



# Federal Register

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**Part II**

## **Environmental Protection Agency**

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**40 CFR Part 82**

**Protection of Stratospheric Ozone:  
Process for Exempting Critical Uses From  
the Phaseout of Methyl Bromide; Final  
Rule**

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

[FRL-7850-8]

RIN 2060-AJ63

**Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to exempt production and import of methyl bromide for critical uses from the accelerated phaseout regulations that govern the production, import, export, transformation and destruction of substances that deplete the ozone layer under the authority of the Clean Air Act (CAA). Today's amendments establish the framework for an exemption permitted under the *Montreal Protocol on Substances That Deplete the Ozone Layer* (Protocol) and the CAA and specify the amount of methyl bromide that may be supplied in 2005 from available stocks and new production and consumption to meet approved critical uses. In addition, this action establishes the list of critical uses approved by EPA for 2005.

**DATES:** *Effective Date:* This final rule is effective on January 1, 2005.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OAR-2003-0230. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Hodayah Finman, U.S. Environmental Protection Agency, Office of Air and

Radiation, Stratospheric Protection Division (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343-9246; fax numbers: (202) 343-2338; [finman.hodayah@epa.gov](mailto:finman.hodayah@epa.gov). You may also visit the EPA's Ozone Depletion Web site at [www.epa.gov/ozone](http://www.epa.gov/ozone) for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and other related topics.

**SUPPLEMENTARY INFORMATION:** This final rule concerns CAA restrictions on the consumption, production and on the use of methyl bromide (class I, Group VI controlled substance) for critical uses after the phaseout date of January 1, 2005. Under the CAA, methyl bromide consumption and production will be phased out on January 1, 2005 apart from allowable exemptions, namely the critical use exemption and the existing quarantine and pre-shipment exemption. With today's action, EPA is establishing a framework for how the critical use exemption will operate as well as specific amounts of methyl bromide to be made available for approved critical uses in 2005.

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**. Today's final rule is issued under section 307(d) of the CAA, which states: "The provisions of section 553 through 557 \* \* \* of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." CAA Section 307(d)(1). Thus, section 553(d) of the APA does not apply to this rule. EPA nevertheless is acting consistently with the policies underlying APA section 553(d) in making this rule effective January 1, 2005. APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Today's final rule grants an exemption from the phaseout of production and import of methyl bromide for critical uses. Because the complete phaseout takes effect January 1, 2005, EPA is making this exemption effective on the same date to ensure the availability of methyl bromide for critical uses.

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**I. General Information****A. Does This Action Apply to Me?**

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

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

The above table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is aware could potentially be regulated by this proposed action. To determine whether your facility, company, business, or organization is regulated by this proposed action, you should carefully examine the regulations promulgated at 40 CFR Part 82, Subpart A. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** Section.

**II. What Is the Background of the Phaseout Regulations for Ozone Depleting Substances?**

The current regulatory requirements of the Stratospheric Ozone Protection Program that limit production and consumption of ozone depleting substances can be found at 40 CFR Part 82 Subpart A. The regulatory program was originally published in the **Federal Register** on August 12, 1988 (53 FR 30566), in response to the 1987 signing and subsequent ratification of the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol). The U.S. was one of the original signatories to the 1987 Montreal Protocol and the U.S. ratified the Protocol on April 21, 1988. Congress then enacted, and President Bush signed into law, the Clean Air Act Amendments of 1990 (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 new regulations to implement this legislation and has made several amendments to the regulations since that time.

**III. What Is Methyl Bromide?**

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

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

**IV. What Is the Background for Today's Action?**

EPA published a proposed rule in the **Federal Register** on August 25, 2004 (69 FR 52366) proposing an exemption to the phaseout of methyl bromide for critical uses, an allowance allocation system for critical use methyl bromide, and a list of approved critical uses. EPA received 15,231 on-time comments related to Air Docket OAR-2003-0230 and 6 people spoke at a hearing EPA held on September 20, 2004 in Washington D.C. that was attended by 20 individuals.

Methyl bromide was added to the Protocol as an ozone depleting substance in 1992 through the Copenhagen Amendment to the Protocol. The Parties agreed that each industrialized country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing a freeze in the level of methyl bromide production and consumption for industrialized countries. EPA published a final rule in the **Federal Register** on December 10, 1993 (58 FR 65018), listing methyl bromide as a class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 level, and, in Section 82.7 of the rule, setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until the year 2001, when the complete phaseout would occur (58 FR 65018). 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." EPA based its action on scientific assessments and actions by the Parties to the Montreal Protocol to freeze the level of methyl bromide production and consumption for industrialized countries at the 1992 Meeting of the Parties in Copenhagen.

At their 1995 meeting, the Parties made adjustments to the methyl bromide control measures and agreed to reduction steps and a 2010 phaseout date for industrialized countries with

exemptions permitted for critical uses. At this time, the U.S. continued to have a 2001 phaseout date in accordance with the CAAA of 1990 language. At their 1997 meeting, the Parties agreed to further adjustments to the phaseout schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phaseout for industrialized countries. In October 1998, the U.S. Congress amended 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 exemptions for critical uses. These amendments were contained in Section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105-277, October 21, 1998) and were codified in Section 604 of the CAA, 42 U.S.C. 7671c. On November 28, 2000, EPA issued regulations to amend the phaseout schedule for methyl bromide and extend the complete phaseout of production and consumption to 2005 (65 FR 70795).

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

Both Section 604(d)(6) and Section 614(b) of the CAA address the relationship between the Montreal Protocol and actions taken under the CAA’s stratospheric ozone provisions. Section 604(d)(6) addresses critical uses specifically, while Section 614(b) is more general in scope. Section 604(d)(6) states that “to the extent consistent with the Montreal Protocol,” the Administrator may exempt methyl bromide for critical uses. Section 614(b)

states: “This title as added by the Clean Air Act Amendments of 1990 shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol, as provided in Article 2, paragraph 11 thereof, and shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of conflict between any provision of this title and any provision of the Montreal Protocol, the more stringent provision shall govern.”

EPA must take into account not only the text of Article 2H but also the related Decisions of the Protocol Parties that interpret that text. Under customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (8 International Legal Materials 679 (1969)) both the treaty text and the practice of the parties in interpreting that text form the basis for its interpretation. Although the United States is not a party to the 1969 Convention, the United States has regarded it since 1971 as “the authoritative guide to current treaty law and practice.” See Secretary of State William D. Rodgers to President Richard Nixon, October 18, 1971, 92d Cong., 1st Sess., Exec. L (Nov. 22, 1971). Specifically, Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

Article 31(3) goes on to provide that “[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” In the current circumstances, Decisions of the Parties can be construed as subsequent consensus agreements among the Parties to the Montreal Protocol, including the United States, regarding the interpretation and application of the Protocol.

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

- (a) That a use of methyl bromide should qualify as “critical” only if the nominating Party determines that:
- (i) The specific use is critical because the lack of availability of methyl

bromide for that use would result in a significant market disruption; and

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

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

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

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

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

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

At the First Extraordinary Meeting of the Parties in March of 2004, the Parties issued several decisions that address the agreed critical uses, the allowable levels of new production and consumption for critical uses, the conditions for granting critical use exemptions, and reporting obligations. Decision Ex. 1/3 covers the agreed critical uses and allowable levels of new production and consumption for the year 2005. This Decision includes the following terms:

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

for critical uses is to make up any such difference between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available;

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

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

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

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

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

## V. What Are the Details of Today's Action?

### A. Critical Need

#### 1. Should EPA Establish a Critical Use Exemption?

With today's final action, EPA is establishing the critical use exemption (CUE) by amending 40 CFR Part 82 to exempt production and import of

methyl bromide from the January 1, 2005 phaseout to meet the needs of users who do not have technically and economically feasible alternatives available to them. In today's rulemaking, EPA is describing the framework for the critical use exemption, assigning allowances for critical use methyl bromide, and determining the quantities of exempted methyl bromide allowable under the Clean Air Act (CAA) and the Montreal Protocol.

EPA received 15,176 on time comments requesting the Agency not to exempt any methyl bromide for critical uses. The CAA allows the Agency to create an exemption for critical uses to the extent consistent with the Protocol. The Protocol authorizes an exemption to the extent decided by the Parties. In Decision Ex. I/3, the Parties decided to permit a limited exemption for specified uses nominated by the United States. EPA, in conjunction with other U.S. government entities, spent substantial time reviewing applications for critical use exemptions and preparing a nomination based on the lack of technically and economically feasible alternatives for the nominated uses. As discussed below, EPA does not have new information that would change the basis for the nomination. Although the Act does not require EPA to establish an exemption, EPA believes that the lack of suitable alternatives for the uses listed as approved critical uses in today's rulemaking warrants the establishment of an exemption.

The history of the ozone protection programs has been the transition of industries away from production, import, and use of ozone depleting chemicals to alternatives. In some instances a successful transition was possible within the allotted time. In other instances, additional time has been required to allow for the development and market penetration of alternatives. In fact, more than ten years after the phaseout of chlorofluorocarbons (CFCs), the U.S. government is still exempting the production of CFCs for essential uses in metered dose inhalers. In the instance of critical uses where suitable alternatives are not yet available for all uses, EPA believes it would be inconsistent with the history and the goals of the ozone protection program to not allow for a safety valve in accordance with the provisions of both international and domestic law.

#### 2. Should EPA Further Adjust the Amount of Methyl Bromide Available Under the Critical Use Exemption?

Similar to CFCs which were used in varied applications, methyl bromide is a

highly effective general biocide and is used in a wide variety of distinctly different pest control operations. Some of the effective treatments which are available as alternatives to methyl bromide work in certain niche applications or under specific conditions. There is no "drop in" replacement for all of the current uses of methyl bromide. The registration of alternatives continues to be a priority for the Agency.

EPA conducted a thorough analysis on the technical and economic feasibility of available alternatives specified by the Methyl Bromide Technical Options Committee (MBTOC) for each critical use and the potential for significant market disruption in the event that methyl bromide were not available for a particular use. The analysis, in the form of the U.S. nomination of critical uses and answers to clarifying questions on those documents, is available in the docket OAR-2003-0230. A memorandum describing the review process, titled "Memorandum: 2003 Nomination Process" is also available in the docket. In the notice of proposed rulemaking, EPA solicited comments on the technical and economic assessment conducted on the alternatives to methyl bromide.

EPA received 14 comments on the technical and economic assessment of alternatives to methyl bromide. These comments did not provide the Agency with any new information for EPA's consideration on the efficacy and cost of alternatives. Therefore, EPA is not further adjusting the amount of methyl bromide available under the critical use exemption.

One commenter stated that their products, 1,3-dichloropropene (1,3-D) and sulfuryl fluoride (SF), can displace a significant portion of the critical use market, 40% of the authorized amount, but they recognize that from a practical transition perspective, such reductions will not easily happen in the next year. The commenter provided a table indicating that these two products could be technical and economical substitutes in every critical use category for which their products are registered.

In the U.S. nomination, the EPA took great pains to describe the specific circumstances that make 1,3-D, which may be otherwise technically and economically feasible, not feasible for a certain portion of total domestic use. The EPA determined that 1,3-D products can be used in a variety of circumstances but there are some factors, such as regulatory limits on the use of 1,3-D or the presence of heavy nutsedge weed populations that would

make the 1,3-D products not technically and economically feasible. EPA, in consultation with the U.S. Department of Agriculture (USDA), has determined that over the portion of the crop there may be technical limitations to the use of 1,3-D treatments or economic losses associated with the use of this fumigant.

