CFR 165.1312 is prohibited unless authorized by the Captain of the Port Portland or his designated representative.

**DATES:** The regulations in 33 CFR 165.1312 will be enforced from 1 p.m. on June 3, 2009, through 10 a.m. on June 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call or e-mail MST1 Jaime Sayers, Waterways Management, U.S. Coast Guard Sector Portland; telephone 503-240-9319, e-mail [Jaime.A.Sayers@uscg.mil](mailto:Jaime.A.Sayers@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Coast Guard will enforce the security zone for the Portland Rose Festival detailed in 33 CFR 165.1312 from 1 p.m. on June 3, 2009, until 10 a.m. on June 8, 2009.

Under the provisions of 33 CFR 165.1312, entry into the zone established by that section is prohibited unless authorized by the Captain of the Port Portland or his designated representative. Spectator vessels may transit outside the security zone but may not anchor, block, loiter in, or impede the transit of ship parade participants or official patrol vessels. The Coast Guard may be assisted by other Federal, State or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1312 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with notification of this enforcement period via Local Notice to Mariners and marine information broadcasts.

Dated: April 16, 2009.

**F.G. Myer,**

*Captain, U.S. Coast Guard, Captain of the Port Portland.*

[FR Doc. E9-9992 Filed 4-29-09; 8:45 am]

**BILLING CODE 4910-15-P**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 82**

[EPA-HQ-OAR-2008-0009; FRL-8899-5]

RIN 2060-AO78

**Protection of Stratospheric Ozone: The 2009 Critical Use Exemption From the Phaseout of Methyl Bromide**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule authorizes uses of methyl bromide that qualify for the 2009 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 2009. EPA is taking action under the authority of the Clean Air Act to reflect a consensus decision taken at the Nineteenth Meeting of by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer.

**DATES:** This rule is effective on April 30, 2009.

**ADDRESSES:** EPA has established a docket for this action identified under EPA-HQ-OAR-2008-0009. All documents in the docket are listed on the <http://www.regulations.gov> site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available only through <http://www.regulations.gov> or in hard copy. To obtain copies of materials in hard copy, please call the EPA Docket Center at (202) 564-1744 between the hours of 8:30 a.m.-4:30 p.m. E.S.T., Monday-Friday, excluding legal holidays, to schedule an appointment. The EPA

Docket Center's Public Reading Room address is EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC.

**FOR FURTHER INFORMATION 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 final rule concerns Clean Air Act (CAA) restrictions on the consumption, production, and use of methyl bromide (a Class I, Group VI controlled substance) for critical uses during calendar year 2009. 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 authorizing the uses that will qualify for the 2009 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 2009.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: "The provisions of section 553 through 557 \* \* \* of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies." Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the policies underlying APA section 553(d) in making this rule effective on April 30, 2009. APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. This final rule grants an exemption from the phaseout of methyl bromide.

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**I. General Information**

*Regulated Entities*

Entities potentially regulated by this 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; owners of stored food commodities and structures such as

grain mills and processors; and agricultural researchers.

This list is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility, company, business, or organization could be regulated by this action, you should carefully examine the regulations promulgated at 40 CFR part 82, subpart A. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section.

**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 final 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 this action must continue to comply with FIFRA and other pertinent statutory and regulatory requirements for pesticides when importing, exporting, acquiring, selling, distributing, transferring, or using methyl bromide for critical uses. The regulations in this final rule only 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 that limit production and consumption of ozone-depleting substances are in 40 CFR part 82, subpart A. The Montreal Protocol on

Substances that Deplete the Ozone Layer (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 amended them as needed.

Methyl bromide was added to the Protocol as an ODS in 1992 through the Copenhagen Amendment to the Protocol. The Parties to the Montreal Protocol 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 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 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 that established the framework for the critical use exemption, listed 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. Since then, EPA has published rules applying the critical use exemption (CUE) framework to subsequent control periods. Under authority of section 604(d)(6) of the CAA, this action lists the uses that will qualify as approved critical uses in 2009 and the amount of methyl bromide that may be produced, imported, or supplied from inventory to satisfy those uses.

This action reflects Decision XIX/9, taken at the Nineteenth Meeting of the Parties in September 2007. 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, DC 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 final 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 permits the production and import of methyl bromide for uses that do not have technically and economically feasible alternatives. 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. EPA informed applicants 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, on research programs into the use of alternatives to methyl bromide, and on 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 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, subsequently review the CUNs of the various countries and make recommendations to the Parties on the nominations. The Parties then take a Decision to authorize a critical use exemption for a particular country. The Decision also identifies how much methyl bromide may be supplied for the exempted critical uses. As required in Section 604(d)(6) of the Clean Air Act, 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 has determined to be necessary for critical uses and the uses that the Agency has determined meet the criteria of the critical use exemption.

More on the domestic review process and methodology employed by the Office of Pesticide Programs is available in a detailed memorandum titled "Development of 2003 Nomination for a Critical Use Exemption for Methyl Bromide for the United States of America," contained in the docket for this rulemaking. While the particulars of the data continue to evolve and administrative matters are further streamlined, the technical review itself remains rigorous with careful consideration of new technical and economic conditions.

On December 22, 2006, the U.S. Government (USG) submitted the fifth CUN to the Ozone Secretariat. This fifth nomination contained the request for 2009 critical uses. In February 2007, MBTOC sent questions to the USG concerning technical and economic issues in the 2009 nomination. The USG

transmitted preliminary responses to MBTOC on March 13, 2007. The USG received a second round of questions from MBTOC and submitted responses to those questions in May, 2007. These documents, together with reports by the advisory bodies noted above, are in the public docket for this rulemaking. The determination in this final rule reflects the analysis contained in those documents.

#### *B. How Does This Final Rule Relate to Previous CUE Rules?*

The December 23, 2004, Framework Rule (69 FR 76982) established the operational framework for the CUE 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 CUE program.

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

Today's action authorizes specific critical uses for 2009 and the amounts of critical use allowances (CUAs) and critical stock allowances (CSAs) allocated for those uses. These are the uses included in the USG's fifth CUN and authorized by the Parties in Decision XIX/9. EPA is not modifying the Framework Rule or the approach to determining the level of available stocks finalized in the 2008 CUE rule published on December 28, 2007.

#### *C. Critical Uses*

In Decision XIX/9, taken in September 2007, the Parties to the Protocol agreed "to permit, for the agreed critical use categories for 2009, 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 2009 set forth in table D of the annex to the present decision which are necessary to satisfy critical uses. \* \* \*

Table C of the annex to Decision XIX/9 lists the following uses: 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, Strawberry—field, Strawberry runners, Tomatoes—field, Sweet potato slips. The agreed critical use levels for 2009 total 4,261,974 kilograms (kg), which is equivalent to 16.7% of the U.S. 1991 methyl bromide consumption baseline of 25,528,270 kg. However, the maximum amount of allowable new production and import as set forth in Table D of Decision XIX/9 is 3,961,974 kg (15.5% of baseline), minus available stocks. For the reasons described in Section V.D of this preamble, EPA is allowing limited amounts of new production or import of methyl bromide for critical uses for 2009 up to the amount of 2,275,715 kg (8.9% of baseline), with 1,919,193 kg (7.5% of baseline) coming from pre-phaseout inventory (*i.e.*, stocks).

This final rule modifies 40 CFR part 82, subpart A, Appendix L to reflect the agreed critical use categories identified in Decision XIX/9 for the 2009 control period. The Agency is amending the table of critical uses based, in part, on the technical analysis contained in the 2009 U.S. nomination that assesses data submitted by applicants to the CUE program as well as public and proprietary data on the use of methyl bromide and its alternatives. EPA sought comment on the technical analysis (which is provided in the docket) and as well as information regarding changes to the registration or use of alternatives that may have transpired after the 2009 U.S. nomination was written. The Agency stated that such information has the potential to alter the technical or economic feasibility of an alternative and could thus cause EPA to modify the analysis that underpins EPA's determination as to which uses and what amounts of methyl bromide qualify for the critical use exemption. Based on the information described above, EPA is determining that the uses in Table I: Approved Critical Uses, with the limiting critical conditions specified, qualify to obtain and use critical use methyl bromide in 2009.

<sup>1</sup> NPMA, National Pest Management Association, includes both food processing structures and processed foods. This year's exemption does not include cocoa beans.

TABLE I—APPROVED CRITICAL USES

Approved critical uses Column A	Approved critical user and location of use Column B	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation: Column C
<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, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.	Moderate to severe soilborne disease infestation. A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe root knot nematode infestation. A need for methyl bromide for research purposes.
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. A need for methyl bromide for research purposes.
	(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. A need for methyl bromide for research purposes.
	(c) Michigan growers .....	Moderate to severe soilborne disease infestation. A need for methyl bromide for research purposes.
Forest Nursery Seedlings.	(a) Growers in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. (b) International Paper and its subsidiaries limited to growing locations in Alabama, Arkansas, Georgia, South Carolina, and Texas. (c) Government-owned seedling nurseries in Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, Ohio, Pennsylvania, West Virginia, and Wisconsin. (d) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, and South Carolina. (e) Weyerhaeuser Company and its subsidiaries limited to growing locations in Oregon and Washington. (f) Michigan growers .....	Moderate to severe yellow or purple nutsedge infestation 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. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode or worm 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. (b) California rose nurseries .....	Moderate to severe yellow nutsedge infestation. Moderate to severe soilborne disease infestation. 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. Medium to heavy clay soils. Local township limits prohibiting 1,3-dichloropropene. A need for methyl bromide for research purposes.
Orchard Replant .....	(a) California stone fruit, table and raisin grape, wine grape, walnut, and almond growers.	Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene. A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes.
	(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.

