

preshipment provisions, the Administrator shall exempt the production, importation, and consumption of methyl bromide to fumigate commodities entering or leaving the United States or any State (or political subdivision thereof) for purposes of compliance with Animal and Plant Health Inspection Service requirements or with any international, Federal, State or local sanitation or food protection standard." Prior to Congressional passage of section 604(d)(5), the CAA did not provide authority for creating such an exemption to the methyl bromide phaseout schedule. In today's final regulation, EPA is implementing the express language provided in Article 2H, paragraph 6, of the Protocol under the authority provided by section 604(d)(5) of the CAA. EPA is also acting in a manner consistent with, and to fulfill the obligations of, section 614(b) of the CAA. Section 614(b) of the CAA states that, "[t]his title as added by the Clean Air Act Amendments of 1990 shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal protocol, as provided in Article 2, paragraph 11 thereof, and shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of a conflict between any provision of this title and any provision of the Montreal Protocol, the more stringent provision shall govern."

EPA's interim final rule related to the process for exempting quarantine and preshipment applications of methyl bromide, published in the **Federal Register** on July 19, 2001 (66 FR 37752), defined quarantine and preshipment applications as agreed by the Parties to the Montreal Protocol in Decisions VII/5 and XI/12, respectively. EPA received ten comments regarding our decision to adhere to the language of the Parties' Decisions. All commenters stated that Decisions of the Parties do not have the same force of law as the Protocol itself, its amendments, or adjustments adopted by the Parties and, as such, EPA is not bound to their language. The comments submitted to EPA in response to the interim final rule echo a legal memorandum submitted to EPA by the legal counsel of the Methyl Bromide Industry Panel at a July 1999 meeting. A more detailed discussion of the arguments made in this memorandum can be found in the interim final rule published in the **Federal Register** on July 19, 2001 (66 FR 37752).

EPA responded directly to the legal memorandum submitted by the Methyl

Bromide Industry Panel in the interim final rule. EPA has reconsidered the issue as it was raised by the comments submitted in response to the interim final rule and has concluded that its approach reflects widely accepted principles of customary international law. The provisions of the Vienna Convention on the Law of Treaties (VCLT), 8 International Legal Materials 679 (1969), that concern treaty interpretation generally reflect customary international law. Paragraph 1 of Article 31 of the VCLT provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Paragraph 3 of Article 31 of the VCLT states, "[t]here shall be taken into account, together with any context: \* \* \* (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Decisions VI/11, VII/5, XI/12 and XI/13 constitute subsequent consensus agreements among the Parties to the Montreal Protocol (including the United States) regarding the interpretation and application of the quarantine and preshipment provision of Article 2H. Therefore it is appropriate for EPA, when determining what is consistent with the "Montreal Protocol's quarantine and preshipment provisions," to take into account the Decisions of the Parties.

Furthermore, in amending the CAA, Congress specifically cited the plural "quarantine and preshipment provisions." If Congress intended for this phrase to be limited to the single provision in the Protocol referencing quarantine and preshipment in Article 2H, and not the subsequent Decisions between the Parties regarding interpretation or application of the treaty, Congress would have presumably directed the Agency to be consistent with the singular provision.

Precedents within the current regulations (40 CFR part 82) demonstrate that the United States has routinely considered Decisions that clarify and interpret obligations under the Montreal Protocol to be authoritative and that such Decisions of the Parties are currently implemented through regulations under the CAA. Examples of such regulatory implementation of Decisions of the Parties include the current U.S. definitions of "controlled substance" (based on Decision IV/12) and "essential use". Additional examples of how U.S. regulations incorporate Decisions by the Parties to the Protocol can be found in the

preamble of the interim final rule published in the **Federal Register** on July 19, 2001 (66 FR 37752) and in 40 CFR part 82, subpart A.

## VI. What Are the Definitions of Quarantine and Preshipment Applications?

In today's final action, EPA is defining quarantine applications and preshipment applications, as agreed by the Parties to the Montreal Protocol. The Parties to the Protocol agreed to the following definition of "quarantine applications" in Decision VII/5: "quarantine applications, with respect to methyl bromide, are treatments to prevent the introduction, establishment and/or spread of quarantine pests (including diseases), or to ensure their official control, where: (i) Official control is that performed by, or authorized by, a national plant, animal, or environmental protection or health authority; (ii) quarantine pests are pests of potential importance to the areas endangered thereby and not yet present there, or present by not widely distributed and being officially controlled."

The Parties to the Protocol first agreed to the following definition for preshipment applications of methyl bromide in Decision VI/11 and VII/5: "preshipment applications are those treatments applied directly preceding and in relation to export, to meet the phytosanitary or sanitary requirements of the importing country or existing phytosanitary or sanitary requirements of the exporting country." At the 11th Meeting of the Parties in December 1999, the Parties further clarified the intent of the term preshipment by agreeing to the following definition in Decision XI/12: "\* \* \* preshipment applications are those non-quarantine applications within 21 days prior to export to meet the official requirements of the importing country or the existing official requirements of the exporting country. Official requirements are those which are performed by, or authorized by, a national plant, animal, environmental, health or stored product authority."

EPA adopted the above definition of preshipment applications in the interim final rule and received nine related comments. All of the commenters raised the concern that the 21-day limitation on treatments to qualify as a preshipment application is unduly restrictive and arbitrary. One commenter stated that the time restriction is unrelated to the purpose of the preshipment exemption and that so long as a treatment is done to meet the official non-quarantine requirements of