

December 23, 2004

Hon. Michael O. Leavitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

By fax: (202) 501-1450

Re: Request for Stay of 2005 Methyl Bromide Critical Use Exemption Rules,
69 Fed. Reg. 76,983 (Dec. 23, 2004)

Dear Administrator Leavitt:

On behalf of more than one million members and active supporters of the Natural Resources Defense Council (NRDC), I respectfully request that you issue an administrative stay of the effective date of the final rules published today addressing critical use exemptions for methyl bromide, or in the alternative specific parts of those final rules, pending judicial review. NRDC has today filed a petition for review of those rules with the U.S. Court of Appeals for the District of Columbia Circuit.¹ NRDC makes this administrative stay request pursuant to 5 U.S.C. § 705, which provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”

NRDC submits that the exemption rules violate the Clean Air Act and the Montreal Protocol on Substances that Deplete the Ozone Layer in at least three ways. First, they authorize new methyl bromide production and consumption in excess of legally permissible amounts. Second, they authorize critical use exemptions in excess of legally permissible amounts. Third, they fail to require that all available methyl bromide stocks be used only to meet critical use needs. Additional support is set forth in the attachment to this letter.

A stay of the rules, or at least a partial stay as set forth below, is necessary and appropriate because NRDC is likely to prevail on the merits of the petition for review and

¹ A copy of the petition, *NRDC v. U.S. Environmental Protection Agency*, No. 04-1438 (D.C. Cir., filed Dec. 23, 2004) is attached. A formal service copy has also been mailed today.

because unrecoverable production, consumption, and use of methyl bromide during the period of review will irreparably harm the ozone layer and public health and the environment.

Consequently, NRDC respectfully requests that you stay the effective date of the entire final rule pending the completion of judicial review. Alternatively, NRDC requests that you stay the portion of the rule, 40 C.F.R. §82.8(c)(1), purporting to authorize critical use allowances which are necessary for the production or consumption of new methyl bromide in 2005. This relief would prevent new production and consumption of methyl bromide pending judicial review. NRDC notes that it would not prevent critical users with limiting critical conditions from using methyl bromide from available stocks to meet legitimate needs while the rule is under review.

NRDC further requests that you stay or amend the rule to prohibit, pending judicial review, the use of more than 7,674 metric tons of methyl bromide by critical users in 2005. This is the total amount of use in 2003 shown in EPA records supplied to NRDC in June 2004 in response to our Freedom of Information Act Request.

NRDC also requests that you concurrently clarify the prohibitions of 40 C.F.R. §82.4(p) to make clear that no person may sell methyl bromide, whether from existing stocks or new production and consumption, for any purpose other than an approved critical use and limiting critical condition.¹ NRDC requests that you rescind that portion of the preamble that purports to say that persons who did not apply for or did not qualify critical use exemptions nonetheless may use methyl bromide from stocks.

Finally, NRDC requests clarification of 40 C.F.R. §82.4(p)(2)(v) to state clearly that no person may ever use methyl bromide outside of a critical use exemption and then use additional quantities for the same application under a critical use exemption. (Currently that provision bars another application “concurrently” or “subsequently” but not “before.”)

We request that you act on this stay request before the final rule otherwise takes effect on January 1, 2005.

NRDC reserves the right to seek relief regarding other portions of the rule and preamble beyond those specifically addressed here, and to seek judicial relief as expeditiously as possible. Further explanation of the basis for our request for stay and other relief is set forth in the attachment to this letter.

¹ The only other purposes for which such sales may legally be made are (1) for quarantine and preshipment uses, and (2) for export to another Article 2 country to meet its legitimate critical use exemptions or (3) for export to an Article 5(1) country to meet basic domestic needs.

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Sincerely,

David D. Doniger
Attorney for NRDC

**Attachment to NRDC Letter to Administrator Michael Levitt
December 23, 2004
Basis for Stay and Other Requested Relief**

The Natural Resources Defense Council (NRDC) makes this administrative stay request pursuant to 5 U.S.C. § 705, which provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” NRDC also requests clarification and amendment of the preamble and the rule as set forth in the letter included with this attachment.

NRDC has today filed a petition for review of those rules with the U.S. Court of Appeals for the District of Columbia Circuit. *NRDC v. U.S. Environmental Protection Agency*, No. 04-1438 (D.C. Cir., filed Dec. 23, 2004).

NRDC submits that the exemption rules violate the Clean Air Act and the Montreal Protocol on Substances that Deplete the Ozone Layer in at least three ways. First, they authorize new methyl bromide production and consumption in excess of legally permissible amounts. Second, they authorize critical use exemptions in excess of legally permissible amounts. Third, they fail to require that all available methyl bromide stocks be used only to meet critical use needs. The basis for these conclusions is set forth below.

A stay of the rules, or at least a partial stay as set forth in the attached letter and below, is necessary and appropriate because NRDC is likely to prevail on the merits of the petition for review and because unrecoverable production, consumption, and use of methyl bromide during the period of review will irreparably harm the ozone layer and public health and the environment.