The commenter specifically pointed to comments made in the 2004 Methyl Bromide Technical Options Committee (MBTOC) report where the committee indicated that there are technically feasible herbicides available to control nutsedge, specifically halosulfuron for peppers and halosulfuron and triflxsulfuron for tomatoes, that can be used in combination with 1,3-D products to provide complete spectrum pest control. As described in the nomination, both of these herbicides have been recently registered and can provide effective control of nutsedge populations, however certain regulatory restrictions exist on the use of these products causing them to be not technically available within current cropping systems for the exempted portion of production. For example, both products have plant back restrictions which limit the ability of growers to plant a second crop. Almost without exception, U.S. pepper and tomato farmers plant more than one crop on the same acreage. The U.S. nominations additionally analyzed the feasibility of using 1,3-D products without the herbicides and finds that the treatment is not economically feasible. For example, a typical tomato farm in the southeastern U.S. would experience approximately \$5,700 in losses per acre using 1,3-D products compared to using methyl bromide due to losses in product yield and quality.

The commenter indicated the use of alternatives, specifically an emulsified formulation of chloropicrin (Pic EC) and metham sodium in combination with chloropicrin, is technically feasible for strawberry production in California according to the 2004 MBTOC report. Again, the U.S. nomination describes the limitations of these alternatives for the specific circumstance of the nominated acreage. For example, 15% of the nominated area is located on hilly terrain that makes the use of drip applied fumigants a technically infeasible alternative. Furthermore, chloropicrin is not a full spectrum fumigant. Chloropicrin provides good control of disease but the nomination clearly states that the nominated area additionally has nematode and weed pressures as well. The commenter did not provide a copy of a study documenting comparable pest control and yields using Pic EC for areas with

nematode, weed, and disease pressures. Further, metham sodium used with chloropicrin is not economically feasible according to the nomination. EPA, in consultation with USDA, has determined that yield differences could result in 24% decline in gross revenues on average compared to methyl bromide.

Six of the 14 comments indicted above that the Agency should reduce the amounts the methyl bromide exempted from the phaseout to allow for the uptake of a newly registered alternative, sulfuryl fluoride, for mills and grains. Sulfuryl fluoride (SF) was registered by EPA for use on grains and flour mills on January 23, 2004 under the trade name Profume. The SF fumigant has been available in the U.S. since 1961 under the trade name Vikane for non food uses such as structural termite fumigation. The registrant, Dow Agrochemicals, is pursuing registration of Profume for use on dried fruit and tree nuts and non-specific food handling and storage.

The U.S. originally nominated 536,328 kilograms (kg) of methyl bromide for critical uses in mills and processors for the year 2005. As described in the notice of proposed rulemaking, this nomination was reduced by the Parties to 483,000 kgs to account for the market uptake of alternatives including sulfuryl fluoride and to account for more efficient methyl bromide fumigation practices. This reduction is a 10% reduction from the originally nominated amount. The 2004 MBTOC report on recommended exemptions for next year (2006) states that a further 10% reduction for flour mills could be warranted to allow for the adoption of a number of alternatives, of which sulfuryl fluoride is one, and more efficient methyl bromide fumigation techniques. Since the 2005 exemption had already been reduced by 10% for sulfuryl fluoride and that 10% seems to be a reasonable technical adoption rate according to the MBTOC as quoted by the commenter. EPA does not believe further reductions for 2005 can be justified at this time given the lack of specific technical and economic feasibility data provided to the Agency on Profume and given the lack of specific market penetration data provided by the commenter to substantiate assertions for a larger market penetration.

EPA understands that Profume can be effective in controlling insects, although higher rates of the chemical are required to control insect eggs. As this is a newly registered compound, EPA does not have sufficient data at this time to conduct a technical and economic

analysis to determine if further reductions are warranted. One key uncertainty regarding the market penetration and economic feasibility of Profume is the cost of the product on a per pound basis and the cost of a typical fumigation. The Agency anticipates that as trial fumigations or commercial fumigations take place, that the registrant will be able to compile technical and economic data to EPA for use in the development of future critical use nominations.

In addition to the technical and economic data required to conduct a critical use assessment, as noted by the Technology and Economic Assessment Panel (TEAP), a scientific panel that advises the Parties to the Montreal Protocol, a specific alternative may take up to 5 fumigation cycles of use before efficacy can be determined in the specific circumstances of the user. This would mean that several repeat fumigations would be needed before determining the technical feasibility of an alternative. An additional limitation to SF uptake at this time is that many mills in the U.S. produce partial recipe products that contain ingredients such as sugar or baking soda. The registration of SF does not include tolerances for these ingredients thus limiting the use of this alternative for a certain portion of the sector. Finally SF is not registered in California and therefore can not be used by mills in that state.

#### *B. Amount From Stocks*

EPA is allowing up to 1,283,214 kilograms of methyl bromide from inventories stockpiled before the phaseout date of January 1, 2005 to be sold for approved critical uses. In evaluating the issue of the amount of the critical use level for 2005 that should be met from stocks, EPA considered comments received and the following statements in Decision Ex. I/3. Decision Ex I/3(1) permits a level of production and consumption equal to 30% of the 1991 baseline and establishes an agreed critical use level equal to 35% of the 1991 baseline. With regard to drawdown from existing inventory, Decision Ex. I/3(2) states: "That a Party with a critical-use exemption level in excess of permitted levels of production and consumption for critical uses is to make up any such difference between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available." The availability of stocks is also addressed in Decision Ex. I/3(5), which states: "That each Party which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting

or authorizing the use of methyl bromide and that such procedures take into account available stocks.

In acting in accordance with Decision Ex. I/3, EPA looks to Paragraph (3) of that Decision, which states that a Party "shall prohibit" the use of stocks when the usage of stocks combined with production and consumption exceeds the total level of critical uses agreed to by the Parties, and to Paragraph (2) of that Decision, which states that a Party with a use exemption exceeding allowable production and consumption "is to make up" any such difference by using stocks recognized to be available. Additionally, Paragraph (5) of Decision Ex. I/3 states that Parties should ensure that Decision IX/6's criteria are applied, and Decision IX/6 states that production and consumption should not be permitted where stocks are recognized to be available.

Taking into account the language of Decision Ex. I/3's first three Paragraphs, and the fact that the fifth Paragraph is hortatory, EPA concludes that the appropriate level of stocks utilization is set forth in Decision Ex. I/3(1), which establishes a critical use level of 35% but permits production and consumption of 30%. Paragraph (1) of Decision Ex. I/3, read in conjunction with paragraph (2) of the same Decision, specifies the amount of the critical use level for 2005 that should be met from stocks. Paragraph (1) establishes a critical use level of 35% of baseline but permits production and consumption of 30%. Paragraph (2) explains that the difference is to be made up by using available stocks. Therefore, the amount of the United States' 2005 critical use level that should be met from stocks is 1,283,214 kilograms, *i.e.*, an amount equivalent to 5% of baseline.

EPA's conclusion is consistent with Paragraph (5) of Decision Ex. I/3. That Paragraph requests each Party with an agreed critical use to take into account available stocks when authorizing the use of methyl bromide. Given the language in Paragraphs (1) and (2) of Decision Ex. I/3, EPA interprets Paragraph (5)'s language as meaning that the U.S. should not authorize critical use exemptions without including provisions addressing drawdown from stocks for critical uses. EPA is acting consistently with Paragraph (5) by establishing requirements governing the sale of pre-phaseout inventories for approved critical uses. In section V.F of today's rulemaking, EPA describes the mechanism by which the Agency is allowing stocks of methyl bromide to be sold for approved critical uses. In addition, EPA is taking into account stocks through the trading provisions

outlined in section V. G of today's rulemaking, which allow critical use allowances to be converted into critical stock allowances.

EPA had proposed to undertake an independent analysis of the amount to come from stocks and to adjust the authorized level of new production and consumption for critical uses by the amount of "available" stocks determined through this analysis. The methodology proposed for this analysis was elaborated in the NPRM and also in a Technical Support Document that can be obtained from the rulemaking docket.

EPA also sought comment on an alternative approach: "For the 2005 calendar year, the Agency could make a determination that the amount of methyl bromide available from existing stocks is simply based on the difference between the limit on methyl bromide for critical uses (8,942 metric tons) and the limit on new production and import (7,659 metric tons) in the Decision Ex. I/3." 69 FR 52375. This is essentially the approach adopted in today's final rule. EPA is clarifying, however, that the appropriate level of stock drawdown for critical uses in 2005 is set out in Decision Ex. I/3.

EPA received 10 comments on the independent assessment approach proposed in the NPRM for determining available stocks: five comments in favor of this approach and nine comments suggesting further refinements to the methodology. However, since EPA is not using the methodology to determine available stocks for the 2005 control period, the Agency is not responding to the details of the comments in today's rulemaking.

One commenter stated that EPA should use a "mathematical" approach, under which the amount from stocks would equal the difference between the limit on methyl bromide for critical uses and the limit on new production and import. EPA believes that the approach adopted in this final rule is consistent with this commenter's recommendation.

Two commenters stated that all stocks must be used before any new production is permitted and that all stocks other than those for export to developing countries should be considered "available" for critical uses. One commenter refers to Decision IX/6, paragraph (1)(b), in which the Parties agreed: "That production and consumption, if any, of methyl bromide for critical uses should be permitted only if: \* \* \* (ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide." EPA does not

believe that this is an accurate characterization of Decision IX/6 as it relates to Decision Ex. I/3. Paragraph 2 of Decision Ex. I/3 states that a Party "is to make up" the difference between an agreed use level and production and consumption "from stocks that the Party has recognized to be available." Moreover, Decision IX/6 asks Parties to permit production and consumption where "methyl bromide is not available in sufficient quantity and quality from existing stocks of banked and recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide." Both of these statements contemplate the possibility that available stocks could be less than existing stocks. Moreover, the United States and other countries have interpreted identical decisional language in the essential use exemption context not to require the use of all existing stocks, and Decision Ex. I/3's consideration of stocks is consistent with this interpretation. In addition, EPA disagrees with the commenter's assumption that all stocks that are not specifically designated for export to developing countries are available for critical uses. For example, there may be stocks in the U.S. produced specifically for quarantine and pre-shipment uses or stocks held on behalf of another entity for a non-critical use during their transition to alternatives. In addition, the U.S. is a global supplier of methyl bromide and existing inventories may be tagged for critical uses in other developed countries.

### C. Access to Stocks

In the proposed rule, EPA described several different approaches to controlling access to stocks of methyl bromide produced or imported before the phaseout date of January 1, 2005. EPA proposed a limit on the sale of stocks to approved critical users. In addition, EPA proposed to prohibit sale of stocks to end users in nominated sectors who lacked the limiting critical conditions that make methyl bromide use critical for the categories listed in Decision Ex. I/3. EPA sought comment on whether to apply use restrictions to other groups. The Agency recognizes that a person who qualifies as an approved critical user may have both approved critical uses and other uses. Further, the Agency also recognizes the possibility that an approved critical user could grow two distinct crops or fumigate two distinct commodities in the same field or structure during a single control period. In today's rule, EPA is restricting access to stocks for approved critical uses. Approved

critical uses are listed in Appendix L to 40 CFR Part 82, Subpart A.

The total amount of pre-phaseout inventory that may be sold as critical use methyl bromide is equivalent to 5% of the 1991 baseline. As discussed below, this rule creates critical stock allowances (CSAs) in this amount. For each kilogram of methyl bromide sold from pre-phaseout inventories as critical use methyl bromide, a CSA holder must expend one CSA.

