

Dissenting Views on H.R. 6194

The stated purpose of this bill is to ensure that American growers have access to methyl bromide where it is necessary for certain critical uses. However, the provisions of this bill will not achieve that purpose. The bill includes several counterproductive changes to the existing process for obtaining critical use exemptions that will undermine efforts to ensure that growers have methyl bromide for truly critical uses and reverse progress that has been made on phasing out the use of methyl bromide.

I. CURRENT CRITICAL USE EXEMPTION PROCESS

Methyl bromide is an odorless, colorless, toxic gas that was once used as a soil fumigant and structural fumigant to control pests across a range of agricultural sectors. It is controlled as a Class I ozone-depleting substance under the Clean Air Act. In 1997, the Parties to the Montreal Protocol agreed to phase-out methyl bromide in industrialized countries by 2005 and in developing countries by 2015. In 2000, the Environmental Protection Agency (EPA) issued regulations to phase-out the production and consumption of methyl bromide on January 1, 2005, apart from allowable exemptions, such as the critical use exemption (CUE) and the quarantine and pre-shipment exemption.

Article 2H of the Montreal Protocol established the critical use exemption and EPA established a critical use exemption process in 2004.¹ Under EPA rules, a “critical use” is defined as:

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.²

Under this process, each year EPA solicits critical use exemption applications and “reviews the data submitted by applicants, as well as data from governmental and academic sources” to determine whether each application meets the critical use exemption criteria.³ EPA also analyzes “dosage and emissions minimization techniques and applicants’ research or transition plans.”⁴ EPA consults with the U.S. Department of Agriculture (USDA) and other federal agencies that have regulatory authority related to methyl bromide. Based on this assessment and these

¹ U.S. Environmental Protection Agency, *Protection of Stratospheric Ozone: Process for Exempting Critical Uses from the Phaseout of Methyl Bromide*, 69 Fed. Reg. 76982 (Dec. 23, 2004) (final rule).

² 40 CFR 82.3.

³ U.S. Environmental Protection Agency, *Protection of Stratospheric Ozone: The 2012 Critical Use Exemption from the Phaseout of Methyl Bromide*, 77 Fed. Reg. 29218 (May 17, 2012) (final rule).

⁴ *Id.*

consultations, the U.S. government develops its critical use nomination (CUN) for the control period two years in the future and submits its nomination to the Ozone Secretariat.

Two advisory bodies to the Parties to the Montreal Protocol – the Methyl Bromide Technical Options Committee (MBTOC) and the Technology and Economic Assessment Panel (TEAP) – review each country’s CUNs and make recommendations to the Parties. The Parties then make decisions to authorize critical use exemptions to specify the amount of production and consumption of methyl bromide for each country. EPA subsequently allocates the U.S. critical use allowances among the applicants through a rulemaking.

Consistent with the goals of the Montreal Protocol, the quantities of critical use exemptions for the United States have declined considerably since 2005. For 2005, the U.S. received critical use exemptions for 9,552 metric tons of methyl bromide.⁵ For 2013, the U.S. received critical use exemptions for 562 metric tons of methyl bromide.⁶ The U.S. stockpiles of pre-phase-out methyl bromide also have declined during this period – from 12,994 metric tons in 2004 to 1,249 metric tons by the end of 2011.⁷

Despite this decline, the United States is by far the largest recipient of critical use exemptions. In 2013, only three other developed countries received CUEs: Australia received 32 metric tons, Canada received 13 metric tons, and Japan received 3 metric tons.⁸ With 562 metric tons, the United States received 92% of all CUEs.

II. BILL SUMMARY: H.R. 6194, U.S. AGRICULTURAL SECTOR RELIEF ACT OF 2012

The bill would significantly alter the current CUE process, with results that are likely to be counterproductive.

Section 2 amends section 604(h) of the Clean Air Act relating to the phase-out of methyl bromide. It requires the EPA Administrator, for each year beginning in 2013, to seek a critical use exemption under the Montreal Protocol in order to allow the production, importation, and consumption of methyl bromide for any approved critical use in the amount necessary for that use. The term “approved critical use” is defined as the regulatory list of approved critical uses in effect on January 1, 2005, plus the approved critical uses added to the regulatory list since

⁵ Technology and Economic Assessment Panel, *Progress Report Volume One* (May 2012) (online at http://ozone.unep.org/Assessment_Panels/TEAP/Reports/TEAP_Reports/TEAP_Progress_Report_May_2011.pdf).

⁶ Montreal Protocol, Decision XXIII/4.

⁷ Technology and Economic Assessment Panel, *Progress Report Volume One* (May 2012) (online at http://ozone.unep.org/Assessment_Panels/TEAP/Reports/TEAP_Reports/TEAP_Progress_Report_May_2011.pdf).

⁸ Montreal Protocol, Decision XXIII/4.

January 1, 2005. The Administrator is prohibited from denying or reducing the amount requested in any application for a critical use exemption unless the Administrator has “substantial evidence” to establish that there is a technically and economically feasible alternative available to the applicant for the use of methyl bromide for which the application was submitted.

