Comments of Natural Resources Defense Council

Proposed Rules for Methyl Bromide Official Quarantine Uses
69 Fed. Reg. 49,824 (Aug. 12, 2004)

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November 12, 2004

On behalf of its more than one million members and active supporters, the Natural Resources Defense Council (NRDC) submits these comments on rules proposed by the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture for determining "official quarantine uses" of methyl bromide under Section 419 of the Plant Protection Act. NRDC submits that the proposed rules do not comply with Section 419 and conflict with requirements of the Montreal Protocol and the Clean Air Act.

Illegal expansion of eligibility for "quarantine" status

The proposed rules appear to allow a gross abuse of the limited exemption for "quarantine" uses allowed by Montreal Protocol and the Clean Air Act. The proposed rules appear to allow APHIS, on the request of a State, county, local, or tribal government, to slap the "quarantine" label on thousands of tons of methyl bromide uses that have never been classified as quarantine before, thereby exempting those amounts from the phase-out requirements of the Protocol and the Act.

The quarantine exemption was included in the Montreal Protocol to cover a relatively small amount of methyl bromide used to prevent the spread of pests into countries or regions where those pests are not yet present or established. The amount used for quarantine and preshipment purposes in 2000 was only 19-21 percent of all world-wide production,[1] and probably was on the order of 10 percent or less of total baseline U.S. production in 1991, before the phase-out of production for non-quarantine uses began.

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[1] The Montreal Protocol's Technical and Economic Assessment Panel reported in 2003 that total world-wide use for quarantine purposes was only 10,475 to 11,800 tons in 2000. Report of the Technology and Economic UNEP Assessment Panel, Progress Report (May 2003), p. 99.

The vast bulk of U.S. methyl bromide production and consumption has been used primarily for soil and structural fumigation purposes that have never been considered quarantine uses. The U.S. established a baseline level for these non-quarantine uses equal to the 1991 level of approximately 25,548 metric tons. Under the phase-out obligations of the Montreal Protocol, this amount has been reduced by specified percentages in specified years. For example, as of 2003, the total amount allowed for non-quarantine purposes had been reduced by 70 percent, to 7,659 metric tons. At the end of this year, the amount allowed for non-quarantine purposes is reduced by 100 percent, to zero. Production and consumption is permitted for these uses after the end of this year only under exemptions for "critical uses." Critical use exemptions may be granted only through a demanding domestic and international process that imposes much more rigorous criteria than those proposed under this rulemaking.

There is no legal basis under the Montreal Protocol, the Clean Air Act, or Section 419 itself for reclassifying any of this *non-quarantine* production and consumption as quarantine. The only basis for continued production of any portion of this amount is if it has been awarded a critical use exemption pursuant to Decision IX/6 of the Parties to the Montreal Protocol and pursuant to a rulemaking by the Environmental Protection Agency under Section 604(d)(6) of the Clean Air Act.

Far from expanding the scale of quarantine use, Section 419 should have the effect of *shrinking* it. The reason is that Section 419 includes a new requirement to determine that there is no alternative available for a proposed quarantine use. Section 419(a) states: "The Secretary shall not authorize such treatments or applications unless the Secretary finds there is no other registered, effective, and economically feasible alternative available." In this respect, Section 419 is more stringent than the Montreal Protocol and the Clean Air Act, which exempt quarantine uses *per se*, without a review of alternatives. When there are effective alternatives for traditional quarantine uses – e.g., the use of new fumigants such as sulfuryl fluoride in QPS fumigation – the registry of official quarantine uses maintained under Section 419 should narrow, not broaden, the number of quarantine uses and the amount of methyl bromide used for quarantine purposes.