In finalizing the provisions on access to stocks, EPA considered comments received and the language of Decision Ex I/3(3), which states: "That a Party using stocks under paragraph 2 above shall prohibit the use of stocks in the categories set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol when amounts from stocks combined with allowable production and consumption for critical uses exceed the total level for that Party set forth in annex II A to the present report."

EPA received four comments supporting unlimited access to stocks for approved critical uses and 24 additional comments supporting unlimited access to stocks for all uses. EPA also received 1 comment stating that there is no legal basis for allowing use of stocks by users that did not apply for or did not qualify for critical use status, and no basis for the Agency's supposition that some users did not apply for CUE status because they were counting on use of stocks.

EPA reads Decision Ex I/3(3) as requiring limitations on the use of stocks only with respect to uses agreed by the Parties to be critical. Annex II A to the report of the First Extraordinary Meeting is titled "Agreed critical-use categories." Paragraph (1) of Decision Ex. I/3 permits limited production and consumption "[f]or the agreed critical uses set forth in annex II A." Because paragraph (3) of Decision Ex I/3 also refers to Annex II A, EPA concludes that the burden of the stock restriction is coextensive with the benefit of the new production and import. EPA does not believe that Decision Ex I/3(3) can be read to allow unlimited access to stocks for approved critical uses because the prohibition is directly linked to "the categories set forth in annex II A," which are the categories of critical uses agreed to by the Parties. Nor can the Decision be read to allow unlimited access to stocks for all uses: that would fail to give any effect to the phrase "shall prohibit the use of stocks." EPA disagrees with the comment that there is no legal basis for allowing use of stocks by users that did not apply for or did not qualify for critical use status.

Decision Ex I/3(3) does not require that individual Parties prohibit use of stocks by users whose uses fall outside the categories of agreed critical uses. Nothing in the Protocol or the CAA mandates that EPA limit drawdown from stocks for such uses. In anticipating that some users did not apply for CUE status because they were counting on use of stocks, the Agency did not assume that any user had special knowledge of the total amount of stocks available but rather that an individual user might have confirmed with its supplier that enough methyl bromide would be available from that supplier's inventory to meet the individual user's limited transitional needs. For example, some onion growers in the southeastern U.S. informed EPA in their comments on the rulemaking they did not apply for an exemption because they intend to avail themselves of existing stocks.

Nine commenters stated that EPA does not have legal authority to restrict the use of methyl bromide stocks. These commenters argue that no provision of the CAA authorizes EPA to impose such restrictions. Specifically, they state that section 604(d)(6) refers only to production, importation, and consumption, and that by addressing use in other sections of the CAA, Congress demonstrated its intent to deny EPA authority to regulate stocks under 604(d)(6). However, section 604(d)(6) directly relates to use: the exempted production, importation and consumption is for critical "uses." While Congress, in the CAA, generally mandated that production and consumption of ozone-depleting substances be phased out across the board, regardless of use, the Act does contain certain provisions, including section 604(d)(6), that authorize EPA to provide exceptions on the basis of use. Thus, section 604(d)(6) is one of the provisions of the CAA where use is clearly at issue.

In today's final rule, EPA is imposing narrowly tailored use restrictions as a condition of obtaining new production and import. EPA believes that section 604(d)(6) mandates this result. In section 604(d)(6), Congress provided EPA authority to exempt production and import of methyl bromide for critical uses, but only "to the extent consistent with the Protocol." The use restrictions in today's final rule are necessary to ensure that total usage for critical uses does not exceed the limit agreed to by the Parties in implementing the critical use provision in Article 2H of the Protocol. The relationship between sections 604(d)(6) and 614(b) of the CAA and the Protocol and its

Decisions is discussed in detail in the NPRM and in the background section of this preamble.

The commenters further argue that EPA cannot rely on Decision Ex I/3 to justify restrictions on use of stocks. They state that while Decisions may be used to interpret existing requirements in the Protocol, they cannot be used to substantively change those requirements. However, EPA is not suggesting that Decision Ex I/3 substantively changed the requirements of Article 2H. Article 2H establishes a prohibition on the production and consumption of methyl bromide, but states that the prohibition shall not apply "to the extent the Parties decide to permit the level of production and consumption that is necessary to satisfy uses agreed by them to be critical uses." The Parties have not interpreted Article 2H in the manner the commenters assert. Instead, they understood the language referring to "uses agreed by them to be critical uses" to allow the Parties to tie the determinations of production and consumption to use. Under international law, this interpretation and practice of the Parties may, in the current situation, be read to be an accurate interpretation of Article 2H's language. Although Decision Ex. I/3 focuses on regulating production and consumption, the Parties could reasonably set related conditions on agreeing to production and consumption at a particular level. Therefore, the stock restrictions are an integral part of the Parties' decision regarding the level of production and consumption necessary to satisfy critical uses.

The commenters further characterize the restrictions on access to stocks proposed in the NPRM as "an attempt by the Agency to bypass the Treaty Clause of the U.S. Constitution by unilaterally amending the Montreal Protocol through a rulemaking, without the advice and consent of the Senate." EPA rejects this characterization. Article 2H explicitly assigns to the Parties the task of deciding what level of production and consumption "is necessary to satisfy uses agreed by them to be critical uses \* \* \*." Therefore, EPA looks to the Parties' Decisions to provide the details of the exemption authorized in Article 2H. In Decision Ex I/3, the Parties decided what level of production and consumption was necessary given certain assumptions about stocks. Accordingly, in compliance with Article 2H, this final rule addresses both production and consumption and the use of stocks.



#### D. Cap on Critical Use Methyl Bromide

Based on the EPA's assessment of the technical and economic feasibility of alternatives and the potential for a significant market disruption if methyl bromide were not available for the uses listed in Appendix L, and the lack of any new information that would change EPA's assessment, EPA is establishing the following amounts of methyl bromide as critical use methyl bromide available only for approved critical uses as described in section V.H of this preamble for the control period of the year of 2005.

With today's action, EPA is finalizing a determination that 8,942,214 kgs of methyl bromide are required to satisfy critical uses for 2005. EPA intends to address supplemental and new CUE allocations in a subsequent rulemaking following the 16th Meeting of the Parties to the Montreal Protocol. EPA is authorizing the full amount of new production/import allowable under Decision Ex I/3, a total of 7,659,000 kgs, and is authorizing those entities that hold inventories of methyl bromide to sell 1,283,214 kgs for approved critical uses during 2005. The details of allowance allocation for both critical production/import and critical stocks are described in sections V.E and V.F of this preamble.

EPA co-proposed two options for the cap on critical use methyl bromide: A universal cap where all approved critical uses would purchase critical use methyl bromide under the same cap and a sector specific cap where each of the 16 critical use sectors would have their own cap of reserved material. EPA also solicited comment on an applicant-specific cap and on several hybrid options. In preparing this final rule, EPA considered comments received and Decision Ex I/3(4), which states: "That Parties should endeavor to allocate the quantities of methyl bromide recommended by the Technology and Economic Assessment Panel as listed in annex II A to the report of the First Extraordinary Meeting of the Parties."

EPA received 28 comments supporting the fully flexible universal cap. Commenters supported this option for several reasons: ease of implementation, cost savings and efficiencies to the regulated community, and the inability of EPA to predict with precision the exact market demand for methyl bromide on a sector basis. EPA received four comments supporting a sector specific cap to ensure that smaller uses, less frequent uses, and uses that occur towards the end of the control period are guaranteed access to some minimum supply. EPA received one

comment supporting an applicant specific approach so that the Agency can track use of methyl bromide at a more specific level. EPA also received one comment supporting a hybrid option that would separate pre-plant uses of methyl bromide from post-harvest uses. Additional comments received by EPA on other hybrids are addressed in the response to comment (RTC) document available in the docket for today's rule.

In today's rulemaking, EPA is establishing two types of critical use allowances (CUAs) for the production/import of methyl bromide: CUAs for pre-plant soil uses and CUAs for post-harvest and structural uses. The portion of the critical use methyl bromide supplies obtained from available stocks, however, will be allocated as a universal cap as proposed. EPA did not receive any adverse comment on the proposal to make the quantities from stocks available in a universal fashion.

EPA agrees with the comments made by entities supporting the universal option and believes that such a system would in fact lead to the most economically efficient outcome and impose the least burden on industry. However, to address concerns raised by smaller, less frequent and end of year uses, EPA is separating out the post-harvest uses of methyl bromide, which occur regularly throughout the year, from pre-plant uses which tend to be clustered around a particular time in the growing season. Noting that Decision Ex I/3 (4) states that Parties "should endeavor" to allocate "as listed in annex II A," EPA examined our ability to implement a sector specific system. However, there are several practical impediments to implementing such a system. EPA does not have precise data on use of methyl bromide because the current regulations on methyl bromide require reporting of production, imports, and exports of methyl bromide, not use. The more specific the categories for which EPA is estimating use, the less precise the estimate becomes. Therefore, EPA is reluctant to create sector or applicant specific limits because of the inherent uncertainty of the data at that detailed level. With the establishment of the critical use exemption, EPA will begin to track sector level use data and therefore the concern about data viability should diminish over time.

Another limitation to the sector or applicant specific approach is the upstream allowance allocation system itself where EPA issues allowances to producers and importers and not end users. Using an upstream allowance allocation system as proposed, EPA would be unable to adjust amounts of

methyl bromide from one sector to another after the allowance was expended. This artifact of the allocation framework would deny the marketplace any flexibility to meet unforeseen demand in a particular use. For example, under a sector specific system, if a pest outbreak were to occur in the peppers sector no additional material could be made available to peppers even if there were an unanticipated surplus in a different sector. For these reasons, EPA believes it is not practicable to implement a sector specific system at this time.

The Agency believes, and has received comment to that effect, that the pre-plant and post-harvest markets operate as separate markets under the phaseout, as evidenced by the different prices for methyl bromide in the two markets, for several reasons. The timing and cycles of fumigations for the two sectors are different as well. Pre-plant fumigations typically occur once a year about a month before planting the first crop whereas fumigations for post-harvest uses occur routinely throughout the year to control ongoing insect pressures. The standard product formulations for pre-plant and post harvest uses substantially differ. In the pre-plant uses the formulations of methyl bromide contain substantially more chloropicrin, as much as 50%. Lastly, the post harvest sector has more purchasing power than the pre-plant sector and is therefore willing to pay more for methyl bromide. Post-harvest uses rely on nearly pure methyl bromide. For all of these reasons, EPA believes that these two use categories already function as separate markets and therefore the hybrid option would not result in substantial regulatory burden but would achieve a careful balance between flexibility and greater assurance.

EPA believes that establishing distinct caps for pre-plant and post-harvest uses is consistent with the Parties' statement in Decision Ex I/3(4) that each Party "should endeavor" to allocate "as listed in annex II A." By virtue of this rulemaking process, EPA has made the endeavor to allocate quantities of methyl bromide in a manner consistent with Annex IIA of the Report to the First Extraordinary Meeting of the Parties. Because of the practical and administrative difficulties described above, however, EPA has arrived at an allocation system that relies at least partly on the market to allocate quantities on a sectoral basis. EPA anticipates, based on historical use patterns and the research undertaken pursuant to submitting the U.S. nomination, that usage patterns will

generally reflect the sectoral quantities found in Annex IIA.

*E. Critical Use Allowance Allocations*

1. Allocation of Critical Use Allowances

EPA is allocating the following number of pre-plant and post-harvest critical use allowances (CUAs) to the

entities listed below subject to the trading provisions discussed in section V.G of the preamble. Through this rulemaking, EPA is notifying entities in Table I that they have an allocation of the number of critical use allowances specified in the table for 2005. Depending on the agreement of the Parties to the Protocol, EPA may engage

in a subsequent rulemaking to allocate supplemental methyl bromide for 2005. Each allowance is equivalent to 1 kg of critical use methyl bromide. These allowances expire at the end of the control period and, consistent with the proposed rule and comments received, are not bankable from one year to the next.

