

U.S. AGRICULTURAL SECTOR RELIEF ACT OF 2012

SEPTEMBER 19, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 6194]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 6194) to ensure the viability and competitiveness of the United States agricultural sector, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary .....	2
Background and Need for Legislation .....	2
Hearings .....	6
Committee Consideration .....	7
Committee Votes .....	7
Committee Oversight Findings .....	9
Statement of General Performance Goals and Objectives .....	9
New Budget Authority, Entitlement Authority, and Tax Expenditures .....	9
Earmark .....	9
Committee Cost Estimate .....	9
Congressional Budget Office Estimate .....	9
Federal Mandates Statement .....	10
Advisory Committee Statement .....	10
Applicability to Legislative Branch .....	10
Section-by-Section Analysis of Legislation .....	10
Changes in Existing Law Made by the Bill, as Reported .....	11
Dissenting Views .....	15

## PURPOSE AND SUMMARY

H.R. 6194, the “U.S. Agricultural Sector Relief Act of 2012,” was introduced by Representative Phil Gingrey, M.D., on July 25, 2012 (together with Representatives Bishop, Conaway, Costa, Ellmers, Lucas, Rooney, Schmidt, Southerland, Terry, Walden, and Whitfield). The legislation seeks to ensure that the U.S. agricultural sector has access to sufficient quantities of the fumigant methyl bromide for critical uses. Key provisions of this bill would:

- Direct the EPA Administrator to seek critical use exemptions under the Montreal Protocol treaty process for the full quantities needed for critical uses.
- Direct the EPA Administrator to allow use of limited amounts of methyl bromide in response to emergency events at farms, nurseries, and food processing and storage facilities where needed to control a pest or disease.

## BACKGROUND AND NEED FOR LEGISLATION

For decades, methyl bromide was widely used as a fumigant to control pests, including for the cultivation of a variety of crops, including strawberries, tomatoes, peppers, eggplant, flowers, and tree and vine crops, and at grain mills, food storage and food processing facilities. Pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), methyl bromide in the U.S. has been phased out except for allowable exemptions, including critical uses. H.R. 6194 addresses concerns relating to U.S. critical use exemptions under the treaty process.

## STATUTORY AND REGULATORY BACKGROUND

The Montreal Protocol is an international environmental treaty designed to reduce the release of ozone-depleting substances into the atmosphere by restricting their production and consumption. The treaty was originally signed by the U.S. in 1987 and entered into force in 1989. To implement the treaty, Congress amended the Clean Air Act in 1990 and 1998 to add provisions to protect the stratospheric ozone layer. These provisions are set forth in Title VI of the Clean Air Act, which is administered by the U.S. Environmental Protection Agency (EPA).

The Montreal Protocol treaty sets schedules for developed and developing countries to gradually phase out the use of ozone-depleting substances according to a schedule that differentiates between industrialized and developing countries.<sup>1</sup> Methyl bromide was added to the list of ozone-depleting substances covered by the treaty in 1992. Under the treaty, the U.S. and other industrialized countries phased out production and consumption of methyl bromide in 2005 except for allowable exemptions.

Under the treaty, Parties to the Montreal Protocol have authority to approve exemptions from the phaseout of methyl bromide for “critical” uses that are nominated by a given country. In 1997, the Parties issued Decision IX/6, which defines a use to be critical if “the lack of availability of methyl bromide for that use would result in a significant market disruption,” and “there are no technically

---

<sup>1</sup>Ozone-depleting substances scheduled for phaseout in the U.S. include halons, chlorofluorocarbons (CFCs), carbon tetrachloride, hydrobromofluorocarbons (HBFCs), methyl chloroform, chlorobromomethane, methyl bromide, and hydrochlorofluorocarbons (HCFCs).

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.” In addition, in 1997 the Parties also issued Decision IX/7, allowing for use of methyl bromide in response to emergency events, in an amount up to 20 tons per event.