From the Federal Register preamble and the proposed rules, it is impossible to discern what eligibility criteria APHIS intends to apply to determine whether a use is eligible or ineligible for classification as an official quarantine use. The Environmental Assessment (EA), however, reveals that under at least two of the alternative eligibility interpretations considered, thousands of tons of methyl bromide production and consumption that must either be eliminated after this year or authorized by a critical use exemption would be shifted to the "official quarantine use" category. They could then continue to be used *indefinitely* in disregard of the Protocol's and Clean Air Act's substantive and procedural requirements for obtaining critical use exemptions.[2]

[2] Critical use exemptions are currently made on an annual basis, with a fresh domestic and international review of the availability of alternatives required on an annual cycle. Under APHIS's proposed rules, however, approval of an official quarantine use application has no term limit. APHIS says it will consult with EPA and review listed quarantine uses from time to time, but proposes no deadline to govern when

The EA states that under "Alternative A," 35 percent or more of baseline non-quarantine methyl bromide production and consumption – the entire 8,942 tons currently proposed for CUE status in 2005, and then some – would be re-labeled as official quarantine use.[3] Under "Alternative B," the amount of non-quarantine production and consumption re-labeled as quarantine would equal 25-50 percent of this amount, or as much as 2,236 to 4,471 tons.[4] Only "Alternative C" would respect the legal barrier against evading the limits the amount of production and consumption for non-quarantine purposes by re-labeling currently non-quarantine uses as "official quarantine uses."[5]

Neither the EA nor the proposal package indicates which alternative eligibility test – A, B, or C – APHIS has decided to pursue. The definition of "official quarantine use" provides no meaningful direction on this point. The proposed definition states:

> *Official quarantine use.* A methyl bromide treatment or application that the Administrator determines to be an official control or official requirement, based on information that the treatment or application is required by a State, local, or tribal authority for either of the following reasons:
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> (1) For the management of plant pests or noxious weeds of potential importance to the area endangered thereby and not yet present there, or present but not widely distributed; or
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> (2) To meet official quarantine requirements for the management of economic plant pests in plant material intended for propagation.

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such reviews must be initiated and how long they may take once initiated. In other words, far from the annual cycle for approving critical use exemptions, official quarantine use status could go on indefinitely.

[3] "Assumption for Alternative A: Regional consortia, grower associations, or private industry may request from State, local, or tribal authorities a quarantine requirement on their behalf. Under this scenario, *all requests would be honored, and because of the ease by which the uses may be included in the registry, there would be no need to apply for a CUE."* EA, p. B-2 (emphasis added).

[4] "Assumption for Alternative B: Under this scenario, where State, local, or tribal authorities would keep, and perhaps for a short time, add to existing laws, regulations, and mandatory procedures, *some of the approved uses may be those that were formerly categorized as critical use exemptions.* For purposes of this analysis, *we will assume that those uses currently considered by the Parties to be critical for the year 2005 may become partially incorporated into State, local, or tribal regulations and placed on the registry,* and the remaining uses that are not recognized for inclusion into the registry by State, local, or tribal authorities would be pursued as a CUE. For the high end estimate, *we will assume that 50% of the current 2005 CUE uses would be incorporated into the registry,* with the remaining 50% continuing as a CUE. Over time, the assumption is that the CUEs will dwindle downward, as alternatives are discovered and implemented, to comprise approximately 25% of the original 2005 CUEs; *an additional 25% of that amount may still be incorporated into the registry.* This amounts to 0.5 × 8,942 = 4,471 MT (high end) and 0.25 × 8,942 = 2,235.5 MT (low end)." EA, p. B-2 (emphasis added).

[5] "Assumption for Alternative C: In this, the "no action" scenario, only APHIS listed federally regulated pests would be considered for the registry; quantities of methyl bromide for use against these pests are currently exempt from the phaseout. All organizations or commodity groups seeking methyl bromide allotments for pests that are not federally regulated by APHIS would have to apply for a CUE if they wish to retain uses of methyl bromide—critical use applications would account for 35% of the baseline (2005 exemption) with the assumption that these uses would fall to half of that (17.5% of the baseline) some time in the future." EA, pp. B-2 – B-3.