TABLE I—APPROVED CRITICAL USES—Continued

Approved critical uses Column A	Approved critical user and location of use Column B	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation: Column C
Peppers .....	(c) Michigan herbaceous perennial growers ... (a) Alabama, Arkansas, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia growers. (b) Florida growers .....	A need for methyl bromide for research purposes. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Moderate to severe yellow nutsedge and other weed infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe pythium root, collar, crown and root rots. A need for methyl bromide for research purposes. 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.
Strawberry Fruit .....	(c) Georgia growers .....	A need for methyl bromide for research purposes. 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 .....	A need for methyl bromide for research purposes. Moderate to severe soilborne disease infestation.
	(a) California growers .....	A need for methyl bromide for research purposes. 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 .....	A need for methyl bromide for research purposes. 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.
Strawberry Nurseries ....	(c) Alabama, Arkansas, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, and Virginia growers. (a) California growers .....	A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe black root and crown rot. A need for methyl bromide for research purposes
	(b) North Carolina and Tennessee growers ....	Moderate to severe soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. A need for methyl bromide for research purposes. Moderate to severe black root rot. Moderate to severe root-knot nematode infestation. Moderate to severe yellow and purple nutsedge infestation.
Sweet Potato Slips .....	(a) California growers .....	A need for methyl bromide for research purposes. 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 .....	A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes. 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) Bakeries in the U.S .....	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. Presence of sensitive electronic equipment subject to corrosion.

TABLE I—APPROVED CRITICAL USES—Continued

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:
Column A	Column B	Column C
	(d) Members of the North American Millers' Association in the U.S.	Time to transition to an alternative. Moderate to severe beetle infestation. Presence of sensitive electronic equipment subject to corrosion.
	(e) Members of the National Pest Management Association treating processed food, cheese, herbs and spices, and spaces and equipment in associated processing and storage facilities.	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. Export to countries which do not allow the use of sulfuryl fluoride. A need for methyl bromide for research purposes.
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. Dermestid beetle infestation. Ham mite infestation.

EPA proposed revising the description of the National Pest Management Association (NPMA) to remove the term cocoa beans in storage and associated spaces. NPMA has transitioned to sulfuryl fluoride for cocoa bean fumigation and such fumigations were not included in the CUN or approved by the Parties. NPMA requested that instead of the proposed description, EPA describe their members as "Members of the National Pest Management Association treating processed food, cheese, dried milk, herbs and spices, and spaces and equipment in associated processing and storage facilities." The use of methyl bromide for dried milk was not included in the CUN or approved by the Parties. Therefore, EPA agrees with NPMA's revised description except for the inclusion of dried milk.

EPA proposed adding "restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation" as a limiting critical condition for Georgia grown peppers and eggplants. Dow AgroSciences commented that there are no soil restrictions on the uses of 1,3-D in Georgia and asked that that limiting critical condition be revised. Dow AgroSciences is correct that "soils not supporting seepage irrigation" is not a limiting critical condition for Georgia and the final rule reflects this change. EPA intended this limiting critical condition to only reflect restrictions due to karst topographical features. This change does not affect the amount of critical use methyl bromide EPA is allocating because EPA's analysis only assumed limitations due to karst topographical features.

EPA proposal inadvertently included "Local township limits prohibiting 1,3-dichloropropene" as a limiting critical condition for tomato growers in the Southeast. There are no such township limits in the Southeast. Instead, this critical condition should have been "Restrictions on alternatives due to karst topographical features and, in Florida, soils not supporting seepage irrigation," as was the language in the 2008 CUE Rule. The final rule has added back the appropriate limiting critical condition for those growers in the Southeast.

EPA proposed adding tomatoes grown in Maryland as a critical use when limited by "high water tables and proximity to environmentally sensitive estuaries which limit use of 1,3-D." Dow AgroSciences commented that there are no restrictions on the uses of 1,3-D products in Maryland associated with high water tables or environmentally sensitive estuaries and asked that that Maryland tomatoes thus not be approved as a critical use. EPA has ascertained that there is no labeling restriction concerning high water tables or environmentally sensitive estuaries for 1,3-D and thus the final rule does not include this as a limiting critical condition. Moderate to severe fungal pathogen infestation still remains a limiting critical condition for Maryland tomatoes, as authorized by the Parties to the Protocol. Therefore, EPA is approving Maryland tomatoes as an authorized critical use. Removing the language concerning high water tables and proximity to environmentally sensitive estuaries does not affect the amount of critical use methyl bromide EPA is allocating because EPA's

analysis did not include use or acreage estimates where this limiting critical condition would apply. Therefore, EPA is not reducing the estimated amount of demand or the amount of new production based on this change.

EPA also proposed adding "export to countries which do not allow the use of sulfuryl fluoride" as a limiting critical condition for commodities. Dow AgroSciences commented that import Maximum Residue Levels (MRLs) exist in countries that import commodities treated with sulfuryl fluoride and asked that this limiting critical condition be removed. EPA disagrees with that this limiting critical condition be removed. EPA has accounted for the Codex MRLs in the 2007 nomination for use in 2009. However, many countries that the U.S. exports to set their own MRLs and many have not yet done so for sulfuryl fluoride. Therefore EPA is retaining the limiting critical condition for the use of methyl bromide in the commodities sector.

Dow AgroSciences also had other comments on limiting critical conditions that have existed in prior CUE Rules. EPA has addressed those comments in the Response to Comments document contained in the docket for this rule.

EPA is finalizing most of the proposed changes to the table in Appendix L, with the exception of the three issues discussed above. The remaining changes reflect the recommendations made by MBTOC and the critical uses authorized by the Parties to the Protocol. Specifically, the changes between this year's critical uses and those in 2008 are: adding cucurbits grown in Maryland and Delaware as a critical use

under the limiting critical conditions listed in the table; moving herbaceous perennials grown in Michigan from forest nursery seedlings to ornamentals; adding “restrictions on alternatives due to karst topographical features” as a limiting critical condition for Georgia grown peppers; adding tomatoes grown in Maryland as a critical use under the limiting critical conditions of “moderate to severe fungal pathogen infestation”; adding “export to countries which do not allow the use of sulfuryl fluoride” as a limiting critical condition for commodities; and revising the description of NPMA to remove cocoa beans as was done in the CUN, but in a manner consistent with the CUN.

In addition, EPA is making the following editorial changes to Table I to remove redundancy and ensure that the limiting critical conditions are described uniformly throughout. First, EPA has consolidated, into the same row, all critical users with the same limiting critical condition within a critical use. Second, EPA moved clarifying information from the table to the preamble to improve readability. Thus, EPA clarifies here that the “local township limits prohibiting 1,3-dichloropropene” are prohibitions on the use of 1,3-dichloropropene products because 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. EPA does not intend for these edits to change the effect of any of the limiting critical conditions, the approved critical user, location of use, or any other aspect of the table.

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, and pistachios.

The categories listed in Table I were designated as critical uses for 2009 in Decision XIX/9 of the Parties. The amount of methyl bromide approved for research purposes is included in the amount of methyl bromide approved by the Parties for the commodities for which “research purposes” is indicated as a limiting critical condition in Table I. As explained in Section V.D.5., EPA is issuing CSAs to allow the sale of 22,171 kg of methyl bromide from existing stocks for research purposes,

and adjusting new production accordingly.

In accordance with the recommendations in Tables 4 and 8 of the TEAP’s August 2007 Final Report titled “Evaluations of 2007 Critical Use Nominations for Methyl Bromide and Related Matters,” available on the docket for this rulemaking, EPA is allowing the following to use critical use methyl bromide for research purposes: commodities, cucurbits, eggplant (field), nursery stock (fruit, nut, flower), orchard replant, ornamentals, peppers (field), strawberry (field), strawberry runners, sweet potato slips, and tomatoes (field). As discussed below, EPA allows the use of newly-produced methyl bromide for research purposes but encourages researchers to use pre-phaseout inventory by reducing the amount of new production by the amount the Parties authorize for research. In their applications to EPA, these sectors identified research programs that require the use of methyl bromide.

#### *D. Critical Use Amounts*

Section V.C. of this preamble explains that Table C of the annex to Decision XIX/9 lists critical uses and amounts agreed to by the Parties to the Montreal Protocol. When added together, the authorized critical use amounts for 2009 total 4,261,974 kilograms (kg), which is equivalent to 16.7% 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 XIX/9 is 3,961,974 kg (15.5% of baseline), “minus available stocks.”

EPA’s allocation of critical use allowances and critical stock allowances for 2009 applies the existing regulatory framework to the amounts authorized by the Parties to reflect the following factors:

- (a) The amount of available stocks;
- (b) The amount of unused critical use methyl bromide at the end of 2007 (the carryover amount); and
- (c) The amount of methyl bromide authorized for research purposes.

Using the existing framework, EPA also proposed a reduction to accommodate a certain amount of transition to the recently registered fumigant iodomethane for some pre-plant uses. Given recent information concerning the reduced production of another alternative, Telone, EPA is not making a reduction for the uptake of alternatives in this final rule. Commenters’ concerns about each of these reductions are described in the sections below.