Illegal authorization of new production and consumption

The final rules violate both the Clean Air Act and the Montreal Protocol because they do not comply with the express prohibition on authorizing new production and consumption of methyl bromide when the chemical is available from existing stocks. Based on publicly available EPA data, five companies alone held at least 10,000 metric tons (22 million pounds) of methyl bromide stocks at the end of 2003. The final rules illegally authorize new production and consumption of 7,659 metric tons (more than 16.8 million pounds) of methyl bromide without showing why all – or at least some – of this amount cannot be supplied from these stocks.

Under the Montreal Protocol, production and consumption of methyl bromide must cease at the end of 2004 “save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.” Montreal Protocol, Art. 2H, ¶ 5. Simultaneously with the adoption of this paragraph, the United States and the other Protocol parties agreed in 1997:

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;

Montreal Protocol Decision IX/6, ¶ 1(b).¹ The Parties reiterated these requirements in Decision Ex. I/3, in March 2004, whose preamble specifically stated that “exemptions must fully comply with decision IX/6,” and that “decision IX/6 permits the production and consumption of methyl bromide for critical uses only if it is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide.”²

Paragraph 5 of Decision Ex. I/3 specifically stated each Party’s responsibility to implement these requirements through its domestic legal process for issuing exemptions:

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 the case of the United States, the domestic legal authority for issuing exemptions for critical uses and for production and consumption is provided by the Clean Air Act. Section 614(b) of the Act provides that Title VI of the Act supplements the Montreal Protocol, that it may not be construed to conflict with the Protocol, and that, where different, the more stringent of the Act’s or the Protocol’s provisions shall govern. In short, the Act incorporates the Protocol as minimum requirements and, in instances both procedural and substantive, the Act is frequently more demanding. Section 604(d)(6) provides for EPA to make critical use exemptions “to the extent consistent with the Montreal Protocol.” The two provisions together mean that all of the Protocol’s substantive criteria for critical use decisions are incorporated into domestic law as provisions of the Clean Air Act. The preamble to the final rule correctly observes that EPA must comply with the terms of both Article 2H of the Protocol and the related Decisions of the Parties pursuant to that article. 69 Fed. Reg. 76,984.

The final rule fails to limit production and consumption in 2005 and later years in compliance with these requirements. In contrast, the proposed rule expressly acknowledged that the amounts allowed for production and consumption are “*subject to compliance with the conditions* set forth in Decisions Ex. I/3 and Ex. I/4,” and EPA then

¹ http://www.unep.org/ozone/Meeting_Documents/mop/09mop/9mop-12.e.doc

² http://www.unep.org/ozone/Meeting_Documents/mop/Ex_mop/1ex_mop-3.e.doc

expressly quoted the above-cited language of Ex. I/3 paragraph 5. 69 Fed. Reg. 52,371, cols. 1-2 (emphasis added). The proposed rule acknowledged that the production and consumption number contained in Annex II of that decision (7,659 metric tons) is only an upper limit that is subject to reduction under paragraph 5 of the decision. The proposal then set forth a formula for reducing the allowable production to reflect available stocks, and proposed reducing new production and consumption by as much as four percent of the 1991 baseline level – by some 1020 metric tons (more than 2.2 million pounds). While NRDC commented – and will maintain on review – that the proposed reduction did not *fully* comply with the requirements of the Protocol, the Decisions, and the Clean Air Act, at least the proposed rule acknowledged EPA’s duty to reduce 2005 production and consumption for critical uses to account for available stocks of methyl bromide.

The final rule simply abandoned this effort and authorized the full 7,659 metric tons of new production and consumption, with *no* accounting for stocks as required by Decision IX/6, Decision Ex. I/3, and the Clean Air Act. The final rule asserts that Decision Ex. I/3 is satisfied simply by the fact that new production and consumption are limited to this amount, and that any *additional* amount for critical uses – over and above 7,659 metric tons – must come from the stock. This is not correct. Decisions IX/6 and Ex. I/3 are not satisfied unless the *entire* available stock is applied to meeting critical use exemptions.

The final rule also asserts that Paragraph 5 is “hortatory,” presumably because it uses the words “should ensure” instead of “shall ensure.” Paragraph 5, however, is as clear as can be that each Party is expected fulfill the conditions of Decision IX/6 – *specifically* including the accounting for stocks – through its domestic legal regime for authorizing methyl bromide exemptions, in our case, through the critical use rulemaking under the Clean Air Act. The final rule has given no explanation of how the use of “should” can diminish our country’s clear obligations stated under Decision IX/6, repeated without qualification in the preamble to Decision Ex. I/3, and doubly reiterated in Paragraph 5 itself. Further, the final rule has not given any reasoned explanation of why the government is justified in not doing what it formally agreed it “should” do less than a year ago.

Accordingly, NRDC requests that EPA stay the entire rule, or at least the portion of the rule, 40 C.F.R. §82.8(c)(1), purporting to authorize critical use allowances. This would prevent new production and consumption of methyl bromide pending judicial review. We note that it would not prevent critical users with limiting critical conditions from using methyl bromide from available stocks to meet legitimate needs while the rule is under review.