To allow for critical uses in the U.S., EPA issued a final rule in 2004 entitled “Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide.”<sup>2</sup> The rule established a critical use exemption (CUE) process for U.S. growers and set forth a list of approved critical uses, including pre-plant uses for cultivation of cucurbits, eggplant, forest seedlings, ginger, orchard nursery seedlings, orchard replant, ornamentals, peppers, strawberry nurseries, strawberry fruit, sweet potatoes, tomatoes and turfgrass, and post-harvest uses including for food processing and commodity storage.

Pursuant to the CUE process, EPA annually solicits and reviews applications from growers and grower groups to determine whether technically and economically feasible alternatives available to the applicant, and whether there would be significant market disruption if no exemption were available. The process culminates in the submission of a critical use nomination by the U.S. Department of State to the United Nations Environment Programme Ozone Secretariat. After a decision is made by the Parties to the Montreal Protocol, EPA issues a regulation authorizing critical uses and amounts for the relevant year consistent with that decision.

To facilitate the research and development of methyl bromide alternatives, Congress has since 2000 appropriated nearly \$300 million to the U.S. Department of Agriculture (USDA) for research. The U.S. agricultural sector also has committed significant time, resources, and funds to identify alternatives and conduct research, and there are substantial ongoing efforts at USDA, land-grant universities, and in the private sector to develop viable alternatives. The Committee is encouraged by the work of these entities and hopes that alternatives will continue to be developed and adopted.

#### NEED FOR LEGISLATION

U.S. critical use exemption nominations submitted by the U.S. Department of State to the United Nations Environment Programme Ozone Secretariat on behalf of America’s agricultural and food sector have declined steeply since 2005, and the most recent U.S. nominations represent less than 10 percent of the quantity of methyl bromide first approved for exemption in 2005. While alternatives (with varying degrees of effectiveness) have been developed for agricultural applications, a number of growers testified at a July 18, 2012, legislative hearing that they and others in their industry are concerned about the current exemption process and the continued need for methyl bromide for critical uses.<sup>3</sup>

<sup>2</sup>See 69 Fed. Reg. 76982 (Dec. 23, 2004). Under the Montreal Protocol treaty, there is also an allowable exemption, not addressed in H.R. 6194, for the production and consumption of methyl bromide for quarantine and preshipment purposes.

<sup>3</sup>At the July 18, 2012 hearing, the following growers testified: Mark Murai who is President of the California Strawberry Commission and third-generation California strawberry farmer; Scott DiMare who is Vice President and Director of Farm Operations for Dimare Ruskin, Inc. and Florida tomato farmer; Michelle Keeler who is Vice-President of Mellano & Company, a

For example, growers expressed concern about the lack of access to methyl bromide under the current process and testified that in some cases viable methyl bromide alternatives do not yet exist, existing alternatives are not effective, or there is a resurgence of pests or disease several years after transitioning to alternatives. Witnesses testified that the recent withdrawal from the U.S. market of methyl iodide, marketed as “Midas,” has left certain growers without a viable methyl bromide alternative. EPA is also currently proposing to phase out the tolerances for sulfuryl fluoride, which is a primary alternative to methyl bromide for certain post-harvest uses.

Growers further raised concerns that under the current CUE process exemption applications have been arbitrarily reduced by EPA and the Methyl Bromide Technical Options Committee (MBOC), which is an advisory body that reviews U.S. CUE nominations and makes recommendations to the Parties. For example, California Strawberry Commission President Mark Murai testified “our applications continue to be arbitrarily reduced without any or inadequate scientific explanation,” and that “the rules keep changing every page we turn.” Similarly, Society of American Florists representative Michelle Keeler testified that “[d]espite having submitted CUE applications substantiating their need for the product in accordance with the provisions of the Protocol, U.S. growers are being forced to take arbitrary cuts in their requested levels, with absolutely no scientific reasoning and no justification.”