EPA proposed to issue 1,617,921 kg (6.3% of baseline) of critical use allowances (CUAs) and 2,576,987 kg (10.1% of baseline) of critical stock allowances (CSAs). Generally, commenters were opposed to the proposed level of new production, stating it would be insufficient to meet the needs of critical users and would result in shortages in some areas. Based on comments received on the proposed rule, as well as additional data, EPA is issuing 2,275,715 kg (8.9% of baseline) of critical use allowances, which allow limited amounts of new production and import of methyl bromide for 2009 critical uses up to the amount of 2,275,715 kg as shown in Table III. EPA is also issuing 1,919,193 kg (7.5% of baseline) of critical stock allowances, which allow sales of 1,919,193 kg from existing pre-phaseout inventories for critical uses in 2009. The sub-sections below explain EPA’s reasons for issuing these critical use amounts for 2009.

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

The December 23, 2004, Framework Rule and subsequent CUE rules each took note of language regarding stocks of methyl bromide in relevant decisions of the Parties. In developing this action, the Agency noted that paragraph seven of Decision XIX/9 contains the following language: “that each Party which has an agreed critical use renews its commitment to ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting or authorizing critical use of methyl bromide and, in particular, the criterion laid down in paragraph 1(b)(ii) of decision IX/6.” Language calling on Parties to address pre-phaseout inventory also appears in prior Decisions related to the critical use exemption.

In the Framework Rule, which established the architecture of the CUE program and set out the exempted levels of critical use for 2005, EPA interpreted paragraph 5 of Decision Ex. I/3, which is similar to Decision XIX/9(7), “as meaning that the U.S. should not authorize critical use exemptions without including provisions addressing drawdown from stocks for critical uses” (69 FR 76987). Consistent with that interpretation, 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. 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. In developing this final rule, EPA did not propose changes to these basic CSA provisions.

Paragraph 5 of Decision XIX/9 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 August 25, 2004, proposed Framework Rule (69 FR 52366), EPA proposed to adjust the authorized level of new production and consumption for critical uses by the amount of “available stocks.” The methodology for determining the amount of available stocks considered exports, methyl bromide for feedstock uses, and the need for a buffer in case of catastrophic events. However, the final Framework Rule did not adopt the proposed methodology for determining available stocks. Instead, for the 2005 control period 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 (Total Authorized CUE Amount—Authorized New Production and Import).

EPA issued CSAs for the 2006, 2007, and 2008 control periods 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. In the 2006 CUE Rule, EPA issued a total of 1,136,008 CSAs, equivalent to 4.4% of baseline. For that control period, 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). EPA reduced the portion of CUE methyl bromide to come from new production and import in each of the 2006–2008 control periods accordingly in order to ensure that the total critical use allocation did not exceed the total amount authorized by the Parties for that year.

As established in these earlier rulemakings, EPA views the allocation of additional CSA amounts as an appropriate exercise of its discretion. The Agency is not required to allocate

the full amount of authorized new production and consumption. The Parties agreed to “permit” a particular level of production and consumption; they did not—and could not—mandate that the U.S. authorize this level of production and consumption domestically. Nor does the CAA require EPA to exempt the full amount permitted by the Parties. Section 604(d)(6) of the Clean Air Act (CAA) does not require EPA to exempt any amount of production and consumption for critical uses, but instead specifies that the Agency “may” exempt amounts for production, import, and consumption, thus providing EPA with substantial discretion in creating critical use exemptions.

The Methyl Bromide Industry Panel commented that EPA abused its discretion by proposing to allocate a much greater number of CSAs than required by the Parties to the Protocol. EPA believes that it has the discretion to allocate beyond the minimum stock drawdown set forth in the Parties’ decision, as described above. EPA’s basis for setting the specific CSA amount is detailed in the remainder of this notice.

Prior to determining the CSA amount for a particular year, EPA considers what portion of “existing” stocks is “available” for critical uses. As discussed in the 2008 rulemaking, 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.” In addition, Decision XIX/9, 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 XIX/9 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 Clean Air Act does not require that EPA 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. In this action, EPA did not propose to change its practice of adjusting the level of new production and import

authorized by the Parties to reflect the availability of stocks.

EPA introduced in the 2008 CUE rule a refined approach for determining the amount of existing methyl bromide stocks that is available for critical uses (72 FR 74118). That approach involves the concept of a “Supply Chain Factor” (SCF). The SCF represents EPA’s technical estimate of the amount of methyl bromide inventory that would be adequate to meet a need for critical use methyl bromide after an unforeseen domestic production failure. The SCF is used in the formula finalized in the 2008 CUE rule for calculating the available stocks. That formula is expressed as  $AS = ES - D - SCF$ , where  $AS$  = available stocks;  $ES$  = existing pre-phaseout stocks of methyl bromide held in the United States by producers, importers, and distributors; and  $D$  = estimated drawdown of existing stocks. In the 2008 CUE rule, EPA stated that it would use this refined approach in 2008 and each year thereafter as appropriate and feasible (72 FR 14134). EPA is not changing the SCF concept or the formula finalized in the 2008 CUE rule for calculating the available stocks, with the exception that for 2009 EPA will not estimate the drawdown of existing stocks during 2008 but rather, as was encouraged by commenters, use the actual drawdown based on end-of-year reported data. The SCF approach continues to be appropriate and feasible, as it is the most reasonable, efficient, and transparent way for the Agency to continue to facilitate responsible management of the pre-phaseout inventory.

## 2. Calculation of Available Pre-Phaseout Inventory

In this action, EPA is adjusting the authorized level of new production and consumption for critical uses to account for the amount of existing pre-phaseout inventory that is “available” for critical uses. EPA is calculating the amount of existing stocks that is available for critical uses in 2009 based on the SCF and formula introduced in the 2008 CUE final rule (72 FR 74118). EPA is allowing sales of the amount of existing pre-phaseout inventory that the Agency has determined to be available for critical uses by issuing an equivalent number of CSAs on a one-CSA-per-one-kilogram-of-methyl-bromide basis.

As described in the 2008 CUE Rule, EPA calculates the amount of available stocks as follows:  $AS_{2009} = ES_{2008} - D_{2008} - SCF_{2009}$ , where  $AS_{2009}$  is the available stocks on January 1, 2009;  $ES_{2008}$  is the existing pre-phaseout stocks of methyl bromide held in the United States by producers, importers,

and distributors on January 1, 2008; D<sub>2008</sub> is the estimated drawdown of existing stocks during calendar year 2008; and SCF<sub>2009</sub> is the supply chain factor for 2009.

EPA received comment from MBIP that the Agency has not adequately explained why using a formulaic approach is preferable to utilizing an amount of stocks that is more consistent with past control periods. In response, EPA notes that the formula for calculating available stocks is not a new approach: It was finalized in the 2008 CUE Rule. Information on the development of that formula can be found in the proposed and final 2008 CUE Rules, as well as in the Technical Support Document for the 2008 control period, which is included in the docket for today's action. In addition, the CSA amount allocated in today's final rule is within the same range as past allocations. In previous control periods, EPA has authorized CSAs ranging from 4.4% to 7.5% of baseline. As discussed below, EPA is finalizing a CSA amount of 7.5% of baseline.

As established in the 2008 CUE Rule, "ES<sub>2008</sub>" refers to pre-phaseout inventory—*i.e.*, existing stocks of methyl bromide that was produced before January 1, 2005, and that is still held by domestic producers, distributors, and third-party applicators. January 1, 2005, was the phaseout date for production and import of methyl bromide in the United States. ES<sub>2008</sub> does not include critical use methyl bromide that was produced after January 1, 2005, and carried over into subsequent years. EPA addresses the carryover amount in section V.D.4 of this preamble. "ES<sub>2008</sub>" also does not 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. Methyl bromide produced for QPS uses or for export to Article 5 countries may not be sold to domestic entities for critical uses and, therefore, is separate from the CUE program. Thus, such amounts have been removed from the calculation of the amount of "available stocks" for critical uses.

In the proposed rule, EPA stated that unless the Agency received evidence to the contrary, it would assume that all pre-phaseout inventory is suitable for both pre-plant and post-harvest uses. EPA is making this assumption because the Agency has received no data that show that pre-phaseout inventory is mixed with chloropicrin and is unsuitable for post-harvest uses. One commenter requested that EPA require

inventory holders to report information regarding the purity of their stocks. EPA does not believe that such a step is necessary. EPA has not received any data through comments or other means indicating that some pre-phaseout inventory is unsuitable for particular critical uses due to its formulation. Therefore, this final rule assumes that all pre-phaseout inventory is suitable for all uses.

The Agency also sought comment on its presumption that geographic location is not a factor in the availability of pre-phaseout inventory. EPA based this conclusion on the geographic distribution of the companies that are granted CSAs (See Table IV) as well as end of year reporting data submitted by CSA holders regarding the size of their inventory. EPA continues to believe that geography is not a factor in inventory methyl bromide. However, commenters did cite regional shortages of inventoried methyl bromide and questioned the actual availability of pre-phaseout inventory. First, commenters said that pre-phaseout inventory is held by only a small number of distributors. EPA's end-of-year reporting data support this comment and this has been the case since methyl bromide was phased out in 2005. These distributors, however, serve the major markets for methyl bromide. Thus, even though there may be a small number of distributors, this does not necessarily limit the ability to supply customers in different regions.

Second, EPA has received comment that these distributors will likely continue to supply their existing client base, which consist mainly of non-CUE users. These commenters also state that EPA has no authority to require distributors to sell their material to critical users. As a result, the commenters state that critical users who are unable to purchase newly produced material will not have access to any methyl bromide and that the Agency should assume all inventoried material to be unavailable and increase the amount of new production to the level authorized by the Parties.