Clause (1) appears to be consistent with either Alternative A or Alternative B. It does not appear to constrain official quarantine use to Alternative C. Because the definition would allow thousands of tons of methyl bromide to be shifted to the quarantine heading and to continue without meeting requirements for obtaining critical use exemptions, the definition is not consistent with either the Protocol or the Clean Air Act.

At no other point in the proposed rules is there any provision preventing States and localities from seek to re-label currently non-quarantine uses as quarantine. Nor are there any criteria and procedures for APHIS to reject applications that seek to do so. Before promulgating these rules, APHIS must articulate definitions, criteria, and procedures to prevent use of Section 419 to expand the quarantine category to cover uses and amounts that have never been considered quarantine before. This will require meaningful definitions, eligibility requirements, and procedures.

At present, the proposed rules do not require States or localities to present any support for their applications – on any issue, whether eligibility or the existence of alternatives. States and localities are required to present support for their applications only if they wish to appeal an APHIS rejection – and even then their obligation to support their applications extends only to whether there are acceptable alternatives issues. The final rules must include a requirement that each application be accompanied by supporting evidence to show that it does not seek to convert a historically non-quarantine quantity of methyl bromide use into quarantine. APHIS also must add a meaningful procedure to review the applications it receives. The current proposal contains *no* requirement or procedure for APHIS to review the State's or locality's assertion that a use is not a non-quarantine use and is eligible to be labeled quarantine. This is essential to prevent evasion of the Protocol and Clean Air Act requirements that non-quarantine methyl bromide – the uses and amounts encompassed the 1991 baseline and the three phase-down steps accomplished to date – may continue to be used after this year, if at all, only under the more limited and demanding conditions for obtaining critical use exemption.

The proposed rules currently do not include a mechanism for public notice of applications and for comment on those applications. Nor do they require that APHIS state reasons for approving an application. These are critical violations of the Administrative Procedure Act. The review of specific applications is not a merely ministerial act. This is especially so given the absence of any criteria to effectively prevent applications from seeking to sweep in uses and amounts that are not legally eligible to be considered quarantine under the Clean Air Act and the Protocol.

Section 304.2(e) of the proposed rules also must be dropped. Although it opens with what might be read as a savings clause, this provision could be read as purporting to command the EPA Administrator to exempt whatever APHIS lists as a quarantine use: "Consistent with the Montreal Protocol and under the authority of the Clean Air Act, the Administrator of the Environmental Protection Agency (EPA) shall exempt quarantine applications of methyl byomide." Insofar as it purports to command EPA to rubber-

stamp APHIS decision, this provision conflicts with Section 419 itself. Section 419(d)(2) states that "[n]othing in this section shall be construed to alter or modify the authority of the Administrator of the Environmental Protection Agency or to provide any authority to the Secretary of Agriculture under the Clean Air Act or regulations promulgated under the Clean Air Act." The proposed regulation cannot validly command EPA to exempt as "quarantine" uses and amounts that are have always been subject to the phase-out and CUE requirements. And regardless what Section 304.2(e) may say, any such action by EPA would violate the Protocol and the Clean Air Act.

Review of alternatives

As noted, Section 419(a) states: "The Secretary shall not authorize such treatments or applications unless the Secretary finds there is no other registered, effective, and economically feasible alternative available." Implementation of this requirement should lead to a narrowing of quarantine classifications, not an expansion, since (1) current quarantine uses have never before been screened for alternatives under the Montreal Protocol or the Clean Air Act and (2) alternatives actually do exist for many current quarantine uses.

The proposed rules, however, turn Section 419(a) on its head. The rules do not require APHIS to make any finding regarding the availability of alternatives when APHIS grants an application, only when APHIS *denies* an application. This is a straightforward violation of Section 419(a), which expressly states that the Secretary shall not approve an application without making an affirmative finding that there are no effective and feasible alternatives: "The Secretary *shall not authorize* such treatments or applications *unless the Secretary finds* there is no other registered, effective, and economically feasible alternative available." The final rule must comply with the requirement for an affirmative finding.