This provision would shift the burden on EPA to prove that a requested critical use exemption is unwarranted. Currently, an applicant for a CUE is required to provide data demonstrating that such an exemption is warranted. By eliminating rigorous EPA analysis of a CUE application, the provision may reduce the ability of EPA and the U.S. government to support its critical use nomination at the annual Meeting of the Parties to the Montreal Protocol.

Moreover, the provision reinstates the list of approved critical uses in effect on January 1, 2005, and makes that outdated list permanent in law. An amendment offered by Rep. Whitfield during the July 19, 2012, Subcommittee markup establishes that the list of approved critical uses only reflects additions to the list since that date, not subtractions from the list. Under the bill, there can be no future additions to or subtractions from the list. As a result, sectors that may have a legitimate need for methyl bromide could be prevented from obtaining a CUE under the bill.

In addition, sectors that have completely phased-out the use of methyl bromide during the last seven years would be permitted to use methyl bromide again under this provision. For example, golf courses would once again be allowed to seek critical use exemptions for methyl bromide. The bill would reinstate critical uses for sectors that have not even submitted requests for methyl bromide in years. Michigan growers have not applied for a critical use exemption since 2007. Tobacco growers sought a critical use exemption in 2006, but did not seek methyl bromide for any of the years between 2007 and 2014. By allowing sectors that have successfully transitioned to alternatives to revert to methyl bromide, this provision goes well beyond the stated purpose of the bill.

At the full Committee markup, Rep. Waxman offered an amendment to fix the problem of freezing an outdated list of critical uses in law. Under his amendment, the bill’s list of approved critical uses would be aligned with the latest regulatory list. If that list is changed to add new uses or to take off sectors that no longer need methyl bromide, those changes would be reflected in the bill’s definition. That approach would provide the regulatory flexibility to take into account changing circumstances and new information. It also would avoid the result of re-introducing methyl bromide to sectors that have successfully transitioned to alternatives that do not deplete the ozone layer. Rep. Waxman’s amendment was defeated by voice vote.

Section 2 of the bill also requires EPA, for each year beginning in 2013, to allow the production, importation, and consumption of methyl bromide for any use in response to an “emergency event” in an amount necessary for such use. An “emergency event” is broadly defined as a situation (1) where there are not sufficient quantities of methyl bromide available and (2) that requires the use to control a pest or disease because there is no technically and economically feasible alternative available. The provision does not specify who determines if sufficient quantities of methyl bromide are available. The amount of methyl bromide allowed

per emergency event at a specific location is limited to 20 metric tons. The aggregate amount of methyl bromide allowed for emergency events in the United States in a year is limited to the amount of critical use exemptions authorized by the parties to the Montreal Protocol for the U.S. in 2011, which was 2,055 metric tons. This is about four times the amount of methyl bromide for which the United States received CUEs for 2013.

This “emergency event” provision is so broadly drafted that it could create a major loophole in the critical use exemption process. Currently, a Montreal Protocol decision allows for the use of methyl bromide without a CUE in genuine emergencies, but this emergency exemption has been invoked only twice (once by Australia and once by Canada). Under the bill, any time an applicant does not obtain a CUE or uses up all of its allotted methyl bromide under a CUE, it could potentially trigger this “emergency event” procedure to obtain up to 20 metric tons of methyl bromide. The language of the provision does not rule out routine reliance on this “emergency event” procedure by current or past users of methyl bromide. According to testimony received at the July 18, 2012, legislative hearing, some growers would use the bill’s “emergency event” procedure to obtain methyl bromide for this type of planned, routine application. For example, a witness testifying on behalf of the Society of American Florists argued that growers should be allowed “to develop an ‘emergency cleanup process’ that will allow us to go into our fields every few years and clean up the pests and diseases” with methyl bromide.⁹

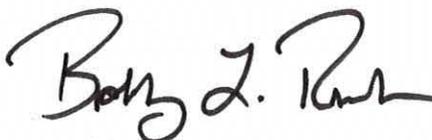
In addition, pursuant to an amendment offered by Rep. Whitfield during the July 19, 2012, Subcommittee markup, section 2 requires EPA to review and, as appropriate, take action to adjust any critical use nomination that has been submitted to the Parties of the Montreal Protocol if (1) a methyl bromide alternative is removed from the U.S. market and (2) on the basis of the availability of such alternative, EPA denied, or reduced the amount requested under, any application for a critical use exemption for the year covered by the nomination. This provision creates the potential for litigation regarding the content of the U.S. nomination to the Montreal Protocol. Such litigation could prevent the U.S. government from submitting timely critical use nominations. Requiring EPA to adjust previously-submitted critical use nominations, potentially after the deadline for submission of critical use nominations, could also delay or complicate the review of U.S. critical use nominations by the MBTOC and Parties of the Montreal Protocol. This could have a detrimental effect on the ability of growers who have a legitimate need for methyl bromide to obtain CUEs.

⁹ Michelle Castellano Keeler, Vice President of Mellano & Company, Committee on Energy and Commerce, Subcommittee on Energy and Power, *Legislative Hearing on H.R. ___, the U.S. Agricultural Sector Relief Act of 2012, and H.R. ___, the Asthma Inhalers Relief Act of 2012*, 112th Cong. (Jul. 18, 2012).

For the reasons stated above, we dissent from the views contained in the Committee's report.



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