EPA disagrees that it should allocate increased production of new methyl bromide in response to distributors' decisions not to sell their pre-phaseout inventory to critical users. Issues concerning supply of pre-phaseout inventory are addressed in the Response to Comment Document for the 2008 CUE Rule. Briefly, EPA regards this material as "available" because it is owned by someone other than the end user. While a distributor might prefer to sell methyl bromide to non-critical users to satisfy prior contracts or internal

business decisions, this is not the result of any EPA regulatory constraint. EPA does not currently require the sale of inventory to critical users. However, beginning in 2010, distributors will be unable to sell to non-critical users due to labeling changes to methyl bromide. Under the Reregistration Eligibility Determination (RED) for methyl bromide soil fumigation uses issued in July 2008, uses already considered critical by the Parties have been considered eligible for reregistration, along with QPS uses. More information is available in the methyl bromide RED, available on the Web at: <http://www.epa.gov/oppsrrd1/REDs/methylbromide-red.pdf>.

#### a. Estimated Drawdown

In the 2008 CUE rule, EPA estimated the drawdown of existing stocks (D<sub>2008</sub>) by using a simple linear fit estimation of inventory data from all available years. For the 2009 CUE rule, EPA proposed to estimate drawdown using an exponential projection. Using that method, EPA projected that the pre-phaseout methyl bromide inventory, which was 6,457,806 kg on January 1, 2008, would be drawn down by 1,528,806 kg during 2008 resulting in a pre-phaseout inventory of 4,929,000 kg on January 1, 2009. Under the exponential model, 2,576,987 kg (10.1% of baseline) of existing pre-phaseout stocks of methyl bromide would have been deemed "available" for critical uses on January 1, 2009. EPA also provided the results of the linear model for comment. Under the linear model, EPA estimated a much greater drawdown leading to a lower amount of available stocks, 777 MT (3% of baseline), in 2009. EPA invited comment on those two different analyses or any alternative method of estimating drawdown. Comments were unanimous that EPA should use actual end-of-year data on inventory levels instead of a statistical estimate of drawdown. EPA agrees that it would be less accurate to use an estimate when the Agency has actual reported data at the time it is preparing the final rule. Therefore, for 2009, EPA is using actual end-of-year data submitted to the Agency under the reporting requirements of 40 CFR 82.13. EPA responds to additional comments about various statistical methods in the response to comments document. EPA is not deciding in this action how to calculate the drawdown for future years. Such calculations may use an estimate or actual reported data depending on the timing of those future rules.

The Methyl Bromide Industry Panel, in its comment to the Agency, provided

EPA with preliminary data regarding the size of the pre-phaseout inventory. MBIP collected this data through an outside accounting firm who contacted most of the CSA holders in mid-December. The data showed that in mid-December, the inventory was 4,252,931 kilograms. EPA welcomed this initial estimate because it provided crucial early information in formulating a final rule before the end of year data was reported February 15. The Agency may find such information to be useful in drafting future CUE allocation rules as well. In this final rule, EPA is using the actual end-of-year data as it is more complete than the information MBIP submitted.

The reported inventory on December 31, 2008, was 4,271,226 kg. This is less than the 4,929,000 kilograms that EPA estimated under the exponential model (although more than the 3,129,000 kg estimated by the linear model). This means that the drawdown for 2008 was 2,186,600 kg. The effect of this value on the levels for new production and CSAs is discussed in more detail below.

EPA also asked for comment on its discussion of the market conditions that could be affecting the decline in inventory use, including whether inventory during 2008 is being depleted at rates similar to 2007 or whether it is being depleted faster than that. For 2008, the drawdown did not appear to have adhered precisely to either an exponential or linear curve. EPA still believes that the market conditions in 2008 are substantively different from those in 2004, as described in the proposed rule. First, the Critical Use Exemption process did not exist in 2004, as that was the last year of the methyl bromide phaseout. EPA believes that the economics and use patterns since the 2005 phaseout differ from those pre-phaseout. Second, at the beginning of 2004, the inventory was 16,422,000 kg MT, a substantially higher amount than an inventory of 4,271,226 kg at the end of 2008. Third, the price of methyl bromide has increased roughly 30–50% since 2004. Therefore, today growers face stronger economic incentive to use alternatives and reduce application rates than they did in 2004. Fourth, more alternatives are available, including sulfuryl fluoride and iodomethane, reducing the total demand for methyl bromide. However, the comments suggest that the rate of drawdown at this point is based mostly on the business decisions of the companies that hold pre-phaseout inventory. In the proposed rule, EPA stated that less of the inventory was used for non-critical uses in 2007 than 2006. In 2006, 1,519 MT of pre-phaseout

inventory was for non-critical uses, whereas in 2007, this dropped to 291 MT. This pattern does not appear to continue through 2008. Preliminary review of the data submitted for 2008 show an increase in sales of inventory for non-critical uses. The exact amounts will be contained in the 2008 Accounting Framework submitted to UNEP in late spring 2009.

The goal of EPA's methodology for the CSA allocation is to allocate CSAs equal to "available stocks" such that the private sector has the flexibility to retain in inventory the amount needed in case of a catastrophic supply chain failure (the Supply Chain Factor). As the Agency stated in the 2008 CUE Rule and in Section V.D.3 below, once the inventory declines below the SCF level, the Agency will not require any additional drawdown of stocks beyond what is required in the authorization by the Parties to the Protocol for that control period.

#### b. Supply Chain Factor

The supply chain factor (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, EPA estimated that in the event of a major supply disruption, it would take 15 weeks for significant imports of methyl bromide to reach the U.S. Using updated numbers on average production during each quarter of the year, EPA estimated in the proposed 2009 CUE rule that critical use production in the first 15 weeks of each year (the peak supply period) accounts for 55% of annual critical use methyl bromide production. In the proposed rule, EPA estimated that the peak 15-week shortfall in 2009 could be 2,352,013 kg ( $55.186\% \times 4,261,974$  kg). EPA received two comments regarding the SCF. The MBIP generally supported the inclusion of the SCF but commented that it should be equivalent to one year's supply of material rather than 55%, which they asserted would not be sufficient to meet the needs of critical users were a catastrophic disruption to occur. EPA disagrees with this comment, as it relates to decisions made in the 2008 CUE Rule rather than any new decisions made for 2009. MBIP made the same comment in the 2008 proposed rule and EPA responded to their comments in the 2008 Response to Comments document contained in the docket to this rule. As EPA states in that document, the SCF is based on conservative assumptions about the effect of a disruption.

MBIP also commented that the rate of inventory drawdown that would result from the new production levels in the proposed rule would lead to too little stockpiled methyl bromide for a Supply Chain Factor in 2010 and beyond. EPA disagrees that this will occur. First, as discussed elsewhere, this final rule allocates more for new production and authorizes less to be taken from stocks than the proposed rule. Second, EPA has calculated a preliminary estimate of the SCF for 2010 based on the amounts authorized by the Parties, and believes that there will be sufficient inventory to meet the SCF.

Ultimately, MBIP's comment appears to be based on the assumption that the Agency seeks through this rule to deplete the inventory to zero. EPA reiterates that the Agency's purpose in utilizing the SCF is to give the private sector the flexibility to retain in inventory the amount needed in case of a catastrophic supply chain failure. EPA does believe that the amount of drawdown should exceed the minimum amount required by the Parties to the Protocol as long as the inventory remains above the SCF level. While MBIP's comment suggested that EPA simply maintain the same level of CSAs as was finalized last year, the Agency believes that using the available stocks formula adopted in the 2008 CUE Rule provides a more rigorous approach. While MBIP states that under the proposed rule, the level of existing stocks would be "dangerously close to EPA's 55% SCF target," EPA believes that this is appropriate, as it is the Agency's goal to draw down inventory levels to the SCF target.

EPA also received comments from Dow AgroSciences, which argued that the SCF is unnecessarily conservative, given the remoteness of an event such as an unforeseen domestic production failure occurring. As EPA stated in the 2008 CUE Rule, the Agency did not conduct a statistical or probability analysis of the likelihood of this scenario. EPA recognizes that a catastrophic loss is unlikely, but this does not obviate the need to plan for such a scenario. Methyl bromide, unlike most commercial chemicals, is produced at only one facility. Therefore, a scenario in which this facility completely ceases production is of special concern. While EPA expects private entities to take prudent steps to protect themselves, EPA does not wish to render them incapable of maintaining a reasonable supply buffer.

EPA explained in the 2008 CUE rule that the SCF is affected by the uptake of alternatives, because the SCF is based on the peak demand and the uptake of

alternatives affects the peak demand for methyl bromide. The proposed rule did not adjust for the uptake of iodomethane because the analysis had not yet been completed. Since then, EPA has developed projections for uptake of iodomethane in 2009. Nevertheless, the allocation in the final rule does not explicitly reflect uptake of iodomethane because, due to the Telone shortage discussed below, the Agency is not making any reductions to account for the uptake of alternatives. Therefore, EPA will finalize the proposed value of 2,352,013 kg for the SCF. Consistent with the 2008 CUE rule, this is a conservative estimate of the amount of methyl bromide needed to cover a supply disruption during the estimated peak 15-week period of critical use supply.