Growers also testified that insufficient access to methyl bromide threatens significant economic hardship and job losses within the agricultural sector. For example, California Strawberry Commission President Mark Murai testified that a University of California Davis economic study commissioned by the California Department of Food and Agriculture has concluded that without access to methyl bromide “California communities will lose over \$1.5 billion annually and more than 23,000 jobs annually.” Society of American Florists representative Michelle Keeler testified that without access to methyl bromide “U.S. growers will be rendered noncompetitive in the global marketplace. This will force many to cease operations, killing jobs and causing significant harm to the local communities in which we operate at a time of great economic uncertainty.” Florida tomato grower Scott DiMare testified that “[a]s an industry that is struggling to remain competitive in the globally expanding sourcing of fresh vegetables, we have seen our fumigation costs triple since the mainstay of our production system, methyl bromide, has come under regulatory restrictions dictated by the Montreal Protocol on Substances that Deplete the Ozone Layer and its implementation under the US Clean Air Act.” Michigan vegetable farmer Russell Costanza testified that “I cannot overstate the importance of access to methyl bromide for my farm operation and my fellow Michigan growers. We are facing a crisis and need relief.”

The Committee has received numerous letters of support for H.R. 6194 expressing concerns about the current critical use exemption process and the availability of methyl bromide for critical uses, including from the following entities:

---

California grower and testified on behalf of the Society of American Florists; and Russell Costanza who is owner of Russell Costanza Farms in Michigan and grows peppers, eggplant, squash, tomatoes and cucumbers.

Agricultural Trade Services  
 Almond Hullers & Processors Association  
 American Farm Bureau Federation  
 American Nursery & Landscape Association  
 AG-Fume Services  
 California Citrus Mutual  
 California Grape and Tree Fruit League  
 California Strawberry Farmers and Shippers<sup>4</sup>  
 Florida Farm Bureau Federation  
 Florida Fruit and Vegetable Association  
 Florida Tomato Exchange  
 Georgia Farm Bureau Federation  
 Georgia Fruit & Vegetable Growers Association  
 Holzinger Flowers Inc.  
 Hopkinsville Milling Company  
 Knappen Milling Company  
 Lassen Canyon Nursery, Inc.  
 Maritime Exchange for the Delaware River and Bay  
 Leitz Farms LLC  
 North American Millers Association  
 Northwest Horticultural Council  
 Produce Marketing Association  
 Society of American Florists  
 Star of the West Milling Co.  
 Sunkist Growers  
 Sunshine State Carnations, Inc.  
 Sunsweet  
 TriCal/TriEst  
 USA Rice Federation  
 Western Growers Association  
 Western Industries

Letters expressing concern about the continued availability of methyl bromide for critical uses were also submitted by the California Date Commission and California Walnut Commission.

In addition, a number of companies submitted letters specifically raising concerns due to EPA's pending proposal to phase out use of sulfuryl fluoride, which is a primary alternative to methyl bromide for certain post-harvest uses. These uses include to control stored product pests in cereal grains (e.g., wheat, corn, and rice, and the mills that process these grains), tree nuts (e.g., walnuts, almonds), dried fruits (e.g., raisins, dried plums); dried legumes (e.g., garbanzo beans, black-eyed peas), cocoa beans, and coffee beans. While EPA has solicited further comment with respect to its initial proposal to withdraw the tolerances for food uses of sulfuryl fluoride, a product critical to the protection of U.S. agriculture, there is currently uncertainty about the outcome of this rule-making process.

---

<sup>4</sup>Letters were submitted by Aptos Berry Farms, Del Mar Food Products, Corp., Dole Berry Company, Dole Fresh Berry Co., Driscoll's, Driscoll Strawberry Associates, Inc., Garroutte Farms, Inc., M. Chavez & Son Farming, Inc., Mira Mar Farms, Nagata Brothers, Naturipe Berry Growers Inc., Otilio Farms, LLC, Providence Farms LLC, Rancho Guadalupe, LLC, RBI, Shelford Associates, Solmar Farms, Inc., Sunrise Growers, Uesugi Farms, Inc., Uyematsu, Inc., Well-Pict Berries and other California strawberry growers.