To make an affirmative finding, APHIS will require a record. The present proposal does not require State or local applicants to undertake any efforts to investigate alternatives or to produce any evidence or findings to support their applications. In order to support a finding under Section 419(a), APHIS must have a record and a basis for that finding. If APHIS does not require State or local applicants to produce this record and basis, then the agency will have to produce it. The final rules should require applicants to show that they have undertaken an up-to-date and compete review of potential alternatives and to present the reasons the applicant believes APHIS can make the finding required under Section 419(a). APHIS must also provide an opportunity for public comment on the application, the information put forward in support of it, and APHIS's proposed finding. The comment opportunity must be even-handed – it must extend not only to the applicant, but to members of the public that have an interest in the amount of methyl bromide allowed to be produced and used.

The proposal asks for comment on definitions of "registered," "effective," and "economically feasible." With regard to "registered," the proposal notes that there may be alternatives that do not require registration under pesticide laws. We agree with

APHIS that such alternatives must be considered and that "registered" has no reasonable purpose or application with respect to an alternative that is not subject to pesticide laws.

With regard to the terms "effective" and "economically feasible," the preamble (but not the proposed rules) contains the following:

- ''Effective'' means that there is a body of science with sufficient rigor and specificity to show that an alternative treatment would meet the efficacy requirements to allow its consideration as a quarantine treatment; and
- ''Economically feasible'' means that the costs of the alternative quarantine treatment would not be so high as to make the trade in the treated good prohibitively expensive.

These definitions do not supply any meaningful content. "Effective" is not meaningfully defined without specifying the type and amount of evidence needed to establish the efficacy of an alternative with "sufficient rigor and specificity." As written, it is so entirely standard-less as to be incapable of principled application and review. Similarly, APHIS needs to supply meaningful criteria for the terms "prohibitively expensive." What standard or criteria must State and local applicants, and APHIS, meet to demonstrate that an alternative is "prohibitively expensive"? We submit that APHIS needs to articulate a threshold cost, as a percentage of shipment values or final market prices, that it considers "prohibitive."

Finally, APHIS needs to create a reasonable process for reviewing and withdrawing official quarantine use status as alternatives become available. The process must be symmetrical. There cannot be a one-sided, fast-track method to get a use listed as quarantine, and no similar method to get its listing withdrawn. At present, APHIS has articulated no triggers or criteria to require such review and withdrawal and no deadlines. A reasonable process would require an annual review of listed uses and their alternatives. The process should allow public comment for gathering data on alternatives and request the removal of a listed use. An informal, non-public consultation with EPA, governed by no criteria, timetable, or process, is not adequate to comply with Section 419 and further deepens the conflict between these rules and the requirements of the Montreal Protocol and the Clean Air Act.

Conclusion

Section 419 should have the effect of shrinking, not expanding, quarantine uses of methyl bromide. It imposes a new limitation on quarantine use that is more restrictive than the Montreal Protocol and the Clean Air Act – namely that it does not allow APHIS to approve an "official quarantine use" without a positive finding that there are no effective or economically feasible alternatives. The proposed rules fail to implement this requirement at all.

What is worse, the proposed rules appear to allow a vast expansion of quarantine status to encompass thousands of tons of methyl bromide production and consumption

that currently must terminate at the end of this year, unless covered by a critical use exemption. Section 419 gives APHIS no authority to supercede the legal requirements of the critical use exemption process under the Montreal Protocol and the Clean Air Act, and replace those binding legal requirements with a purely unilateral exemption.

APHIS must thoroughly re-write the proposed rules as indicated in these comments, to implement the requirements of Section 419 itself and to prevent the illegitimate expansion of quarantine status in violation of the Clean Air Act and the Montreal Protocol.