Illegal authorization of critical use amounts

The final rules also violate the Protocol and the Clean Air Act because the amount of methyl bromide authorized for critical uses exceeds the minimum amount needed to meet uses for which there are no technically and economically feasible alternatives. *See* Decision IX/6, ¶ 1(a)(ii) and 1(b)(i). EPA has failed to provide a reasoned basis for

concluding that the full amount authorized by the rule – 8,942 metric tons, or almost 19.7 million pounds – is actually needed to meet the critical uses identified in the rule.

First, it is clear that the same legal regime applies to the determination of the critical use amount as to the allowable production and consumption. Namely, the criteria of Decision IX/6 apply and must be met. Those criteria are reiterated in the preamble to Decision Ex. I/3 and compliance with the conditions of Paragraph 5 was to be ensured in this Clean Air Act rulemaking. Like the production/consumption figure in Annex II, the 8,942 metric ton amount set forth in Annex I of that Decision was only an upper limit, the reduction of which was to be considered in this rulemaking. At no point, however, did EPA comply with these conditions.

NRDC's comments specifically referenced EPA data supplied to NRDC under the Freedom of Information Act showing that total U.S. use in 2003 was only 7,674 metric tons (16.8 million pounds). That is 1,268 metric tons (nearly 2 million pounds) less than the 8,942 ton that the rules purport to authorize for 2005 critical uses. In short, the amount authorized for only critical users in 2005 is more than a 16 percent increase over the amount used in 2003 by *all* users, not just those qualifying for critical use exemptions. A massive *increase* in methyl bromide use by critical users is not authorized under the Montreal Protocol or the Clean Air Act.³

EPA has failed to provide any reasoned basis for rejecting its own 2003 use data. The final rule makes reference to partial survey data from 2002 – the year before, when production and consumption were still permitted at 50 percent of the 1991 baseline. These figures are irrelevant to use in 2003, when allowable production and consumption had dropped to 30 percent of baseline. EPA also continues to insist that the so-called “bottom-up” assessment of need – which was based on critical use applicants’ unsystematic and self-serving self-surveys – should be considered superior to the agency’s own centralized accounting of production, import, export, and draw-down from stockpiles. NRDC submits that the agency’s response does not provide a rational basis for allowing a large increase in methyl bromide use by critical users in 2005.

Accordingly, NRDC requests that EPA stay or amend the rule to prohibit, pending judicial review, the use of more than 7,674 metric tons of methyl bromide by critical users in 2005.

Illegal use by ineligible users

The preamble to the rule purports to allow use of methyl bromide stocks by users who did not apply for or did not qualify for critical use exemptions. This is not permitted by the Protocol, Decisions IX/6 and Ex. I/3, and the Clean Air Act.

³ NRDC has learned that EPA may have made an internal reassessment of the amount used in 2003, resulting in a minor upward adjustment of less than 2 percent in the amount drawn down from stockpiles in 2003. We have seen no documentation of any such reassessment, however. In any event, that might raise EPA’s data on total U.S. use in 2003 by about 500 tons – still well below the amount set in Decision Ex.I/3 as the upper limit for 2005 critical use exemptions.

As set forth above, Decisions IX/6 and Ex.I/3 are absolutely clear that new production or consumption of methyl bromide is prohibited after this year except to meet critical use exemptions, and then only in the amount that cannot be met by available stocks of methyl bromide already in existence. It follows directly from that requirement that available stocks cannot be used by other users who did not apply for or qualify for critical use exemptions. In the proposed rules, EPA suggested that an amount of stocks could be deemed not available for critical users and then made available to non-critical users. NRDC's comments demonstrated why there was no legal authority for EPA to take this position. In the final rules, EPA abandoned the specific carve-out for non-critical users but nonetheless signaled in the preamble that it regards them as entitled to use existing stocks. There is still no legal basis for diverting stocks to non-critical users when they should be dedicated to critical users and to reducing or eliminating the need for new production and consumption.

Accordingly, NRDC requests that EPA clarify the prohibitions of 40 C.F.R. §82.4(p) to make clear that no person may sell methyl bromide, whether from existing stocks or new production and consumption, for any purpose other than an approved critical use and limiting critical condition.⁴ NRDC requests that EPA rescind that portion of the preamble that purports to say that persons who did not apply for or did not qualify critical use exemptions may use methyl bromide from stocks.

Additionally, NRDC requests clarification of 40 C.F.R. §82.4(p)(2)(v) to state clearly that no person may ever use methyl bromide outside of a critical use exemption and then use additional quantities for the same application under a critical use exemption. Currently that provision bars another application "concurrently" or "subsequently" but not "before." Thus, it could be read to allow a critical user to "double-dip" by first using a quantity of methyl bromide drawn from stocks, and then using a second quantity pursuant to a critical use authorization. This is not what was intended or allowed under the Protocol, the Decisions, or the Act.

⁴ The only other purposes for which such sales may legally be made are (1) for quarantine and preshipment uses, and (2) for export to another Article 2 country to meet its legitimate critical use exemptions or (3) for export to an Article 5(1) country to meet basic domestic needs.