## WHAT THE U.S. AGRICULTURAL SECTOR RELIEF ACT OF 2012 WOULD DO

H.R. 6194 directs the EPA Administrator to continue to seek critical use exemptions under the Montreal Protocol treaty process for the full amounts of methyl bromide needed by U.S. farmers. It requires EPA, when considering exemption applications, to demonstrate in writing that there is substantial evidence to establish that a technically and economically feasible alternative is available to an applicant, and expressly requires that the agency consider cost, commercial availability, demonstrated effectiveness, and State or local regulations that may restrict its use when evaluating potential alternatives. The bill also directs that if a methyl bromide alternative is removed from the U.S. market, the EPA Administrator shall seek to address the shortfall under the treaty process. The bill also supports development of alternatives by directing EPA to take action to ensure that sufficient quantities of methyl bromide are available for research on methyl bromide alternatives for the agricultural sector.

H.R. 6194 also directs EPA to set up a process, in consultation with U.S. Department of Agriculture, to address emergency situations that may arise at a farm, nursery, or food processing or storage facility where methyl bromide is needed to control a pest of disease. The bill specifically directs the EPA Administrator, in consultation with the Secretary of Agriculture, to issue regulations for these emergency uses. The bill also limits emergency uses in any calendar year to the total amount authorized under the Montreal Protocol for the U.S. in 2011, which was 2,055 metric tons.

While this legislation would ensure that EPA continues to pursue critical use nominations for the limited quantities of methyl bromide still needed by the U.S. agricultural sector, it would not have an adverse impact on the environment. In the U.S., the use of methyl bromide has dramatically decreased, and H.R. 6194 addresses only those limited amounts still needed by U.S. farmers and growers. Currently, methyl bromide comes primarily from natural sources, most of which is destroyed in the troposphere, and according to a 2010 report issued by the World Meteorological Organization, methyl bromide from human activities is responsible for only 0.03% of ozone depleting substances entering the atmosphere. H.R. 6194 does not authorize the use of methyl bromide in quantities greater than the 2011 Montreal Protocol authorized level.

## HEARINGS

On July 18, 2012, the Subcommittee on Energy and Power held a legislative hearing on the “U.S. Agricultural Sector Relief Act of 2012,” and received testimony from:

- Mark Murai, President, California Strawberry Commission;
- Michelle Castellano Keeler, Vice President, Mellano & Company on behalf of the Society of American Florists;
- Russell Costanza, Owner, Russell Costanza Farms;
- Scott M. Dimare, Vice President & Director of Farm Operations, Dimare Ruskin, Inc.;
- David Doniger, Policy Director, Climate & Clean Air Program, Natural Resources Defense Council; and,

- Regina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency (Written Statement for the Record).

#### COMMITTEE CONSIDERATION

H.R. 6194 was introduced on July 25, 2012, by Representative Phil Gingrey (together with Representatives Bishop, Conaway, Costa, Ellmers, Lucas, Rooney, Schmidt, Southerland, Terry, Walden, and Whitfield).

On July 18, 2012, the Subcommittee on Energy and Power held a legislative hearing on the H.R. \_\_\_\_\_, the “U.S. Agricultural Sector Relief Act of 2012.”

On July 18 and 19, 2012, the Subcommittee on Energy and Power met in open markup session. Three amendments were offered and adopted by voice vote. On July 19, 2012, the Subcommittee on Energy and Power reported the bill favorably to the full Committee by a roll call vote of 15 ayes and 6 nays.

On July 31 and August 1, 2012, the Committee on Energy and Commerce met in open markup session and ordered H.R. 6194 reported to the House by a roll call vote of 28 ayes and 16 nays.

#### COMMITTEE VOTES

Clause 3(b) of rule XII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Upton to order H.R. 6194, reported to the House, as amended, was agreed to by a record vote of 28 ayes and 16 nays. The following reflects the recorded votes taken during the Committee consideration, including the names of those Members voting for and against.