TABLE I.—ALLOCATION OF CRITICAL USE ALLOWANCES

Company	2005 Critical use allowances for pre-plant uses* (kilograms)	2005 Critical use allowances for post-harvest uses* (kilograms)
Great Lakes Chemical Corp .....	4,357,690	297,049
Albemarle Corp .....	1,791,950	122,151
Ameribrom, Inc .....	989,911	67,479
TriCal, Inc .....	30,679	2,091
<b>Total .....</b>	<b>7,170,230</b>	<b>488,770</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 40 CFR Part 82.

2. Baseline for Critical Use Allowance Distribution

EPA is using the 1991 methyl bromide consumption baseline for distribution of critical use allowances because this is the best data available to the Agency at the current time. EPA used the 1991 baseline to distribute allowances to the companies listed above during the phaseout of methyl bromide. The 1991 baseline is therefore familiar to the regulated community and poses the least steep learning curve on industry of all the options discussed in the proposed rule.

EPA received four comments supporting use of the 1991 baseline for distribution of allowances and two comments favoring a baseline that uses the volume of methyl bromide marketed over the past three years. EPA does not have the necessary data to implement a marketed volume baseline representing the past three years and the time required to gather, verify, and make publically available such data would prohibit the Agency from implementing this exemption before the beginning of the control period. Such a baseline is therefore not practical to implement.

3. Frequency of Critical Use Allowance Distribution

EPA will issue critical use allowances once a year through an annual rulemaking as proposed, with one important exception noted below. EPA described scenarios where the Agency would distribute allowances more than once a year but did not receive any comments in favor of such options.

The exception to the once a year allocation of allowances applies when the Parties authorize supplemental critical use exemptions for a given control period after EPA has already initiated the notice and comment rulemaking process for the original authorized exemptions. For example, the Parties authorized exemptions for 2005 at their First Extraordinary Meeting of the Parties in March 2004. The Parties are considering additional exemptions for 2005 at the Sixteenth Meeting of the Parties to be held November 2004. EPA would propose additional exemptions as a result of additional authorizations made by the Parties. In this situation, EPA could in fact issue allowances twice for a single control period.

*F. Critical Stock Allowance Allocations*

EPA is allocating critical stock allowances (CSAs) to the entities listed below in Table 2 for the control period of 2005. CSAs are being issued on a pro-rata basis according to the amount of stocks owned by the entity based on an average of their December 31, 2003 and August 25, 2004 data because only that entity has the ability to sell the quantities of material associated with the CSAs on a kilogram basis, regardless of which company is physically holding the stocks. Similar to CUAs, CSAs can not be banked from one control period to the next.

Critical stock allowances (CSAs) are not used to produce or import methyl bromide but are rights that enable the holder to sell pre-phaseout inventories of methyl bromide for use in 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 of methyl bromide along the supply chain does not require expenditure of a CSA.

EPA has determined that the individual holdings of stocks of methyl bromide are confidential business information. The amount of CSAs allocated to each company could be used to calculate the individual stock holdings if information on aggregate stock holdings were released. EPA has determined that the aggregate stock information is not confidential business information but is currently withholding that information due to the filing of complaints seeking to enjoin the Agency from its release. Because release could occur depending on the outcome of that litigation, EPA is not listing the number of allowances distributed to each entity. Concurrent with today's rule, EPA is sending letters to each entity to inform them of the number of critical stock allowances EPA has issued them. In addition, EPA is placing a document listing the allocations and distribution basis of critical stock allowances for each entity in the confidential portion of the docket.

TABLE 2.—ALLOCATION OF CRITICAL STOCK ALLOWANCES

Company	
Albemarle	
Ameribrom, Inc.	
Bill Clark Pest Control, Inc.	
Blair Soil Fumigation	
Burnside Services, Inc.	
Cardinal Professional Products	
Carolina Eastern, Inc.	
Degesch America, Inc.	
Dodson Bros.	
Great Lakes Chemical Corp.	
Harvey Fertilizer & Gas	
Helena Chemical Co.	
Hendrix & Dail	
Hy Yield Bromine	
Industrial Fumigation Company	
J.C. Ehrlich Co.	
Pacific Ag	
Pest Fog Sales Corp.	
Pro Source One	
Reddick Fumigants	
Royster-Clark, Inc.	
Southern State Cooperative, Inc.	
Trical Inc.	
Trident Agricultural Products	
UAP Southeast (NC)	
UAP Southeast (SC)	
Univar	
Vanguard Fumigation Co.	
Western Fumigation	
Total	1,283,214 kilograms

### G. Trading Allowances

In accordance with Section 607 of the CAA of 1990, EPA is allowing producers and importers of methyl bromide to trade or transfer critical use allowances subject to the provisions of 40 CFR part 82. In accordance with paragraph (c) of Section 607, EPA is establishing an offset of one tenth of one percent of the amount of the CUAs transferred consistent with proposed rule. The Act requires that transfers of allowances result in lower production than if the trade had not occurred.

The offset will be deducted from the transferor's allowance balance at the time of a trade. A one tenth of one percent offset is consistent with the offset required for the transfer of essential use allowances under the phaseout program for class I controlled ozone-depleting substances (ODS), which, like critical use allowances permit the exempted production or import of ODS beyond a phaseout date.

Because, CSAs govern the amount of existing material that can be sold, EPA is not implementing an offset for the transfer of CSAs. If the holder of a CSA does not wish to sell his inventories of methyl bromide to the critical use market, he (the transferor) may sell his allowances to another methyl bromide producer, importer, distributor, or applicator (the transferee).

EPA received seven comments supporting the ability of allowance holders to trade allowances. EPA did not receive any adverse comments on the one tenth of one percent offset that is similarly applied to the essential use exemption and is implementing this offset in today's rule.

EPA received one comment suggesting that the Agency should modify its proposed CSA trading framework to allow anyone who wishes to sell inventories of critical use methyl bromide to buy CSAs, not just initial CSA recipients. EPA modified its proposal to allow for any entity in the methyl bromide supply chain to acquire CSAs even if they did not receive an initial CSA allocation from EPA. EPA agrees that the Agency should not restrict the normal flow of commerce.

Lastly, the Agency is allowing for trades of CUAs into CSAs and is not requiring an offset to accompany such transactions. A CUA holder would retire a number of allowances to EPA and EPA would then issue additional CSAs to the allowance holder. EPA is allowing this type of allowance trade to accommodate an entity who wishes to forgo exempted production or import of new methyl bromide to make more of pre-phaseout inventories available for approved critical uses. EPA believes that an environmental benefit would be derived in this type of exchange since the result is less new production or import. As described in the proposed rule, EPA is not allowing the reverse transaction, exchange of CSAs for CUAs, because Decision Ex I/3 imposes a cap of no more than 30% production and import for critical uses in 2005. If the Agency were to allow CSAs to become additional rights to production or import, the U.S. would potentially run into non-compliance with the 30% production cap.

For consistency with the requirements governing other types of allowance transfers in the ozone protection program, EPA is requiring that an entity who sells allowances must file an allowance transfer form with EPA. Existing regulations require EPA to process these forms within 3 business days of receipt.

The Agency believes that trading critical use allowances and critical stock allowances will allow entities to make rational business decisions as to the amount of critical use methyl bromide to produce or import in a given control period and thus supports flexible trading provisions with appropriate environmental offsets as described in this section of today's rule.

### H. Acquiring Critical Use Methyl Bromide

Approved critical users who have an approved critical use may acquire methyl bromide, as described in the proposal, in a similar manner to which they acquire methyl bromide exempted for quarantine and pre-shipment uses (68 FR 237, January 2, 2003). EPA received eight comments supporting the "QPS-like" approach because it is familiar to the regulated community.

Approved critical users who have an approved critical use may acquire critical use methyl bromide, or fumigation services with critical use methyl bromide, by certifying at the point of purchase that they are in fact approved critical users and that they will use the methyl bromide for an approved critical use. The certifications shall be retained by the supplier for a minimum of three years and are part of the reporting and recordkeeping requirements set forth in § 82.13 of this regulation.

Specifically, the certification will state, in part: "I certify, under penalty of law, I am an approved critical user and I will use this quantity of methyl bromide for an approved critical use. My action conforms to the requirements associated with the critical use exemption published in 40 CFR part 82. I am aware that any agricultural commodity within a treatment chamber, facility, or field I fumigate with critical use methyl bromide can not subsequently or concurrently be fumigated with non-critical use methyl bromide during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity). I will not use this quantity of methyl bromide for a treatment chamber, facility, or field that I previously fumigated with non-critical use methyl bromide purchased during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity), unless a local township limit now prevents me from using methyl bromide alternatives." The form will further require users to provide information on the type of critical use methyl bromide purchased, the location of the treatment, the crop or commodity treated, the quantity of critical use methyl bromide purchased and the acreage/cubic footage treated. This information is required so that distributors and applicators are able to meet their annual reporting obligations to EPA. Providing false information on this form constitutes a violation.

EPA is prohibiting suppliers from selling critical use methyl bromide without first obtaining a signed and dated certification form.

*I. Who Is an Approved Critical User*

1. Users and Uses

An approved critical user may obtain access to exempted production/import and reserved inventories of pre-phaseout methyl bromide stocks, the combination of which constitute the supply of "critical use methyl bromide" intended to meet the needs of agreed critical uses. However, a condition for obtaining access to critical use methyl bromide is a limit on the amount of stocks that can be purchased in the control period, as described under section V.D of this rule.

An approved critical user is a self identified entity who meets the following requirements:

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

(2) Has an area in the applicable location of use that requires methyl bromide fumigation because the person reasonably expects that the area will be subject to a limiting critical condition (LCC) during the applicable control period, if an LCC is given in Appendix L.

Using these criteria, an approved critical user could be a tomato farmer in Florida whose farm is over karst topography but would not include a tomato farmer in Oklahoma even if he too has a farm over karst topography because no exemption application was filed on behalf of Oklahoma tomato farmers. Similarly, a Florida tomato farmer who did not have a field with karst topography, or one of the other limiting critical conditions specified in this rule, would not be an approved critical user because the circumstance of the use is not an approved critical use.

Approved critical uses are those uses of methyl bromide listed in Appendix L to 40 CFR Part 82 for the use listed in column A and the location of use in Column B, reproduced from the regulatory text in the table below.

TABLE 3.—APPROVED CRITICAL USES

Column A—approved critical uses	Column B—approved critical user and location of use	Column C—limiting critical conditions
<b>PRE-PLANT USES</b>		
Cucurbits .....	(a) Michigan growers .....  (b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers.	With a reasonable expectation that moderate to severe fungal pathogen infestation already either exists or could occur without methyl bromide fumigation.  With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation already either exists or could occur without methyl bromide fumigation.
Eggplant .....	(a) Georgia growers .....  (b) Florida growers .....	With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation either already exists or could occur without methyl bromide fumigation.  With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.
Forest Seedlings .....	(a) Members of the Southern Forest Nursery Management Cooperative limited to growing locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.  (b) International Paper and its subsidiaries limited to growing locations in Arkansas, Alabama, Georgia, South Carolina and, Texas.  (c) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, South Carolina, Oregon, and Washington.  (d) Public (government owned) seedling nurseries in the states of California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia, and Wisconsin.  (e) Members of the Nursery Technology Cooperative limited to growing locations in Oregon and Washington.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.  With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.  With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.  With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.