As stated in the 2008 CUE Rule, EPA reiterates that the SCF is not a “reserve” or “strategic inventory” of methyl bromide. Rather, it is merely an analytical tool used to provide greater transparency regarding how the Agency determines CSA amounts, in cases where CSA amounts are greater than the amounts stipulated by the Parties. For further general discussion of the SCF, see the final 2008 CUE rule (72 FR 74118). Further detail about the analysis used to derive the value for the 2009 SCF is provided in the Technical Support Document available on the public docket for this rulemaking.

### 3. Approach for Determining Critical Use Amounts

In the proposed rule, EPA applied the SCF to estimate that 2,576,987 of pre-phaseout inventory would be “available stocks”. Following its CSA allocation framework, EPA proposed to allow the sale of 2,576,987 kg from existing stocks for critical uses in 2008 by allocating an equivalent number of CSAs. As in past years, EPA proposed to adjust the critical use allowance (CUA) amounts accordingly, so that the total number of CUAs and CSAs is not greater than the total critical use amount authorized by the Parties. The proposed rule noted that under EPA’s framework, the Agency may allocate a total number of CUAs and CSAs that is less than the total critical use amount authorized by the Parties for 2009 to account for carryover amounts of methyl bromide, amounts for research purposes or other appropriate reasons, including updated information on alternatives.

EPA received one comment that the total number of CUAs and CSAs should not be less than the amount authorized by the Parties to the Protocol because the full amount is needed for critical uses. In making reductions for research

purposes and to account for carryover material, EPA is following its existing framework. The reductions for these purposes are both necessary and appropriate, as discussed below. Furthermore, these reductions are minor. While the Parties approved 4,261,974 kg (or 16.7% of baseline) for use in 2009, this final rule allocates 4,194,908 kg (or 16.4% of baseline). EPA believes that this total CUE amount in the final rule meets the needs of critical users while still responding to decisions taken by the Parties regarding carryover and research amounts.

More commenters were concerned about the level of CSAs than the total amounts of CUAs and CSAs being allocated. Commenters stated that the ratio of CUAs to CSAs was inappropriate and would also not allow for production or import of enough new material to meet the needs of critical users. As discussed elsewhere in this preamble, EPA is finalizing CUAs and CSAs based on new inventory data which will allow for greater levels of new production. The CUAs and CSAs in this final rule were calculated using the approach adopted in the 2008 CUE Rule, but have changed from the proposal because of new data showing the actual inventory levels at the end of 2008. Some commenters may still contend that inventory is declining too rapidly and that new production should thus be increased. As stated elsewhere in this preamble, EPA believes that it has appropriately applied its discretion regarding the rate of drawdown of pre-phaseout inventory. Consistent with the 2008 CUE Rule, the allocations for 2009 continue to allow private entities to maintain an amount equal to the “supply chain factor”—i.e., an amount that would allow continued availability of pre-phaseout inventory in the event of a catastrophic disruption to supply. As discussed above, this approach is consistent with the relevant Decisions of the Parties, especially Table D of the Annex to Decision XIX/9, which for 2009 explicitly authorizes for the United States a certain amount of new production and import “minus available stocks.” After considering all of the comments received, EPA believes that this is the most reasonable, efficient, and transparent way for the Agency to continue to facilitate responsible management of pre-phaseout inventory. EPA calculates that, as of January 1, 2009, 1,919,193 kg of pre-phaseout inventory meets the definition of “available stocks” as calculated using the approach described in Section V.D.2. of this preamble. Therefore, with this action the Agency is allowing

1,919,193 kg of methyl bromide to be supplied from pre-phaseout inventory for critical uses in 2009 by issuing an equivalent number of CSAs, and adjusting the amount of CUAs accordingly. EPA also calculates that there will be sufficient pre-phaseout inventory at the beginning of the 2010 control period to satisfy the amount of 2010 inventory drawdown (470,000 kg) for critical uses identified by the Parties in Decision XX/5.

To summarize, the critical use amounts authorized by the Parties in Decision XIX/9 for 2009 total 4,261,974 kg. The maximum amount of authorized new production or import as set forth in Table D of the Annex to Decision XIX/9 is 3,961,974 kg, “minus available stocks.” Applying the “available stocks” approach finalized in the 2008 CUE Rule, EPA is expecting 1,919,193 kg of 2009 critical use needs to be met from pre-phaseout inventory and thus is issuing CSAs in that amount. As in past years, EPA is adjusting the amount of CUAs accordingly, so that the sum of CUAs and CSAs is not greater than the total amount authorized by the Parties. After accounting for the additional reductions for unsold critical use methyl bromide at the end of 2007 and reductions to encourage research amounts to be supplied from pre-phaseout inventory, EPA is allowing 2,275,715 kg of new production and import for critical uses in 2009.

### 4. Treatment of Carryover Material

As described in the December 23, 2004, Framework Rule (69 FR 76997), EPA is not permitting entities to build stocks of methyl bromide produced or imported after January 1, 2005, under the critical use exemption. Under the current regulations, quantities of methyl bromide produced, imported, exported, or sold to end-users under the critical use exemption in a calendar year must be reported to EPA the following year. These reporting requirements appear at 40 CFR 82.13(f)(3), 82.13(g)(4), 82.13(h)(1), 82.13(bb)(2), and 82.13(cc)(2). EPA uses the reported information to calculate the amount of critical use methyl bromide that has been produced or imported in that control period but not exported or sold to end-users in that year. An amount equivalent to this “carryover,” whether pre-plant or post-harvest, is then deducted from the total level of allowable new production and import in the year following the year of the data report. For example, EPA deducted the amount of carryover from 2006 (reported in 2007) from the allowable amount of production or import for critical uses in 2008. As discussed in

Section V.D.2., carryover material is not included in EPA's definition of existing stocks (ES) as it applies to the formula for determining the amount of available stocks (AS). EPA is not including carryover amounts as part of ES, because doing so could lead to a double-counting of carryover amounts, with proportionate effects on the calculation of critical use allowances (CUAs).

EPA stated in the proposed rule that it calculates the amount of carryover CUE material each year based on data reported to EPA by distributors and applicators regarding sales to end-users. In 2008, 57 entities reported information to EPA under the reporting requirements at 40 CFR 82.13 about critical use methyl bromide production, imports, exports, sales, and/or inventory holdings in 2007. In 2007, 4,314,150 kg of critical use methyl bromide was acquired through production or import. The information reported to EPA indicates that 4,269,255 kg of critical use methyl bromide was exported or sold to end-users in 2007. The carryover amount at the end of 2007 was thus 44,895 kg, which is the difference between the reported amount of critical use methyl bromide acquired in 2007 and the reported amount of exports or sales of that material to end users in 2007 (4,314,150 kg – 4,269,255 kg = 44,895 kg). EPA's calculation of the amount of carryover at the end of 2007 is consistent with the method used in the final 2008 CUE Rule, 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. the Accounting Framework. The 2007 U.S. Accounting Framework is available in the public docket for this rulemaking.

As a result of stakeholder concerns regarding the completeness of reporting and in response to public comment, EPA stated in the 2008 CUE Rule that it would collect the names of all distributors and third-party applicators with critical use exemption reporting requirements under 40 CFR 82.13 using its information gathering authority under section 114 of the Clean Air Act. On January 31, 2008, EPA sent letters to all producers, distributors, and third-party applicators of critical use methyl bromide that it was aware of asking for "the name and address of each non-end user entity (i.e. distributors of methyl bromide and third-party applicators of methyl bromide) to which your company sold critical use methyl bromide during calendar year 2007." As a result, EPA received contact information for distributors and third-party applicators that had never

reported sales data to EPA as well as actual sales reports from some of those new entities. On March 11, 2008, the Agency sent a follow-up letter to the previously unknown entities that had not reported sales data for 2007 and reminded them of their reporting obligations under 40 CFR 82.13. The Agency received 18 responses from previously unknown entities satisfying the required annual reporting requirements.

MBIP suggested that EPA calculate the carryover as the sum of all critical use methyl bromide that companies report as being held in inventory. MBIP raised this issue in the 2008 CUE Rule and EPA continues to maintain that the established methodology is a simple and accurate way to calculate the carryover amount each year and that adjusting the established method could create international confusion about U.S. reporting. More details of MBIP's proposals to modify how the carryover amount is calculated, as well as EPA's response, are found in the 2008 CUE Rule Preamble and Response to Comments document.

In previous CUE rules, EPA has used the approach described in the Framework Rule for implementing carryover reductions. Consistent with that approach, EPA is reducing the total level of new production and import for critical uses by 44,895 kg to reflect the total level of carryover material in existence at the end of 2007.

#### 5. Amounts for Research Purposes

There continues to be a need for methyl bromide for research purposes. A common example is an outdoor field experiment that requires methyl bromide as a standard control treatment with which to compare the trial alternatives' results. EPA notes that the use of methyl bromide under the critical use exemption for research is distinct from the use of methyl bromide under the laboratory and analytical use exemption. Research uses under the critical use exemption refer to field trials of alternative fumigants where methyl bromide is used as a control. Research uses under the laboratory and analytical use exemption refer to methyl bromide used as a reference or standard; in laboratory toxicology studies; to compare the efficacy of methyl bromide and its alternatives inside a laboratory; and as a laboratory agent which is destroyed in a chemical reaction in the manner of feedstock. Decision XVIII/15(1). The critical use sectors that were approved by the Parties to use methyl bromide for research purposes in 2009 are listed in Section V.C. and have "research purposes" as a limiting

critical condition in Table I of this preamble. While use of methyl bromide for the research purposes listed in that section is a critical use, EPA has consistently encouraged research needs be met through the sale of inventory by deducting the amount needed for research from the overall critical use production level and issuing additional CSAs in that amount.