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE #132**

**BILL:** H.R. 6194, the "U.S. Agricultural Sector Relief Act of 2012"

**AMENDMENT:** A motion by Mr. Upton to order H.R. 6194 favorably reported to the House, as amended.  
(Final Passage)

**DISPOSITION:** **AGREED TO**, by a roll call vote of 28 yeas and 16 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Barton				Mr. Dingell		X	
Mr. Stearns				Mr. Markey		X	
Mr. Whitfield	X			Mr. Towns			
Mr. Shimkus	X			Mr. Pallone		X	
Mr. Pitts	X			Mr. Rush		X	
Mrs. Bono Mack	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel		X	
Mr. Terry	X			Mr. Green		X	
Mr. Rogers				Ms. DeGette		X	
Mrs. Myrick				Mrs. Capps		X	
Mr. Sullivan				Mr. Doyle		X	
Mr. Murphy				Ms. Schakowsky		X	
Mr. Burgess	X			Mr. Gonzalez			
Mrs. Blackburn	X			Ms. Baldwin			
Mr. Bilbray	X			Mr. Ross	X		
Mr. Bass	X			Mr. Matheson	X		
Mr. Gingrey	X			Mr. Butterfield		X	
Mr. Scalise	X			Mr. Barrow	X		
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers	X			Mrs. Christensen		X	
Mr. Harper	X			Ms. Castor		X	
Mr. Lance	X			Mr. Sarbanes			
Mr. Cassidy	X						
Mr. Guthrie	X						
Mr. Olson	X						
Mr. McKinley	X						
Mr. Gardner	X						
Mr. Pompeo	X						
Mr. Kinzinger	X						
Mr. Griffith	X						

08/01/2012

## COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings that are reflected in this report.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 6194 directs the Administrator of the Environmental Protection Agency to seek critical use exemptions under the Montreal Protocol treaty process to ensure the availability of methyl bromide where no viable alternative is available. In addition, H.R. 6194 allows for the use of limited amounts of methyl bromide in response to emergency events at farms, nurseries, food processing facilities, or commodities storage facilities that require use of methyl bromide to control pests or diseases.

## NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 6194, the “U.S. Agricultural Sector Relief Act of 2012,” would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## EARMARK

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R., the “U.S. Agricultural Sector Relief Act of 2012,” contains no earmarks, limited tax benefits, or limited tariff benefits.

## COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

*H.R. 6194—U.S. Agriculture Sector Relief Act of 2012*

H.R. 6194 would require the Environmental Protection Agency (EPA) to seek critical-use exemptions under the Montreal Protocol for applications submitted to the agency for the production, importation, and consumption of methyl bromide.

Methyl bromide is a chemical compound commonly used in pesticides, though its use has been mostly phased out since 2005 under the Montreal Protocol, an international treaty to reduce ozone-depleting substances. Under the Clean Air Act (CAA), EPA may grant critical-use exemptions for methyl bromide producers, importers, and users after consulting with the other parties to the Montreal Protocol. H.R. 6194 would prohibit EPA from denying

critical-use applications for methyl bromide unless EPA has substantial evidence that there is a better alternative for this chemical. This legislation also would expand producers' ability to claim emergency exemptions for limited amounts of methyl bromide.

To implement those changes related to the use of methyl bromide under the CAA, EPA would need to issue regulations and establish a methyl bromide emergency program. Based on information from EPA, CBO estimates that developing and issuing such regulations and administering a new program would cost less than \$500,000 annually over the 2013–2017 period, subject to the availability of appropriated funds.

Pay-as-you-go procedures do not apply to H.R. 6194 because the bill would not affect direct spending or revenues.

H.R. 6194 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

#### APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

#### SECTION-BY-SECTION ANALYSIS OF LEGISLATION

##### *Section 1—Short title*

This section provides the short title of “U.S. Agricultural Sector Relief Act of 2012.”

##### *Section 2—Ensuring the availability of methyl bromide for critical uses*

This section amends section 604(h) of the Clean Air Act relating to the phase-out of methyl bromide under the Montreal Protocol treaty.

Section 2(a) directs (i) that the Environmental Protection Agency Administrator, for each calendar year, take all appropriate actions within the agency's authority to seek a critical use exemption under the treaty for the full amount of methyl bromide necessary for approved critical uses; (ii) that the Administrator shall not deny or reduce an application unless the Administrator has substantial evidence, provided to the applicant in writing, establishing there is a technically and economically feasible alternative; and (iii) that

the Administrator, in evaluating any potential alternatives, shall consider the cost, commercial availability, and demonstrated effectiveness of the alternative, and consider any State or local regulations that may restrict its use.