TABLE 3.—APPROVED CRITICAL USES—Continued

Column A—approved critical uses	Column B—approved critical user and location of use	Column C—limiting critical conditions
Ginger .....	(f) Michigan seedling nurseries .....	With a reasonable expectation that one or more of the following limiting critical conditions already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	Hawaii growers .....	With a reasonable expectation that the limiting critical condition already exists or could occur without methyl bromide fumigation, or moderate to severe bacterial wilt infestation.
Orchard Nursery Seedlings	(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in California and Washington (Driscoll's raspberries and their contract growers in California and Washington).	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.
	(b) Members of the California Association of Nurserymen-Deciduous Fruit and Nut Tree Growers.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.
	(c) Members of the California Association of Nurserymen-Citrus and Avocado Growers.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.
Orchard Replant .....	(a) California stone fruit growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(b) California table and raisin grape growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(c) California walnut growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(d) California almond growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
Ornamentals .....	(a) Yoder Brothers Inc. in Florida .....	For use in all chrysanthemum production.
	(b) California rose nurseries .....	With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.

TABLE 3.—APPROVED CRITICAL USES—Continued

Column A—approved critical uses	Column B—approved critical user and location of use	Column C—limiting critical conditions
Peppers .....	(a) California growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe disease infestation, or moderate to severe yellow or purple nutsedge infestation, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.
	(c) Florida growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.
Strawberry Nurseries .....	(a) California growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe black root rot or crown rot, or moderate to severe yellow or purple nutsedge infestation.
	(b) North Carolina and Tennessee growers .....	With a reasonable expectation that the use will occur in the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.
Strawberry Fruit .....	(a) California growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe black root rot or crown rot, moderate to severe yellow or purple nutsedge infestation, a prohibition of the use of 1,3-dichloropropene products because local township limits for this alternative have been reached, time to transition to an alternative.
	(b) Florida growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge, or karst topography.
	(c) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, Virginia, Ohio, and New Jersey growers.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.
Sweet Potatoes .....	California growers .....	With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
Tomatoes .....	(a) Michigan growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe disease infestation, fungal pathogens infestation.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers.	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.
	(c) Florida growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.

TABLE 3.—APPROVED CRITICAL USES—Continued

Column A—approved critical uses	Column B—approved critical user and location of use	Column C—limiting critical conditions
Turfgrass .....	(a) U.S. turfgrass sod nursery producers who are members of Turfgrass Producers International (TPI). (b) U.S. golf courses .....	For the production of industry certified pure sod.  For establishing sod in the construction of new golf courses or the renovation of putting greens, tees, and fairways.
POST-HARVEST USES		
Food Processing .....	(a) Rice millers in all locations in the U.S. who are members of the USA Rice Millers Association..  (b) Pet food manufacturing facilities in the U.S. who are active members of the Pet Food Institute. (For today's rule, "pet food" refers to domestic dog and cat food).  (c) Kraft Foods in the U.S. ....  (d) Members of the North American Millers' Association in the U.S.	With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions already exists or could occur without methyl bromide fumigation: older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.
Commodity Storage .....	(a) Gwaltney of Smithfield in the U.S. ....  (b) California entities storing walnuts, beans, dried plums, figs, raisins, and pistachios in California.	For smokehouse ham curing facilities owned by the company.  With a reasonable expectation that one or more of the following limiting critical conditions exists: rapid fumigation is required to meet a critical market window, such as during the holiday season, rapid fumigation is required when a buyer provides short (2 days or less) notification for a purchase, or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.

The approved critical uses and limiting critical conditions listed in the above table have been modified from the original proposal to reflect comments provided to EPA. EPA received clarifying comments from four commenters that EPA mischaracterized the scope of their application or misidentified some limiting critical conditions. For example, one commenter indicated to EPA that their application only covered dog and cat pet food facilities whereas EPA inadvertently listed all pet food facilities as part of the consortium.

The most significant change to this section involves the limiting critical conditions (LCC). EPA received four comments with concerns about the LCCs and two in favor of the LCCs. The concerns raised in the comments is that these conditions are difficult to

understand and identify. For example, one commenter asked how many nutsedges over what area constitute "moderate to severe" infestation. The same commenter also indicated that at the time of fumigation, nutsedges would not be visible. EPA recognizes that a user may not be able to certify that certain limiting critical conditions will definitely occur. For example, a grower may not know with one hundred percent certainty that moderate to severe nutsedge infestation would occur in a given field in the absence of methyl bromide fumigation. However, the grower should be able to form a reasonable expectation in this regard, based on past experience and the information included in the application. EPA has modified the definition of approved critical user to reflect the "reasonable expectation" standard.

Therefore, if a reasonable person expects that he would have high levels of nutsedge, perhaps because of a problem in a neighboring field or the field in question had problems the previous year, that would be a sufficient basis to meet the LCC. This renders it unnecessary for the grower to wait for a nutsedge problem to develop during the growing season when it is no longer possible to remedy the problem.

EPA received two sets of comments requesting specific modifications to the LCCs. Based on those comments, EPA is making the following changes in today's rule: (a) Eliminating the LCC of "moderate to severe nematode pressure" in all uses except Michigan tomatoes because the commenter correctly states that there are effective alternatives to control this condition when it occurs alone; (b) eliminating "moderate to

severe pathogens" in all uses except Michigan tomatoes because there are effective alternatives to control this condition when it occurs alone and; (c) modifying the buffer zone LCC to reflect recent label changes that reduce the buffer to 100 feet from an occupied structure. The last LCC would apply, as the commenter pointed out, only in situations where methyl bromide has a less restrictive buffer zone. EPA is eliminating the first two LCCs on nematode and pathogen infestation because there are effective alternatives to control these pests when they happen to be the only key pest. EPA had incorrectly characterized these conditions as stand alone circumstances that would allow for the use of methyl bromide in the proposal although the nomination describes these situations as requiring methyl bromide when in conjunction with another circumstance. EPA did not eliminate the first two LCC for Michigan tomatoes because severe nematode or pathogen pressures alone make the alternatives not feasible. This is because Michigan is a cold climate and the alternatives which would otherwise be effective can not properly diffuse in the cool soils.

## 2. New Market Entrants

EPA received two favorable comments on the proposed method for regulating access to critical use methyl bromide by new market entrants. For example, a new market entrant may be a new farmer, a farmer who is expanding production of a crop that is an approved critical use or, a farmer that is moving production from one location to a new location that has the limiting critical condition. EPA is finalizing a framework in today's rule that allows a new market entrant who is a member of a consortium that applied for an exemption to be an approved critical user so long as the use is for a use listed in column A and a location listed in column B of Appendix L to 40 CFR 82. Therefore, an approved critical user includes those users who are members of a consortium that applied for an exemption, even if the user was not a member of the consortium at the time the application was filed. As described in the proposal, EPA will not increase the amount of methyl bromide exempted to accommodate new market entrants without first seeking authorization from the Parties through the nomination and then engaging in a notice and comment rulemaking process. Therefore any increase in demand for methyl bromide due to new market entrants must be met under the cap set forth in today's rule.

For example, the Southern Forest Nursery Management Cooperative consists of a certain number of forest seedling nursery operators. The Cooperative made an application to EPA for an exemption solely on behalf of their membership. If a company that is a member of the Cooperative otherwise meets the definition of approved critical user, the company can access critical use methyl bromide even if it did not join the Cooperative until 2004.

The Agency wishes to accommodate the ever shifting marketplace to allow growers to increase or move production as needed provided that critical use methyl bromide only goes to those uses and locations listed in Appendix L of 40 CFR part 82.

EPA received three comments against EPA's definition because it allows for users to join a consortium in 2005 and use methyl bromide that should be reserved only for those who were part of the consortium at the time of application in the opinion of the commenters. One commenter provided an alternative approach that would have EPA disallow all new market entrants for the first year they enter the market. EPA considered this approach but EPA does not have information on every company that is part of a given consortium. Therefore, it would be difficult if not impossible for EPA to "pre-qualify" some companies as critical uses and disqualify others. Instead, EPA is finalizing an approach that leaves it up to each consortium to define their membership at the time of application for an exemption as broadly or narrowly as they choose.

### *J. Reporting and Recordkeeping Requirements*

#### 1. Reporting

With today's action, producers and importers are required to report the number of expended and unexpended pre-plant CUAs and post-harvest CUAs on a quarterly basis to EPA. On an annual basis, producers, importers, distributors, and third-party applicators are required to report to EPA the following information: the number of expended and unexpended CSAs; a list of the total amount of pre-plant methyl bromide bought and the amount sold to approved critical users for each sector; a list of the total amount of post-harvest methyl bromide bought and the amount sold to approved critical users for each sector; the amount of critical use methyl bromide that has not been sold to an approved critical user as of the end of the control period that the reporting entity owns; the amount of critical use methyl bromide that has not been sold

to an approved critical user that reporting entity is holding on behalf of another entity along with the name of the entity who owns the material.

This information is required so that EPA can track compliance with the critical use allowance and critical stock allowance caps, determine how much methyl bromide is used on a sector (crop or use) basis, and determine how much critical use methyl bromide remains unused at the end of the compliance period. The information collected for this exemption is authorized under Sections 603(b), 603(d) and 614(b) of the CAAA of 1990. EPA believes these reporting requirements are necessary to meet U.S. reporting obligations under Article 7 of the Protocol, CAA reporting requirements to Congress under Section 603(d), and implementation of the exemption from one control period to the next.

The reporting framework that EPA is implementing with today's action is consistent with the information requirements described in the proposal and section 114 request for information on inventories (69 FR 52366 and 69 FR 52403). EPA did not receive any adverse comment on the information requirements although one entity indicated that EPA underestimated the time various compliance activities would take. EPA believes that today's recordkeeping and reporting requirements create the least burden while still ensuring compliance with Protocol requirements. See section VI.C of this preamble for EPA's response to those comments.

EPA also received comment that the Agency should use a real time database system to track the use of methyl bromide. A system similar to this is used in California to allow regulators to prohibit the use of 1,3-D products when the local township cap is close to its maximum allowable level. EPA is primarily concerned with understanding how much methyl bromide is used for each critical use sector on an annual basis. Therefore, a real time tracking system is not warranted. The reporting requirements described in today's action are sufficient to meet the information requirements under the Protocol and the CAAA of 1990 and to ensure that EPA can implement the exemption from one control period to the next. However, there is nothing in this rule to prohibit the private development of such a system and EPA understands that one such database company has had conversations with methyl bromide registrants about developing a database



similar to the one described in the proposal.

EPA received one comment that the Agency should develop a better understanding on use of methyl bromide and to facilitate that understanding, EPA should require direct reporting on methyl bromide use by all large users, defined as those who use more than 10,000 kgs of methyl bromide a year. While EPA understands that at some point during the exemption program it may be helpful to understand use trends for major individual users, the Agency does not believe that it will derive any additional benefit from requiring annual reporting of the data. In addition this would impose additional burden on users and potentially on producers, importers, and distributors. In the event that EPA does need this data at some point, the Agency could use section 114 of the CAA to require distributors and third-party applicators to provide individual user data to EPA based on the recordkeeping requirements laid out in today's rule.

## 2. Recordkeeping

Producers, importers, distributors, and third-party applicators are required to maintain self certification records for three years along with other transactional records such as invoices and order forms. EPA did not receive any adverse comments on the recordkeeping requirements described in the proposal and is implementing the recordkeeping requirements without modification.