MBIP commented that because the inventory is so low, EPA should increase the level of new production by 22,171 kg instead of issuing CSAs for that amount. EPA disagrees, and a detailed analysis of the amount of available stocks, explained further in Section V.D.2 of this preamble, finds that more than 1,900,000 kg of pre-phaseout inventory is available for critical uses. EPA is therefore allowing the sale of 22,171 kg of pre-phaseout inventory for research purposes in 2009 to account for the amount authorized for those purposes. EPA is allowing methyl bromide sale from stocks for exempted research purposes by expending CSAs. The Agency continues to encourage methyl bromide suppliers to sell inventory to researchers and to encourage researchers to purchase inventory for research purposes.

#### 6. Methyl Bromide Alternatives

In this rule, as in previous CUE rules, EPA has considered new data regarding alternatives that was not available at the time the U.S. Government submitted its Critical Use Nomination (CUN) to the Parties. EPA has used this new information in deciding whether to adjust the amount of new production. For example, in the 2006 CUE Rule (71 FR 5985), EPA adjusted the allocation for new production in order to account for the recent registration of sulfuryl fluoride. That allocation reflected transition rates that were included for the first time in the 2007 U.S. Critical Use Nomination (CUN). In the 2007 CUE Rule (72 FR 74139), EPA explained that the transition rates had already been applied as part of the international review process for that year and did not apply them as part of the Agency's domestic rulemaking. EPA did, however, reduce the total volume of critical use methyl bromide in the final CUE rule for 2008 by 27,769 kg because the transition rates did not account for the uptake of iodomethane in various pre-plant sectors or sulfuryl fluoride in cocoa fumigation.

For 2009, EPA is taking into consideration new information about iodomethane and Telone. Absent other factors, new data on the uptake of iodomethane in 2009 would lead the Agency to adjust the CUA allocation to

account for the uptake of this alternative. Through the public comments, EPA also received information regarding a shortage in Telone production, the magnitude of which is uncertain but expected to be significant. EPA therefore believes that it would be imprudent to make a reduction for iodomethane in the face of this substantial but currently unquantifiable reduction in Telone. EPA also received comments regarding the uptake of sulfuryl fluoride. As described below, the Agency does not believe that this information is new or sufficient to adjust new production levels for 2009. Therefore, EPA is not making any adjustment to the authorized amount of new production to account for new data regarding alternatives.

EPA proposed to reduce critical use allowances to account for new information about the uptake of iodomethane. The TEAP report of August 2007 included reductions based on the transition rates for alternatives considered in the 2009 CUN. These alternatives included sulfuryl fluoride, but not iodomethane, which was not yet registered for use. The TEAP's recommendations were then considered in the Parties' 2009 authorization amounts, as listed in Decision XIX/9. Therefore, with the exception of iodomethane, transition rates accounting for the uptake of alternatives like sulfuryl fluoride have already been applied for authorized 2009 critical use amounts. Furthermore, the 2010 CUN, which is the U.S. Government's last opportunity to adjust the 2009 authorization, did not conclude that transition rates should be increased for 2009. As the 2010 CUN reflected, the United States Government had not found new information that supports changing the 2009 transition rates included in the 2009 CUN and applied by MBTOC.

After considering new information about iodomethane, EPA expects that in 2009 iodomethane will be a technically and economically feasible alternative for many pre-plant applications. Beginning in Fall 2008, iodomethane obtained a full pesticide registration for use as a soil fumigant by EPA for a limited number of crops. Iodomethane also received state registrations by all states except California, New York, and Washington.

Iodomethane is currently registered on food crops (peppers, tomatoes, strawberries) and non-food nursery crops (ornamentals, forest seedlings, and strawberry nurseries). EPA has assumed uptake on only the food crops at this time. Although it is registered on non-food nursery crops, the Agency has

not assumed any uptake for 2009. This is in keeping with the Agency's policy of being protective of nursery crops until there is certainty that use of the newly registered alternative is efficacious on nematodes, diseases, and fungi and can meet any certification requirement. There are two major CUE food crops that do not have an iodomethane registration: Curcubits and eggplants. EPA did not estimate any uptake on those crops. For the crops and states where iodomethane is registered, EPA has estimated that an additional 15 percent of the critical use methyl bromide authorized by the Parties for 2009 can transition to iodomethane use. The Agency's analysis, described in a memo on the docket for this action, estimates that iodomethane can feasibly replace 262,035 kg of methyl bromide in 2009.

MBIP commented that EPA may not reduce new production to account for the uptake of iodomethane because EPA did not provide a meaningful opportunity to comment. MBIP states that EPA did not explain the factors it would consider in assessing the uptake of iodomethane or include a memo in the docket setting forth the Agency's methodology, and that accounting for anything other than a *de minimis* uptake of iodomethane would be contrary to administrative law. EPA disagrees that it could not account for the uptake of iodomethane in the final rule. EPA provided for reference the estimated market uptake for iodomethane in the 2008 CUE Rule along with the number of states in which iodomethane was registered at that time compared to the date of the proposed rule. While EPA did not place the analysis conducted for the 2008 CUE Rule in the 2009 Rule docket prior to proposal, EPA's methodology for estimating uptake can be found in the docket to the 2008 Final CUE Rule and has been reviewed and commented upon by MBIP in the past. EPA believes that it has the discretion to make a reduction to account for iodomethane uptake based on the information provided in the proposal and the methodology used in 2008. However, as discussed further below, EPA is not making such a reduction in this rule.

EPA also received comments that it should make reductions for increased use of sulfuryl fluoride. As described above, data about the uptake of sulfuryl fluoride was included in the 2009 CUN and thus was included in the TEAP's August 2007 recommendations. Dow AgroSciences commented that sulfuryl fluoride can currently replace 100% of current post-harvest methyl bromide uses and that EPA should therefore

reduce the allocation of methyl bromide to account for market advances of sulfuryl fluoride. EPA does not believe that the data Dow AgroSciences submitted was applicable to the 2009 control period. Additionally, Dow AgroSciences did not submit economic data regarding the transition to sulfuryl fluoride. While many post-harvest users submitted comment expressing support for sulfuryl fluoride as an efficacious fumigant, the Agency does not yet have the economic data to support a faster transition rate in 2009 than was contained in the CUN. Therefore, EPA is not reducing new production of methyl bromide to account for the adoption of sulfuryl fluoride in the post-harvest sector.

EPA also received information that Dow AgroSciences has reduced its production of 1,3-D (marketed as Telone) for the first half of 2009. The comment states, and the Agency has confirmed, that 1,3-D is a co-product of a chemical used in the plastics industry. The recent downturn in the economy has resulted in less demand of that chemical. Dow AgroSciences has produced less of that chemical and as a result the production of 1,3-D has similarly declined. Commenters believe that this shortage will place greater pressure on stockpiled methyl bromide as growers facing a shortage of Telone will be forced to rely on the pre-phaseout inventory.

EPA agrees that a shortage of Telone in 2009 will result in a greater reliance on methyl bromide, whether newly produced or pre-phaseout inventory. Some growers who had planned to transition to Telone this year will likely not do so and others who had already transitioned to Telone may instead have to revert to methyl bromide for this season. Other crops that use Telone, such as potatoes and tobacco, will not be able to switch to critical use methyl bromide in 2009 as they are not critical use crops.

The Agency believes that it should treat the new information on Telone shortages in the same way as other new data on alternatives. In previous CUE rules, EPA has reduced the amount of new production to account for the expected uptake of alternatives such as sulfuryl fluoride and iodomethane. In this instance, EPA believes that it should not ignore the new information about the reduced production and therefore opportunity for use of an alternative. This reduction in supply directly affects the economic feasibility of Telone in a way not contemplated in the CUN.

EPA is currently unable to quantify the effect that a reduction in Telone

production may have on critical users of methyl bromide. EPA does not know how long the reduction will last because it is due to a downturn in the economy, and the demand for the chemical with which 1,3-D is co-produced. While Dow AgroSciences has only announced this decision for the first half of 2009, neither Dow AgroSciences nor EPA can estimate the length of the economic downturn. EPA is thus unable to estimate the extent of the shortage.

EPA does have some data, however, to suggest that there will be an effect and that action is warranted. EPA anticipates this effect will be greater in California, which has not registered iodomethane, than in the Southeast where that alternative is available. In 2007, Telone was the fifth-most-used pesticide in California by pounds of active ingredient, according to the California Department of Pesticide Regulation. According to that data, strawberries are the largest user of Telone, with over 860,000 kg applied in 2007. Another 356,000 kg were used for

“soil fumigation/preplant.” Using this data, EPA estimates that at least 1,450,000 kg of Telone were applied in California in 2007 on CUE crops. This compares to the 4,269,255 kg of methyl bromide used throughout the U.S. in 2007, as reported to UNEP in the 2007 Accounting Framework. Any reduction in Telone production will therefore likely result in an increase in the use of methyl bromide, assuming the limiting critical conditions are met. EPA notes, however, that Telone usage on CUE crops is only a small fraction of the total amount of Telone used. EPA estimates that about 13,000,000 kg of Telone is used on a variety of crops, with potatoes and tobacco constituting about half of that use. The effect on methyl bromide will depend in large part on how Telone is distributed, and whether some growers will have greater access to what is produced than others.

Given these uncertainties, EPA is unable to model the effects of the shortage with the same precision used to model the uptake of iodomethane.