Section 2(a) also directs that the Administrator allow for the use of methyl bromide in response to emergency events, in an amount necessary up to 20 metric tons. Section 2(a) further provides that the aggregate amount of methyl bromide allowed for use in response to emergency events in the United States in a calendar year shall not exceed the total amount authorized by the Parties to the Montreal Protocol for the United States for critical uses in 2011.

Section 2(a) also directs the Administrator to take all appropriate actions to ensure sufficient quantities of methyl bromide are available for research on methyl bromide alternatives.

Section 2(a) also directs that when an alternative is removed from the U.S. market, the Administrator review and take action as appropriate to adjust any critical use nomination submitted to the Parties to the Montreal Protocol to address the shortfall.

Section 2(a) also provides the following definitions:

(1) The term “approved critical use” means approved critical uses found in Appendix L to subpart A of part 82 of title 40, Code of Federal Regulations, as in effect on January 1, 2005;

(2) The term “critical use” means a circumstance in which (i) there are no technically and economically feasible methyl bromide alternatives or substitutes acceptable from the standpoint of environment and health and are suitable to the crops and circumstances involved; and (ii) the lack of methyl bromide for a particular use would result in significant market disruption;

(3) The term “emergency event” means a situation at a farm, nursery, food processing facility, or commodities storage facility that requires the use of methyl bromide to control a pest or disease, and for which there is no critical use exemption in effect, or insufficient quantities of methyl bromide available under an existing critical use exemption, for such site.

Section 2(b) directs the Administrator, in consultation with the Secretary of Agriculture, to issue final regulations relating to emergency events, including in the regulations criteria for identifying an emergency event and provisions to ensure the timely approval or disapproval of emergency event applications.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

#### CLEAN AIR ACT

\* \* \* \* \*

## TITLE VI—STRATOSPHERIC OZONE PROTECTION

\* \* \* \* \*

### SEC. 604. PHASE-OUT OF PRODUCTION AND CONSUMPTION OF CLASS I SUBSTANCES.

(a) \* \* \*

\* \* \* \* \*

(h) METHYL BROMIDE.—**[Notwithstanding]**

(1) *IN GENERAL.*—*Notwithstanding* subsection (d) and section 604(b), the Administrator shall not terminate production of methyl bromide prior to January 1, 2005. The Administrator shall promulgate rules for reductions in, and terminate the production, importation, and consumption of, methyl bromide under a schedule that is in accordance with, but not more stringent than, the phaseout schedule of the Montreal Protocol Treaty as in effect on the date of the enactment of this subsection.

(2) *CRITICAL USE EXEMPTIONS AND EMERGENCY EVENTS.*—

(A) *CRITICAL USE EXEMPTIONS.*—

(i) *IN GENERAL.*—*For each calendar year, beginning with 2013, the Administrator, pursuant to an application submitted by any person, shall take all appropriate actions within the authority of the Environmental Protection Agency to seek a critical use exemption under the Montreal Protocol in order to allow the production, importation, and consumption of methyl bromide—*

(I) *for any use of methyl bromide that—*

(aa) *is an approved critical use; and*

(bb) *is determined by the Administrator to be a critical use for the applicant; and*

(II) *in the amount necessary for the use described in subclause (I).*

(ii) *APPLICATIONS.*—*The Administrator shall not deny any application referred to in clause (i), or reduce the amount requested under any such application, unless the Administrator—*

(I) *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; and*

(II) *provides such evidence to the applicant in writing.*

(iii) *ALTERNATIVES.*—*The Administrator, when evaluating the technical and economic feasibility of any alternative pursuant to clause (ii), shall consider—*

(I) *cost and commercial availability of the alternative to the applicant;*

(II) *demonstrated effectiveness of the alternative for the applicant's specific intended use;*

(III) demonstrated effectiveness of the alternative in the geographic region of the applicant's intended use; and

(IV) State or local regulations that may restrict use of the alternative for the applicant's intended use.