## 3. Treatment of Unused Critical Use Methyl Bromide

EPA will use the information collected through the annual reporting requirement to determine how much unused critical use methyl bromide is available, or not already sold to an approved critical user, at the end of the calendar year. EPA proposed deducting the corresponding amount from the total number of critical use allowances the Agency would make available for the following control period. A number of commenters correctly indicated that EPA would not have the data on the amount of critical use methyl bromide unused at the end of the year until the March of the following year when the last report is due. EPA is only issuing allowances once a year and such allowance allocations are likely to take place well before EPA has the required data on unused methyl bromide. Therefore, with today's action, EPA is creating a system for deducting the amount of unused methyl bromide from the total number of allowances issued for the control period following the

control period immediately after the control period when the methyl bromide was unused for critical uses. The 2007 CUAs will reflect any unused critical use methyl bromide from 2005 and so forth. For the year 2006, this will result in no reductions made; however all years after 2006 will experience a reduction should there be any unused critical use methyl bromide.

All pre-plant critical use methyl bromide from 2005 would remain pre-plant critical use methyl bromide in 2006 available for all 2006 pre-plant approved critical uses, subject to any adjustments that may be described in the 2006 or 2007 allocation notice and comment rulemaking.

EPA received comment that the Agency should account for the time lag between reporting and issuing of allowances for the following control period using an estimated approach. In other words, the Agency would estimate how much critical use methyl bromide would be unused and then deduct that amount from the number of allowances issued for the following year. EPA is requiring reporting of the required data once a year and so the Agency would have little basis for making realistic estimates of this nature. Although EPA could require more frequent data reports, EPA would still have to estimate year end data because of the large number of fumigations that occur late in the control period. EPA prefers to use actual data even if there is a time lag to ensure that those who need critical use methyl bromide have access to it and that future production can be adjusted to reflect the actual carryover.

## K. Enforcement Provisions

Unauthorized production, import, or sale of critical use methyl bromide will incur a violation on a per kilogram basis identical to nearly all other aspects of the ozone protection program. Section 113 of the CAA governs enforcement activities for violations of requirements under Title VI. One commenter supported the size of violations EPA proposed for allowance holders. There were no dissenting comments on this point.

EPA proposed adjusting the maximum potential fine applied to end users of methyl bromide because users typically operate on a smaller scale and have less ability to pay than chemical companies. EPA proposed defining a violation for improper use of critical use methyl bromide as one violation for every 200 kilograms of misuse. EPA received several comments that the Agency should further lower the penalties to be identical to those applied under the Federal Insecticide,

Fungicide, and Rodenticide Act (FIFRA), the statute that usually governs use of fumigants. Today those penalties are \$1,200 per violation, and a violation is the occurrence of misuse. EPA also received two comments supporting a maximum penalty of \$25,000 per violation, and a violation is the occurrence of misuse and nine comments that end user penalties should be identical to those under FIFRA or should be handled exclusively under FIFRA authorities.

With today's rule, EPA is defining a violation with respect to improper use by a user as one violation for every 200 kilograms noting that EPA typically uses discretion in assessing penalties and takes into account such things as the size of the operation and ability to pay as well as the circumstances—such as whether the misuse was self-reported. Today's rule lowers the basis for calculating a maximum penalty and the Agency notes there is discretion to apply less than the maximum fine per each violation. Today's rule is providing assurances to the end users that they will not face the same level of fines as a chemical producer and codifies flexibility for the Agency to apply less than the maximum penalty for this type of violation. In assessing penalties, the Agency takes into consideration the size of the violator, the economic benefit or advantage achieved from the violation and the ability of the violator to pay a penalty. Thus, the concerns raised by commenters regarding the ability of methyl bromide users to pay the maximum allowable fine proposed by the Agency are addressed through the flexibility EPA provides to enforcement officers in assessing penalties.

Because it is a pesticide, methyl bromide is also regulated by EPA under FIFRA and under other statutes and regulatory authority and by states under their own statutes and regulatory authority. Nothing in today's rule 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.

## L. Exporting Provisions

We received two comments that noted the need for regulatory provisions that would permit U.S. producers of methyl bromide to manufacture material for other countries with critical uses authorized by the Parties. In today's action, the regulatory text includes provisions that permit methyl bromide production explicitly and solely to meet the needs of other countries that have been authorized critical use exemptions for the specific control period. The

producers will be required to report quarterly on quantities produced solely for export to meet orders placed by other countries with authorized critical needs. The proposal noted that the U.S. is the largest world manufacturer of methyl bromide and that U.S. manufacturers will likely produce to meet the needs of other non-Article 5(1) countries that have critical uses authorized by the Parties, such as Canada, Australia or Italy. In creating the regulatory provisions in today's rule to permit production beyond the phaseout explicitly for export to other countries with critical uses authorized by the Parties, we are also correcting an oversight that was discussed in the final rule published in the **Federal Register** on January 2, 2003, (68 FR 238) regarding production beyond the phaseout for quarantine and preshipment applications. In that prior final rule (68 FR 238) as well as in the proposal, we discuss that exempt production for quarantine and preshipment applications is above and beyond the reduction steps prior to the phaseout, and continues after the phaseout. The addition of provisions regarding the quarantine and preshipment exemption is to correct the absence of the intended exemption beyond the phaseout.

#### **VI. What Are the Other Considerations and Situations on Which EPA Received Comments?**

##### *A. Distribution of Permits to Approved Critical Users*

In today's rule, EPA is creating an exemption program that emphasizes direct regulation of the supply chain of methyl bromide through an allowance allocation system that distributes allowances to producers, importers, distributors, and third-party applicators of methyl bromide as described in section V of this preamble. EPA did receive two comments supporting a system that emphasizes direct regulation of the user community whereby EPA would issue critical use permits to end users of methyl bromide in order to direct critical use methyl bromide to the appropriate uses.

One commenter supported the user oriented approach because the administrative burden of such a system would act as a deterrent to the use of methyl bromide and would lead to greater efficiencies. As EPA described in the proposal, the critical use permit (CUP) system would impose additional costs and burden on industry compared to the proposed option. Although these costs could be a deterrent to the use of methyl bromide and thus achieve an

environmental objective of reducing methyl bromide use, EPA is committed to a regulatory approach that relies on existing market mechanisms. Certain critical uses were agreed to and determined through an extensive domestic and international review based on the technical and economic feasibility of alternatives. EPA does not want to impose a regulatory framework with the goal of establishing high administrative costs to force growers who do not have any alternative available to them out of the market. Doing so would obviate the purpose of an exemption altogether.

EPA believes the timing of the domestic and international authorization process would not allow for the creation of an end user allocation scheme on a yearly basis. In addition the learning and transaction costs of changing the whole market structure in the face of the phaseout could adversely impact in U.S. agricultural sectors. For a more detailed description of the economic consideration of the user based system, please refer to the Regulatory Impact Assessment conducted for the proposed rulemaking available at EPA's e-docket number OAR-2003-0230.

EPA received two comments on using an auction to distribute permits to users of methyl bromide, one in favor and one opposed. The commenter in favor of the auction indicated that the revenues derived from an auction could be used to fund transition activities. The other commenter indicated that the auction approach would take a significant amount of time to develop and methyl bromide would be directed to the highest value uses disadvantaging other important uses of methyl bromide. This commenter disputes EPA's assertion that an auction would serve to redistribute windfall profits. EPA did not propose and is not finalizing this option due to the lack of clear statutory guidance on some of the details of this approach, the time it would take to develop this program, and the relatively small size of the market compared to the burden associated with this approach.

##### *B. Comments on the Burden Associated With This Regulatory System*

EPA received one comment on the estimated burden hours associated with this regulatory system. One commenter indicated that EPA grossly underestimated the time required for data compilation and reporting and suggested that it is at least two times greater than what EPA estimated in the Paperwork Reduction Analysis. This commenter did not provide additional comment to explain specifically how or

why the EPA estimate was incorrect nor did they indicate which particular activities should be adjusted. Therefore, EPA has not adjusted the estimated burden hours.

#### **VII. Statutory and Executive Order Reviews**

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

Under Executive Order No. 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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

EPA conducted an economic impact analysis that attempts to assess the likely effect of allowing critical use exemptions on the regulated entities using three illustrative alternatives. The estimated cost savings are approximately \$19 million to \$31 million on an annual basis. The two factors that affect these estimates are the size of the cap and how freely critical use methyl bromide is allocated. Since the assumed cap in the analysis is 39% of the 1991 baseline consumption, and the allocation system chosen for the final rule is not a full universal cap system, the likely cost savings that should result from this rule is lower than the estimates presented in the analysis.

##### *B. Paperwork Reduction Act*

The information collection requirements in this rule will be

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

The information collection under this rule is authorized under Sections 603(b), 603(d) and 614(b) of the CAAA of 1990.

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

- (1) Satisfy U.S. obligations under the international treaty, *The Montreal Protocol on Substances that Deplete the Ozone Layer* (Protocol), to report data under Article 7;
- (2) Fulfill statutory obligations under Section 603(b) of the CAAA of 1990 for reporting and monitoring;
- (3) Provide information to report to Congress on the production, use and

consumption of class I controlled substances as statutorily required in Section 603(d) of the CAAA of 1990.

Information will be collected through quarterly reporting by producers and importers and annual reporting by distributors and third party applicators of methyl bromide. EPA estimates the total burden associated with today's action to be 1,505 hours annually. EPA does not estimate any start-up or capital costs associated with today's action.

Collection activity	No. of respondents	Total No. of responses	Hours per response	Total hours
Rule Familiarization .....	54	54	4	216
Report Inventory Data (one time) .....	54	54	2.5	135
Data Compilation (quarterly basis) .....	4	16	4	64
Data Compilation (annual basis) .....	50	50	8	400
Data Reporting (quarterly basis) .....	4	16	.5	8
Data Reporting (annual basis) .....	50	50	.5	25
Reporting on Allowance Trading Activities .....	4	16	.5	8
Self Certification Activities by Producers, Importers, and Distributors .....	54	100	.25	25
Self Certification Activities by End Users .....	2,000	2,500	.25	625
<b>Total Burden Hours .....</b>			<b>18</b>	<b>1,505</b>

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of

information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

*C. Regulatory Flexibility Act*

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that is identified by the North American Industry Classification System (NAICS) Code in the Table below; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Category	NAICS code	SIC code	NAICS Small business size standard (in number of employees or millions of dollars)
Agricultural production .....	1112—Vegetable and Melon farming; 1113—Fruit and Nut Tree farming; 1114—Greenhouse, Nursery, and Floriculture production.	0171—Berry Crops; 0172—Grapes; 0173—Tree Nuts; 0175—Deciduous Tree Fruits (except apple orchards and farms); 0179—Fruit and Tree Nuts, NEC; 0181—Ornamental Floriculture and Nursery products; 0831—Forest Nurseries and Gathering of Forest products.	\$0.75 million.
Storage Uses .....	115114—Postharvest Crop activities (except Cotton Ginning); 311211—Flour Milling; 311212—Rice Milling. 493110—General Warehousing and Storage; 493130—Farm Product Warehousing and Storage.	2041—Flour and Other Grain; Mill Products; 2044—Rice Milling. 4221—Farm Product Warehousing and Storage; 4225—General Warehousing and Storage.	\$6 million.  \$21.5 million.