The Agency does anticipate pressure on newly produced methyl bromide as well as pre-phaseout inventory as a result of this shortage. EPA believes that it would be imprudent to make a reduction for iodomethane in the face of this substantial but unquantifiable reduction in Telone production. Therefore, for the 2009 control period, EPA is not adjusting the amount of new production either upward or downward to account for new information regarding alternatives. For the same reasons, EPA is also not making a reduction for the uptake of alternatives when calculating the supply chain factor. EPA will consider any appropriate adjustments for iodomethane and Telone in the 2010 CUE Rule based on information available at the time that rule is developed.

#### 7. Summary of Calculations

The calculations described above for determining the level of new production and critical stock allowances are summarized in Table II below:

TABLE II—SUMMARY OF CALCULATIONS

	Kilograms
<b>Step 1: Calculate supply chain factor</b>	
U.S. authorization for 2009 .....	4,261,974
– Further reduction for uptake of alternatives .....	0
= One year's CUE need .....	4,261,974
× Percentage of year's production to recover from production failure .....	55.186%
= Supply Chain Factor .....	2,352,013
<b>Step 2: Calculate available stocks</b>	
Existing pre-phaseout inventory on January 1, 2008 (“ES2008”) .....	6,457,806
– Drawdown of inventory during 2008 (“D2008”) .....	2,186,600
– Supply Chain Factor .....	2,352,013
= Available stocks (“AS2009”) = Critical Stock Allowance .....	1,919,193
<b>Step 3: Calculate carryover</b>	
Reported as produced/imported in 2007 .....	4,314,150
– Reported as sold in 2007 .....	4,269,255
= Carryover .....	44,895
<b>Step 4: Calculate new production</b>	
U.S. authorization for 2009 .....	4,261,974
– Critical Stock Allowance (Step 2) .....	1,919,193
– Carryover (Step 3) .....	44,895
– Amounts Used for Research .....	22,171
– Uptake of alternatives .....	0
= New production = Critical Use Allowance .....	2,275,715

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

Paragraphs 2 and 7 of Decision XIX/9 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 2009 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. The CUNs detail how each 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 all addressed in the nomination documents.

Some of these criteria were 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 XIX/9, 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 proposed rule, EPA encouraged growers to use such techniques but did not propose to require them. At the public hearing for this action the California Strawberry Commission expressed its opinion that EPA should create a regulatory incentive for emissions reduction. Similarly, Dow AgroSciences commented that emissions minimization measures, potentially including application rate reductions, soil sealing requirements, minimum application depths, and maximum soil temperatures be mandated and not merely recommended.

In the judgment of USG scientists, use of virtually impermeable film (VIF) tarps allows pest control with lower application rates while minimizing emissions. EPA encourages the use of tarps by reflecting the lower application rates that are necessary when using tarps in its 2009 nomination. EPA believes that reducing supply through the phaseout provides incentives for use minimization and therefore limits emissions. EPA disagrees, however, that the 2009 CUE rule should require the use of emissions minimization techniques, as the Agency did not propose to do so. The Agency continues to investigate the emissions reductions benefits of using various types of tarps, recognizing the lack of data in field situations, variability in efficacy in reducing emissions by application type (broadcast vs. raised bed), as well as regulatory prohibitions on less permeable tarps in California. EPA has placed a memo detailing some of this analysis into the docket for this rule. Users of methyl bromide should make every effort to minimize overall emissions of methyl bromide by implementing measures such as the ones listed above, to the extent consistent with State and local laws and regulations. The Agency also continues to encourage researchers and users who are successfully utilizing such techniques to provide such information with their critical use applications.

#### G. Critical Use Allowance Allocations

A critical use allowance (CUA) is a privilege granted by EPA, using its authority under Section 604(d)(6) of the Clean Air Act, that enables the holder to produce or import one kilogram of methyl bromide for an approved critical use during the specified control period. 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. The allocation of 2009 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).

EPA proposed to allocate 2009 critical use allowances for new production or import of methyl bromide up to the amount of 1,617,921 kg (6.3% of baseline). EPA sought comment on the total levels of exempted new production or import for pre-plant and post-harvest critical uses in 2009. For the reasons discussed in Section V.D. of this preamble, EPA is adjusting the proposed CUA amounts to account for (1) new data regarding the drawdown of pre-phaseout inventory, (2) carryover of unsold methyl bromide in 2007, and (3) amounts authorized by the Parties for research.

Therefore, the total critical use exemption amount for 2009 is 4,194,908 kg (16.4% of baseline), with 2,275,715 kg (8.9% of baseline) of critical use allowances allowing new production or import, and the remaining amount, 1,919,193 kg (7.5% of baseline), available through critical stock allowances (CSAs) that allow critical users to access pre-phaseout methyl bromide. EPA is continuing to apportion company-specific CUA allocations on the basis of the 1991 baseline consumption share of the companies listed in Table III. The updated calculation spreadsheet is available in the docket. The CUAs are allocated as follows:

TABLE III—PROPOSED ALLOCATION OF CRITICAL USE ALLOWANCES

Company	2009 critical use allowances for pre-plant uses* (kilograms)	2009 critical use allowances for post-harvest uses* (kilograms)
Great Lakes Chemical Corp. A Chemtura Company .....	1,249,703	133,249
Albemarle Corp .....	513,906	54,795
ICL—IP America .....	283,995	30,281
TriCal, Inc .....	8,843	943
Total <sup>2</sup> .....	2,056,448	219,267

\* 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.

<sup>2</sup> Due to rounding, numbers do not add exactly.



EPA received comment that Ameribrom changed its name to ICL-IP America. This new name is reflected in Table III and in the final rule.

Paragraph 6 of Decision XIX/9 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 Ex. I/3(4), Ex. II/1(4), XVII/9(4), and XVIII/13(5) regarding 2005, 2006, 2007, and 2008 critical uses, respectively. The language from these Decisions calls on Parties to endeavor to allocate critical use methyl bromide on a sector basis.

As it did in the final Framework Rule (69 FR 76989) and each critical use allocation rulemaking since, EPA is allocating critical use allowances on a lump-sum, or universal basis, modified to include distinct caps for pre-plant and post-harvest uses. The Agency continues to believe that this is the most efficient and least burdensome approach that would achieve the desired environmental results, and that a sector-specific approach would pose significant administrative and practical difficulties. Although the approach adopted in the Framework Rule does not directly allocate allowances to each category of use, the Agency anticipates that reliance on market mechanisms will achieve similar results indirectly. The Agency believes that under a system of universal allocations, divided into pre-plant and post-harvest sectors, the actual critical use will closely follow the sector breakout listed by the TEAP. These issues were addressed in previous rules and EPA is not aware of any factors that would alter the analysis performed during the development of the Framework Rule.

In developing this action, EPA did not propose to change the approach adopted in the Framework Rule for the allocation of CUAs but, in an endeavor to address Decision XIX/9(6), sought additional comment on the Agency’s allocation of CUAs in the two groupings (pre-plant and post-harvest) that the Agency has employed in the past. MBIP’s comment supported the continued use of the universal allocation approach characterizing it as a simple and understandable system that has proven to work well. Dow AgroSciences commented that CSAs and CUAs should be allocated specifically to each of the 15 critical use categories authorized by the Parties. The comment states that this method would ensure that all critical users have access to methyl bromide, rather than just those with the greatest ability to pay.

EPA agrees with the comments that supported the existing allocation system. EPA considered sector-specific and other allocation approaches in the proposed Framework Rule, and decided that the existing universal allocation system with pre-plant and post-harvest allowances was the most effective and least burdensome system.

#### H. Critical Stock Allowance Allocations

Each critical stock allowance (CSA) is equivalent to one kilogram of critical use methyl bromide. CSAs expire at the end of the control period and, as explained in the Framework Rule, are not bankable from one year to the next (69 FR 76990). CSAs are not used to produce or import methyl bromide but are privileges that enable the holder to sell a specified amount of pre-phaseout inventory for approved critical uses. A CSA is expended when the entity selling methyl bromide sells the material, or fumigation services with the material, to an approved critical user who certifies that the material is for an approved critical use. Thus the movement of pre-phaseout inventories or methyl bromide along the supply chain does not require expenditure of a CSA.

EPA proposed to allocate CSAs to the entities listed below in Table IV for the 2009 control period in the amount of 2,576,987 kg (10.1% of baseline). EPA followed its approach to determining available stocks introduced in the 2008 CUE rule and described in Section V.D.4. For the reasons discussed in Section V.D., in this action EPA is allocating 1,919,193 kg of CSAs to the entities listed in Table IV.

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 Table IV. Following past practice, EPA will inform the listed companies of their CSA allocations in a letter following publication of the final rule.

TABLE IV—PROPOSED ALLOCATION OF CRITICAL STOCK ALLOWANCES

Company
Albemarle.
Bill Clark Pest Control, Inc.

TABLE IV—PROPOSED ALLOCATION OF CRITICAL STOCK ALLOWANCES—Continued

Company
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.
Total—1,919,193 kilograms.

Several companies that receive very small amounts of CSAs from EPA have contacted the Agency and requested that they be permitted to permanently retire their allowances. Some companies receive as few as 6 kg of CSAs. Due to the small allocation and because they typically do not sell critical use methyl bromide, some companies find the allocation of CSAs, and associated record-keeping and reporting requirements, to be unduly burdensome.