(B) *EMERGENCY EVENTS.*—

(i) *IN GENERAL.*—For each calendar year, beginning with 2013, the Administrator, pursuant to an application submitted by any person, shall allow the production, importation, and consumption in the United States of methyl bromide—

(I) for any use described in subparagraph (A)(i)(I) in response to an emergency event; and  
(II) in an amount necessary for such use.

(ii) *LIMITS ON USE PER EMERGENCY EVENT.*—The amount of methyl bromide allowed pursuant to clause (i) for use per emergency event at a specific location shall not exceed 20 metric tons.

(iii) *LIMIT ON AGGREGATE AMOUNT.*—The aggregate amount of methyl bromide allowed pursuant to clause (i) for use in the United States in a calendar year shall not exceed the total amount authorized by the parties to the Montreal Protocol pursuant to the Montreal Protocol process for critical uses in the United States in calendar year 2011.

(C) *INTERNATIONAL OBLIGATIONS.*—The Administrator shall take such actions as may be necessary to carry out this paragraph in accordance with the Montreal Protocol.

(D) *RESEARCH.*—For each calendar year, beginning with 2013, the Administrator shall take all appropriate actions within the authority of the Environmental Protection Agency to ensure that sufficient quantities of methyl bromide are available for research on methyl bromide alternatives for the agricultural sector.

(E) *ADJUSTMENTS TO CRITICAL USE NOMINATIONS.*—The Administrator shall review and, as appropriate, take action to adjust any critical use nomination that has been submitted to the Parties to the Montreal Protocol (for production, importation, or consumption of methyl bromide in the United States) if—

(i) a methyl bromide alternative is removed from the United States market; and

(ii) on the basis of the availability of such alternative, the Administrator denied, or reduced the amount requested under, any application for production, importation, or consumption of methyl bromide for the year covered by such nomination.

(F) *DEFINITIONS.*—In this paragraph:

(i) The term “approved critical use” means a use that—

(I) as of January 1, 2005, was an approved critical use in appendix L to subpart A of part 82 of title 40, Code of Federal Regulations; or

*(II) during the period following such date and ending on the date of enactment of this clause, was added as an approved critical use in such appendix.*

*(ii) The term “critical use” means a circumstance in which—*

*(I) 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*

*(II) the lack of availability of methyl bromide for a particular use would result in significant market disruption.*

*(iii) The term “emergency event” means a situation—*

*(I) that occurs at a farm, nursery, food processing facility, or commodities storage facility;*

*(II) for which there is no critical use exemption in effect for such site, or for which there are not sufficient quantities of methyl bromide available under an existing critical use exemption for such site, as described in subparagraph (A); and*

*(III) that requires the use of methyl bromide to control a pest or disease because there is no technically and economically feasible alternative to methyl bromide available for such use.*

\* \* \* \* \*

## DISSENTING VIEWS

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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> EPA also analyzes “dosage and emissions minimization techniques

<sup>1</sup>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).

<sup>2</sup>40 CFR 82.3.

<sup>3</sup>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).

and applicants' research or transition plans.”<sup>4</sup> 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 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.<sup>5</sup> For 2013, the U.S. received critical use exemptions for 562 metric tons of methyl bromide.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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 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

<sup>4</sup> *Id.*

<sup>5</sup> 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](http://ozone.unep.org/Assessment_Panels/TEAP/Reports/TEAP_Reports/TEAP_Progress_Report_May_2011.pdf)).

<sup>6</sup> Montreal Protocol, Decision XXIII/4.

<sup>7</sup> 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](http://ozone.unep.org/Assessment_Panels/TEAP/Reports/TEAP_Reports/TEAP_Progress_Report_May_2011.pdf)).

<sup>8</sup> Montreal Protocol, Decision XXIII/4.

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.<sup>9</sup>

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.

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

HENRY A. WAXMAN.  
BOBBY L. RUSH.



<sup>9</sup>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).