After considering the economic impacts of today's final rule on small entities, EPA has concluded 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 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

Since this rule will make methyl bromide available for approved critical uses after the phaseout date of January 1, 2005, this is a de-regulatory action which will confer a benefit to users of methyl bromide. EPA believes the estimated de-regulatory value for users of methyl bromide is between \$20 million to \$30 million annually. We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

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

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final

rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's rule creates a recordkeeping and reporting burden on the private sector that is estimated to be under \$200,000 on an annual basis. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. Further, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because it does not create any requirements on any State, local, or tribal government.

#### *E. Executive Order No. 13132: Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's 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 No. 13175: Consultation and Coordination With Indian Tribal Governments*

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

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

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

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

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

This rule is not a "significant energy action" as defined in Executive Order No. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse

effect on the supply, distribution, or use of energy. This rule does not pertain to any segment of the energy production economy nor does it regulate any manner of energy use. Therefore, we have concluded that this rule is not likely to have any adverse energy effects.

*I. National Technology Transfer Advancement Act*

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

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on January 1, 2005.

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

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

Dated: December 15, 2004.

**Michael O. Leavitt**,  
*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.

**Subpart A—Production and Consumption Controls**

- 2. Section 82.3 is amended as follows:
  - a. By adding definitions in alphabetical order for the terms, "Approved critical use(s)," "Approved critical user(s)," "Consortium," "Critical stock allowance (CSA)," "Critical stock allowance (CSA) holder," "Critical use," "Critical use allowance (CUA)," "Critical use allowance (CUA) for pre-plant use," "Critical use allowance (CUA) for post-harvest use," "Critical use allowance (CUA) holder," "Critical use methyl bromide," "Limiting critical condition," "Location of use," "Third party applicator," "Unexpended critical stock allowance (CUA)," and "Unexpended critical use allowances (CUA);"
  - b. By revising definition of "Confer."

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

\* \* \* \* \*

*Approved critical use(s)* means those uses of methyl bromide listed in Column A of appendix L to this subpart as further clarified in Columns B and C of that appendix.

*Approved critical user(s)* means a person who:

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

(2) Has an area in the applicable location of use that requires methyl bromide fumigation because the person reasonably expects that the area will be subject to a limiting critical condition during the applicable control period.

\* \* \* \* \*

*Confer* means to shift the essential-use allowances obtained under § 82.8 from the holder of the unexpended essential-

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

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

\* \* \* \* \*

*Critical stock allowance (CSA)* means the right granted by this subpart to sell one (1) kilogram of class I, Group VI controlled substances from inventory produced or imported prior to the January 1, 2005 phaseout date for an approved critical use during the specified control period to the extent permitted by federal and state pesticide statutes and regulations other than the Clean Air Act and regulations in this part. A person's critical stock allowances are the total of the allowances obtained under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

*Critical stock allowance (CSA) holder* means an entity to which EPA allocates a quantity of critical stock allowances as reflected under § 82.8(c), or who receives a quantity of critical stock allowances through a transfer under § 82.12.

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

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

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

*Critical use allowance (CUA)* means the privilege granted by this subpart to produce or import one (1) kilogram of methyl bromide for an approved critical use during the specified control period. A person's critical use allowances are the total of the allowances obtained

under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

*Critical use allowance for pre-plant uses* means the privilege granted by this subpart to produce or import one (1) kilogram of methyl bromide solely for an approved critical use in pre-plant categories specified in Appendix L to this subpart during the specified control period. A person's critical use allowances for pre-plant uses are the total of the allowances obtained under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

*Critical use allowance for post-harvest uses* means the privilege granted by this subpart to produce or import one (1) kilogram of methyl bromide solely for an approved critical use in post-harvest categories specified in appendix L to this subpart during the specified control period. A person's critical use allowances for post-harvest uses are the total of the allowances obtained under § 82.8(c) as may be modified under § 82.12 (transfer of allowances).

*Critical use allowance (CUA) holder* means an entity to which EPA allocates a quantity of critical use allowances as reflected in § 82.8(c) or who receives a quantity of critical use allowances through a transfer under § 82.12.

*Critical use methyl bromide* means the class I, Group VI controlled substance produced or imported through expending a critical use allowance or that portion of inventory produced or imported prior to the January 1, 2005 phaseout date that is sold only for approved critical uses through expending a critical stock allowance.

\* \* \* \* \*  
*Limiting critical condition* means the regulatory, technical, and economic circumstances listed in Column C of Appendix L to this subpart that establish conditions of critical use for methyl bromide in a fumigation area.

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

\* \* \* \* \*  
*Third party applicator* means an applicator of critical use methyl bromide who fumigates or treats commodities, structures, crops, or land on behalf of an approved critical user.

\* \* \* \* \*  
*Unexpended critical stock allowance (CSA)* means critical stock allowances against which methyl bromide has not yet been sold for an approved critical use.

*Unexpended critical use allowances (CUA)* means critical use allowances

against which methyl bromide has not yet been produced or imported. At any time in any control period a person's unexpended critical use allowances are the total of the level of critical use allowances the person holds at that time for that control period, minus the level of class I, Group VI controlled substances that the person has produced or has imported solely for approved critical uses in that control period.

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

**§ 82.4 Prohibitions for class I controlled substances.**

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

(2) Effective January 1, 2005, production of class I, Group VI controlled substances is not subject to the prohibitions in paragraph (b)(1) of this section if it is solely for quarantine or preshipment applications as defined in this subpart, or it is solely for export to satisfy critical uses authorized by the Parties for that control period.

\* \* \* \* \*  
(d) Effective January 1, 1996, for any class I, Group I, Group II, Group III, Group IV, Group V, or Group VII controlled substances, and effective January 1, 2005, for any class I, Group VI controlled substance, and effective August 18, 2003, for any class I, Group VIII controlled substance, no person may import (except for transshipments or heels), at any time in any control period, (except for controlled substances that are transformed or destroyed) in excess of the amount of unexpended essential use allowances or exemptions, or in

excess of unexpended critical use allowances, for that substance held by that person under the authority of this subpart at that time for that control period. Every kilogram of excess importation (other than transshipments or heels) constitutes a separate violation of this subpart. It is a violation of this subpart to obtain unused class I controlled substances under the general laboratory exemption in excess of actual need and to recycle that material for sale into other markets.

\* \* \* \* \*  
(n) No person may use class I controlled substances produced or imported under the essential use exemption for any purpose other than those set forth in this paragraph. Effective January 1, 1996, essential-use allowances are apportioned to a person under § 82.8(a) and (b) for the exempted production or importation of specified class I controlled substances solely for the purposes listed in paragraphs (n)(1)(i) through (iii) of this section.

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

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

(ii) Space Shuttle—solvents.

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

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

separate violation of this subpart. It is a violation of this subpart to obtain unused class I controlled substances under the exemption for laboratory and analytical uses in excess of actual need and to recycle that material for sale into other markets.

\* \* \* \* \*

(p) Critical Use Exemption: With respect to class I, Group VI substances (methyl bromide):

(1) For critical use allowance holders and critical stock allowance holders:

(i) No person shall sell critical use methyl bromide without first receiving a certification from the purchaser that the quantity purchased will be sold or used solely for an approved critical use. Every kilogram of critical use methyl bromide sold without first obtaining such certification constitutes a separate violation of this subpart.

(ii) No person shall sell a portion of inventory produced or imported prior to the January 1, 2005 phaseout date as critical use methyl bromide in excess of the number of unexpended critical stock allowances held by that person.

(iii) A person who sells methyl bromide produced or imported before the phaseout date of January 1, 2005 for a use identified by the user as a critical use must hold sufficient critical stock allowances (CSA) for the transaction and shall expend one allowance for each kilogram of methyl bromide sold. Every kilogram of critical use methyl bromide produced or imported before the phaseout date of January 1, 2005 that is sold without expending an

allowance constitutes a separate violation of this subpart.

(2) For approved critical users, each action associated with each 200 kilograms of critical use methyl bromide for the following subparagraphs constitutes a separate violation of this subpart.

(i) No person shall take possession of quantities of critical use methyl bromide or acquire fumigation services using quantities of critical use methyl bromide without first completing the appropriate certification in accordance with the requirements in § 82.13.

(ii) No person who purchases critical use methyl bromide may use such quantities for a use other than the specified critical use listed in Column A and the specified location of use in Column B of Appendix L to this subpart.

(iii) No person who purchases critical use methyl bromide produced or imported with expended critical use allowances for pre-plant uses, may use such quantities for other than the pre-plant uses as specified in Column A and Column B of appendix L to this subpart.

(iv) No person who purchases critical use methyl bromide produced or imported with expended critical use allowances for post-harvest uses, may use such quantities for other than the post-harvest uses as specified in Column A and Column B of appendix L to this subpart.

(v) No person who uses critical use methyl bromide on a specific field or structure may concurrently or

subsequently use non-critical use methyl bromide on the same field or structure for the same use (as defined in Column A and Column B of appendix L) in the same control period, excepting methyl bromide used under the quarantine and pre-shipment exemption.

(vi) No person who purchases critical use methyl bromide during the control period shall use that methyl bromide on a field or structure for which that person has used non-critical use methyl bromide for the same use (as defined in Columns A and B of appendix L) in the same control period, excepting methyl bromide used under the quarantine and pre-shipment exemption, unless, subsequent to that person's use of the non-critical use methyl bromide, that person becomes subject to a prohibition on the use of methyl bromide alternatives due to the reaching of a local township limit described in appendix L of this part.

\* \* \* \* \*

■ 4. Section 82.8 is added to read as follows:

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

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

TABLE 1.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2004

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

(b) A global exemption for class I controlled substances for essential laboratory and analytical uses shall be in effect through December 31, 2005 subject to the restrictions in Appendix G of this subpart, and subject to the record-keeping and reporting requirements at § 82.13(u) through (x).

There is no amount specified for this exemption.

(c) Effective January 1, 2005, critical use allowances are apportioned as set forth in paragraph (c)(1) of this section for the exempted production and import of class I, Group VI controlled substances specifically for those approved critical uses listed in

Appendix L to this subpart for the applicable control period. Every kilogram of production and import in excess of the total number and type of unexpended critical use allowances held for a particular type of use constitutes a separate violation of this subpart. Effective January 1, 2005,

critical stock allowances are issued as set forth in paragraph (c)(2) of this section for the sale of class I, Group VI controlled substances from inventory

produced or imported before the January 1, 2005 phaseout date specifically for those approved critical uses listed in Appendix L to this

subpart for the applicable control period.  
(1) Allocated critical use allowances granted for specified control period.

Company	2005 Critical use allowances for pre-plant uses* (kilograms)	2005 Critical use allowances for post-harvest uses* (kilograms)
Albemarle Corp .....	1,791,950	122,151
Ameribrom, Inc .....	989,911	67,479
Great Lakes Chemical Corp .....	4,357,690	297,049
TriCal, Inc .....	30,679	2,091

\*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.  
(2) Allocated critical stock allowances granted for specified control period. The following companies are allocated critical stock allowances for 2005 on pro-rata basis in relation to the stocks held by each.