For the last two rounds of CUE allocation rulemakings EPA has allowed CSA holders, on a voluntary basis, to permanently relinquish their allowances through written notification to the Agency. Such companies would not receive CSA allocations and would be excluded from future allocations. During the comment period for the 2008 CUE Rule, seven companies voluntarily agreed to permanently relinquish their allowances. In the final 2008 CUE Rule, the Agency reallocated the allowances forfeited by these companies to the remaining companies on a pro-rata basis. Though no companies voluntarily relinquished their allowances this year, EPA continues to strongly encourage CSA holders to take advantage of this voluntary opportunity to retire their CSA allocations.

#### I. Stocks of Methyl Bromide

As discussed above and in the December 23, 2004, Framework Rule, 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 CUAs to be converted into CSAs. EPA has retained these provisions for the 2009 control period.

EPA believes that the refined approach for calculating available stocks that was finalized in the 2008 CUE Rule reduces the risks of methyl bromide shortages for critical uses. However, 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.

The aggregate amount of pre-phaseout methyl bromide reported as being in inventory on December 31, 2007, was 6,457, 806 kg. Based on reported end-of-year data submitted by inventory owners, the aggregate inventory on December 31, 2008, was 4,271,226 kg. As explained in detail 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 2007 is available in the docket for this rulemaking.

EPA is also correcting its assessment of the amount pre-phaseout inventory that was available on December 31, 2006, which EPA originally stated was 7,671,091 kg. EPA received late data in 2007 that it did not incorporate into the total inventory level for the year. The corrected value for the amount of pre-phaseout inventory as of December 31, 2006, is 7,941,009 kg. This change does not affect the CUA or CSA allocations in this rule, which are based on reported data rather than estimates.

## 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 is 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 .....	.....  2041—Flour and Other Grain Mill Products. 2044—Rice Milling .....	\$7 million.  500 employees. 500 employees.

Category	NAICS code	SIC code	NAICS small business size standard (in number of employees or millions of dollars)
	493110—General Warehousing and Storage.	4225—General Warehousing and Storage.	\$25.5 million.
	493130—Farm Product Warehousing and Storage.	4221—Farm Product Warehousing and Storage.	\$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 rule will only affect entities that applied to EPA for a de-regulatory exemption. In most cases, EPA received aggregated requests for exemptions from industry consortia. EPA asked consortia applying for critical use exemptions to describe the number and size distribution of entities their applications covered. EPA estimated that 3,218 entities petitioned EPA for critical use exemptions 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 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 is a de-regulatory action which will

confer a benefit to users of methyl bromide. EPA believes the estimated de-regulatory value for users of methyl bromide is between \$20 million and \$30 million annually. We have therefore concluded that this 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 is deregulatory 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 final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in

Executive Order 13132. This 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 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 action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule does not have any effect on energy as it only relates to the production, import, and uses of critical use the agricultural fumigant methyl bromide.

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

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No.

104–113, 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 action does not involve technical standards. Therefore, EPA did not consider 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 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 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.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate,

the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective April 30, 2009.

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

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

Dated: April 24, 2009.

**Lisa P. Jackson,**  
Administrator.

■ For the reasons stated in the preamble, 40 CFR Part 82 is amended as follows:

**PART 82—PROTECTION OF STRATOSPHERIC OZONE**

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

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

■ 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	2009 critical use allowances for pre-plant uses* (kilograms)	2009 critical use allowances for post-harvest uses* (kilograms)
Great Lakes Chemical Corp. A Chemtura Company .....	1,249,703	133,249
Albemarle Corp .....	513,906	54,795
ICL–IP America .....	283,995	30,281
TriCal, Inc .....	8,843	943
<b>Total** .....</b>	<b>2,056,448</b>	<b>219,267</b>

\* 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.

Company
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.

Company
Western Fumigation.
<b>Total—1,919,193 kilograms.</b>

■ 3. Appendix L to Subpart A is revised to read as follows:

**APPENDIX L TO PART 82 SUBPART A—APPROVED CRITICAL USES AND LIMITING CRITICAL CONDITIONS FOR THOSE USES FOR THE 2009 CONTROL PERIOD**

Approved critical uses  Column A	Approved critical user and location of use  Column B	Limiting critical conditions that exist, or that the approved critical user reasonably expects could arise without methyl bromide fumigation:  Column C
<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, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.	Moderate to severe soilborne disease infestation. A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe root knot nematode infestation. A need for methyl bromide for research purposes.
Eggplant .....	(a) Florida growers .....  (b) Georgia growers .....  (c) Michigan 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. A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes. Moderate to severe soilborne disease infestation. A need for methyl bromide for research purposes.
Forest Nursery Seedlings.	(a) Growers in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. (b) International Paper and its subsidiaries limited to growing locations in Alabama, Arkansas, Georgia, South Carolina, and Texas. (c) Government-owned seedling nurseries in Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, Ohio, Pennsylvania, West Virginia, and Wisconsin. (d) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, and South Carolina. (e) Weyerhaeuser Company and its subsidiaries limited to growing locations in Oregon and Washington. (f) Michigan growers .....	Moderate to severe yellow or purple nutsedge infestation. 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. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe soilborne disease infestation. Moderate to severe nematode or worm infestation.  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. (b) California rose nurseries .....	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. Medium to heavy clay soils. Local township limits prohibiting 1,3-dichloropropene. A need for methyl bromide for research purposes.
Orchard Replant .....	(a) California stone fruit, table and raisin grape, wine grape, walnut, and almond growers.	Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene. A need for methyl bromide for research purposes. Moderate to severe nematode infestation.
Ornamentals .....	(a) California growers .....  (b) Florida growers .....	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. Moderate to severe soilborne disease infestation. Moderate to severe nematode infestation. Local township limits prohibiting 1,3-dichloropropene. A need for methyl bromide for research purposes. 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.

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:
Column A	Column B	Column C
Peppers .....	(c) Michigan herbaceous perennial growers ...  (a) Alabama, Arkansas, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia growers.  (b) Florida growers .....	A need for methyl bromide for research purposes. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Moderate to severe yellow nutsedge and other weed infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe pythium root, collar, crown and root rots. A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes. Moderate to severe soilborne disease infestation. A need for methyl bromide for research purposes. 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 Fruit .....	(a) California growers .....	A need for methyl bromide for research purposes. Moderate to severe soilborne disease 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. A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe black root and crown rot. A need for methyl bromide for research purposes.
	(b) Florida growers .....	A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe soilborne disease infestation. Restrictions on alternatives due to karst topographical features and soils not supporting seepage irrigation. A need for methyl bromide for research purposes. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. Moderate to severe black root and crown rot. A need for methyl bromide for research purposes.
Strawberry Nurseries ....	(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 soilborne disease infestation. Moderate to severe yellow or purple nutsedge infestation. Moderate to severe nematode infestation. A need for methyl bromide for research purposes. Moderate to severe black root rot. Moderate to severe root-knot nematode infestation. Moderate to severe yellow and purple nutsedge infestation. A need for methyl bromide for research purposes. Local township limits prohibiting 1,3-dichloropropene. Moderate to severe soilborne disease infestation. Moderate to severe fungal pathogen infestation. A need for methyl bromide for research purposes. 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. A need for methyl bromide for research purposes. Moderate to severe fungal pathogen infestation.
	(b) North Carolina and Tennessee growers ....	
Sweet Potato Slips .....	(a) California growers .....	
Tomatoes .....	(a) Michigan growers .....	
	(b) Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia growers.  (c) Maryland growers .....	
<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) Bakeries in the U.S. ....	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. Presence of sensitive electronic equipment subject to corrosion. Time to transition to an alternative.

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:
Column A	Column B	Column C
	(d) Members of the North American Millers' Association in the U.S.	Moderate to severe beetle infestation.
	(e) Members of the National Pest Management Association treating processed food, cheese, herbs and spices, and spaces and equipment in associated processing and storage facilities.	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. Export to countries which do not allow the use of sulfuryl fluoride. A need for methyl bromide for research purposes.
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. Dermestid beetle infestation. Ham mite infestation.

[FR Doc. E9-9966 Filed 4-29-09; 8:45 am]  
BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 09-853; MB Docket No. 08-244; RM-11507]

### Television Broadcasting Services; Scranton, PA

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission grants a petition for rulemaking filed by MPS MEDIA of Scranton License, LLC ("MPS Media"), the licensee of pre-transition station WSBS-DT, DTV channel 31, Scranton, Pennsylvania. MPS Media has been assigned DTV channel 38 for post-transition use and now requests the substitution of its pre-transition DTV channel 31 for post-transition DTV channel 38 at Scranton.

**DATES:** This rule is effective April 30, 2009.

**FOR FURTHER INFORMATION CONTACT:** David J. Brown, Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order*, MB Docket No. 08-244, adopted April 16, 2009, and released April 17, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>).

(Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-478-3160 or via e-mail [www.BCPIWEB.com](mailto:www.BCPIWEB.com). To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

### List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

### § 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Pennsylvania, is amended by adding DTV channel 31 and removing DTV channel 38 at Scranton.

Federal Communications Commission.

**Clay C. Pendarvis,**

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 09-872; MB Docket No. 08-252; RM-11509]

### Television Broadcasting Services; Cadillac, MI

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission grants a petition for rulemaking filed by Cadillac Telecasting Co. ("CTC"), the licensee of WFQX-TV, analog channel 33, and WFQX-DT, DTV channel 47, Cadillac, Michigan, requesting the substitution of DTV channel 32 for post-transition DTV channel 47 at Cadillac.

**DATES:** This rule is effective April 30, 2009.