Company
Albemarle
Ameribrom, Inc.
Bill Clark Pest Control, Inc.
Blair Soil Fumigation
Burnside Services, Inc.
Cardinal Professional Products
Carolina Eastern, Inc.
Degesch America, Inc.
Dodson Bros.
Great Lakes Chemical Corp.
Harvey Fertilizer & Gas
Helena Chemical Co.
Hendrix & Dail
Hy Yield Bromine
Industrial Fumigation Company
J.C. Ehrlich Co.
Pacific Ag
Pest Fog Sales Corp.
Pro Source One
Reddick Fumigants
Royster-Clark, Inc.
Southern State Cooperative, Inc.
Trical Inc.
Trident Agricultural Products
UAP Southeast (NC)
UAP Southeast (SC)
Univar
Vanguard Fumigation Co.
Western Fumigation
Total—1,283,214 kilograms.

until January 1, 2005, for Group VI, any person (“transferor”) may transfer to any other person (“transferee”) any amount of the transferor’s consumption allowances or production allowances, and effective January 1, 1995, for all class I controlled substances any person (“transferor”) may transfer to any other person (“transferee”) any amount of the transferor’s Article 5 allowances. After January 1, 2002, any essential-use allowance holder (including those persons that hold essential-use allowances issued by a Party other than the United States) (“transferor”) may transfer essential-use allowances for CFCs to a metered dose inhaler company solely for the manufacture of essential MDIs. After January 1, 2005, any critical use allowance holder (“transferor”) may transfer critical use allowances to any other person (“transferee”). After January 1, 2005, any critical stock allowance holder (“transferor”) may transfer critical stock allowances to any critical stock allowance holder or any methyl bromide producer, importer, distributor or third party applicator (“transferee”).  
(i) \* \* \*

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

(ii) The Administrator will determine whether the records maintained by EPA, taking into account any previous

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

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

(e) Exchange of Critical Use Allowances for Critical Stock Allowances. (1) Critical use allowance holders may petition the Administrator to exchange a quantity of their unexpended critical use allowances for an equivalent amount of critical stock allowances. A person allocated critical stock allowances may not petition to exchange unexpended critical stock allowances for critical use allowances.  
(2) [Reserved]

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

**§ 82.12 Transfers of allowances for class I controlled substances.**

(a) *Inter-company transfers.* (1) Until January 1, 1996, for all class I controlled substances, except for Group VI, and



- 6. Section 82.13 is amended as follows:
- a. Revising paragraph (a).
- b. Adding paragraphs (f)(2)(xx) through (f)(2)(xxii).
- c. Revising paragraph (f)(3)(iv).
- d. Adding paragraphs (f)(3)(xvi), and (f)(3)(xvii).
- e. Adding paragraphs (g)(1)(xx) and (xxi).
- f. Revising paragraph (g)(4)(vii).
- h. Adding paragraphs (g)(4)(xviii) and (bb) through (dd).

**§ 82.13 Recordkeeping and reporting requirements for class I controlled substances.**

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

\* \* \* \* \*

(f) \* \* \*  
(2) \* \* \*

(xx) For class I, Group VI controlled substances, dated records such as invoices and order forms, and a log of the quantity of controlled substances produced for critical use, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, and the quantity sold for critical use, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use;

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

(xxii) For class I, Group VI controlled substances, dated records such as invoices and order forms, and a log of the quantity of controlled substances produced solely for export to satisfy critical uses authorized by the Parties for that control period, and the quantity sold solely for export to satisfy critical uses authorized by the Parties for that control period.

(3) \* \* \*

(iv) The producer's total of expended and unexpended production allowances, consumption allowances, Article 5 allowances, critical use

allowances (pre-plant), critical use allowances (post-harvest), critical stock allowances, and amount of essential-use allowances and destruction and transformation credits conferred at the end of that quarter;

\* \* \* \* \*

(xvi) For critical uses of class I, Group VI controlled substances, producers shall report annually the amount of critical use methyl bromide owned by the reporting entity, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, as well as quantities held by the reporting entity on behalf of another entity, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use along with the name of the entity on whose behalf the material is held; and  
(xvii) A list of the quantities of class I, Group VI controlled substances produced by the producer and exported by the producer and/or by other U.S. companies in that control period, solely to satisfy the critical uses authorized by the Parties for that control period.

(g) \* \* \*  
(1) \* \* \*

(xx) For class I, Group VI controlled substances, dated records such as invoices and order forms, of the quantity of controlled substances imported for critical use, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, and the quantity sold for critical use, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, and;

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

(4) \* \* \*

(vii) The importer's total sum of expended and unexpended consumption allowances by chemical as of the end of that quarter and the total sum of expended and unexpended critical use allowances (pre-plant) and unexpended critical use allowances (post-harvest) and critical stock allowances;

\* \* \* \* \*

(xviii) For critical uses of class I, Group VI controlled substances, importers shall report annually the amount of critical use methyl bromide owned by the reporting entity,

specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, as well as quantities held by the reporting entity on behalf of another entity, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use along with the name of the entity on whose behalf the material is held.

\* \* \* \* \*

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

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

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

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

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

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

(i) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide bought;

(ii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide sold for each specified critical use in Appendix L of this subpart;

(iii) For critical uses of class I, Group VI controlled substances, report the amount of critical use methyl bromide owned by the reporting entity, specifying quantities dedicated for pre-

plant use and quantities dedicated for post-harvest use, as well as quantities held by the reporting entity on behalf of another entity, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, along with the name of the entity on whose behalf the material is held;

(iv) The number of unexpended critical stock allowances.

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

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

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

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

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

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

(i) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide bought;

(ii) For critical uses of class I, Group VI controlled substances, an annual list of the amount of critical use methyl bromide sold for each specified critical use in Appendix L of this subpart;

(iii) For critical uses of class I, Group VI controlled substances, report annually the amount of critical use methyl bromide owned by the reporting entity, specifying quantities dedicated for pre-plant use and quantities dedicated for post-harvest use, along with the name of the entity on whose behalf the material is held;

(iv) The number of unexpended critical stock allowances.

(dd) Every approved critical user purchasing an amount of critical use methyl bromide or purchasing fumigation services with critical use methyl bromide must, for each request, identify the use as a critical use and certify being an approved critical user. The approved critical user certification will state, in part: "I certify, under

penalty of law, I am an approved critical user and I will use this quantity of methyl bromide for an approved critical use. My action conforms to the requirements associated with the critical use exemption published in 40 CFR part 82. I am aware that any agricultural commodity within a treatment chamber, facility, or field I fumigate with critical use methyl bromide can not subsequently or concurrently be fumigated with non-critical use methyl bromide during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity). I will not use this quantity of methyl bromide for a treatment chamber, facility, or field that I previously fumigated with non-critical use methyl bromide purchased during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity), unless a local township limit now prevents me from using methyl bromide alternatives." The certification will also indicate the type of critical use methyl bromide purchased, the location of the treatment, the crop or commodity treated, the quantity of critical use methyl bromide purchased, the acreage/ square footage treated and will be signed and dated by the approved critical user.

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

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

Column A—Approved critical uses	Column B—Approved critical user and location of use	Column C—Limiting critical conditions
<b>PRE-PLANT USES</b>		
Cucurbits .....	(a) Michigan growers .....  (b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers.	With a reasonable expectation that moderate to severe fungal pathogen infestation already exists or could occur without methyl bromide fumigation.  With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation already exists or could occur without methyl bromide fumigation.
Eggplant .....	(a) Georgia growers .....  (b) Florida growers .....	With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation either already exist or could occur without methyl bromide fumigation.  With a reasonable expectation that one or more of the following limiting critical conditions either already exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.
Forest Seedlings .....	(a) Members of the Southern Forest Nursery Management Cooperative limited to growing locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.	With a reasonable expectation that one or more of the following limiting critical conditions already exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.

Column A—Approved critical uses	Column B—Approved critical user and location of use	Column C—Limiting critical conditions
	<p>(b) International Paper and its subsidiaries limited to growing locations in Arkansas, Alabama, Georgia, South Carolina and, Texas.</p> <p>(c) Weyerhaeuser Company and its subsidiaries limiting to growing locations in Alabama, Arkansas, North Carolina, South Carolina, Oregon, and Washington.</p> <p>(d) Public (government owned) seedling nurseries in the states of California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia and, Wisconsin.</p> <p>(e) Members of the Nursery Technology Cooperative limited to growing locations in Oregon and Washington.</p> <p>(f) Michigan seedling nurseries .....</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions already either exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p> <p>With a reasonable expectation that one or more of the following limited critical conditions already either exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already either exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already either exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already exist or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p>
Ginger .....	Hawaii growers .....	With a reasonable expectation that the limiting critical condition already either exists or could occur without methyl bromide fumigation, or moderate to severe bacterial wilt infestation.
Orchard Nursery Seedlings	<p>(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in California and Washington (Driscoll's raspberries and their contract growers in California and Washington).</p> <p>(b) Members of the California Association of Nurserymen-Deciduous Fruit and Nut Tree Growers.</p> <p>(c) Members of the California Association of Nurserymen-Citrus and Avocado Growers.</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition of on the use of 1,3-dichloropropene products due to reaching local township limits on the use of this alternative.</p>
Orchard Replant .....	<p>(a) California stone fruit growers .....</p> <p>(b) California table and raisin grape growers .....</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.</p> <p>With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.</p>

Column A—Approved critical uses	Column B—Approved critical user and location of use	Column C—Limiting critical conditions
	(c) California walnut growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
Ornamentals .....	(d) California almond growers ..... (a) Yoder Brothers Inc. in Florida ..... (b) California rose nurseries .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Replanted (non-virgin) orchard soils to prevent orchard replant disease, or medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached. For use in all chrysanthemum production. With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
Peppers .....	(a) California growers .....  (b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers.  (c) Florida growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe disease infestation, or moderate to severe yellow or purple nutsedge infestation, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached. With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less. With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.
Strawberry Nurseries .....	(a) California growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe black root rot or crown rot, or moderate to severe yellow or purple nutsedge infestation.
Strawberry Fruit .....	(b) North Carolina and Tennessee growers ..... (a) California growers .....  (b) Florida growers .....  (c) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, Virginia, Ohio and, New Jersey growers.	With a reasonable expectation that the use will occur in the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less. With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe black root rot or crown rot, moderate to severe yellow or purple nutsedge infestation, a prohibition of the use of 1,3-dichloropropene products because local township limits for this alternative have been reached, time to transition to an alternative. With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge, or karst topography. With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.

Column A—Approved critical uses	Column B—Approved critical user and location of use	Column C—Limiting critical conditions
Sweet Potatoes .....	California growers .....	With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
Tomatoes .....	(a) Michigan growers .....  (b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers.  (c) Florida growers .....	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: moderate to severe disease infestation, fungal pathogens infestation.  With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.  With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: Moderate to severe yellow or purple nutsedge infestation, or karst topography.
Turfgrass .....	(a) U.S. turfgrass sod nursery producers who are members of Turfgrass Producers International (TPI). (b) U.S. golf courses .....	For the production of industry certified pure sod.  For establishing sod in the construction of new golf courses or the renovation of putting greens, tees, and fairways.

POST-HARVEST USES

Food Processing .....	(a) Rice millers in all locations in the U.S. who are members of the USA Rice Millers Association.  (b) Pet food manufacturing facilities in the U.S. who are active members of the Pet Food Institute. (For today's rule, "pet food" refers to domestic dog and cat food).  (c) Kraft Foods in the U.S. ....  (d) Members of the North American Millers' Association in the U.S.	With a reasonable expectation that one or more of the following limiting critical conditions exists: Older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions exists: Older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions exists: Older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.  With a reasonable expectation that one or more of the following limiting critical conditions already exists or could occur without methyl bromide fumigation: Older structures that can not be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, time to transition to an alternative.
Commodity Storage .....	(a) Gwaltney of Smithfield in the U.S. ....  (b) California entities storing walnuts, beans, dried plums, figs, raisins, and pistachios in California.	For smokehouse ham curing facilities owned by the company.  With a reasonable expectation that one or more of the following limiting critical conditions exists: Rapid fumigation is required to meet a critical market window, such as during the holiday season, rapid fumigation is required when a buyer provides short (2 days or less) notification for a purchase, or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.