

November 3, 2008

The Honorable Stephen Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Johnson:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for two of EPA's planned proposed rulemakings entitled "Worker Protection Standard for Agricultural Pesticides" (WPS) and "Certification of Pesticide Applicators" (Certification rule). Possible revisions to the WPS and Certification Rule are being developed by the U.S. Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The proposed changes to the rules are going through the regulation development process concurrently.

THE AGRICULTURAL WORKER PROTECTION STANDARD

In 1974, EPA promulgated the WPS (40 CFR Part 170), based on the 1972 amendments to FIFRA. In that rule, four basic requirements to protect farmworkers performing hand labor activities were established:

- A prohibition against spraying workers and other persons
- A general reentry interval for all agricultural pesticides prohibiting reentry into treated fields until the spray had dried or the dust had settled and longer intervals for 12 specific pesticides
- A requirement for protective clothing for any worker who had to reenter treated fields before the specific reentry period had expired
- A requirement for "appropriate and timely" warnings.

In 1983, an Agency review of the existing standards concluded that the regulations were inadequate to protect these workers. Following an extensive public participation and comment process, a new final rule was promulgated in 1992 and became effective in 1995. These revised regulations are intended to:

- Eliminate or reduce exposure to pesticides
- Mitigate exposures that do occur
- Inform employees about the hazards of pesticides

After the 1995 implementation, the Agency initiated a program assessment based on issues brought forward by stakeholders, by a planned program evaluation, the Government Accountability Office (GAO) and Children's Health Protection Advisory Committee (CHPAC). This national assessment process included public meetings in the major agricultural areas with significant production and labor, and the establishment of workgroups to address the issues. A number of issues were raised through the national assessment process that could not be addressed outside of regulation, and these proposals are the response to those recommendations.

THE CERTIFICATION OF PESTICIDE APPLICATORS

The Certification of Pesticide Applicators rule has been largely unchanged since promulgation in 1974 and 1975. In 1985, a taskforce appointed by EPA reviewed the program and policies and identified areas for improvement in a report. Changes to the regulations were proposed in 1990, but were never made final. In 1996, OPP established the Certification and Training Assessment Group (CTAG) to define the national direction of the pesticide applicator certification and training program. This group has made a number of recommendations to improve the program. Some of these recommendations can only be addressed through regulatory change.

PANEL BACKGROUND

On September 4, 2008, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition to its chairperson, the Panel consists of the Director of the Field and External Affairs Division of the EPA Office of Pesticide Programs, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Acting Chief Counsel for Advocacy of the Small Business Administration (SBA). It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rules, and additional information may be developed or obtained during this process as well as from public comment on the proposed rules. The options the Panel identified for reducing the rules' economic impact on small entities will require further analysis and/or data collection to ensure that the options are practicable, enforceable, protective of public health, environmentally sound and consistent with FIFRA.

SUMMARY OF SMALL ENTITY OUTREACH

EPA has been conducting outreach to the entire stakeholder community, including small businesses, for a number of years. This outreach has included presentations and workshops such as:

- Public meetings were held in 1999 on the Worker Protection Standard in Texas, California, Florida, and Virginia to evaluate the regulation and the implementation and enforcement of the national program. Representatives from grower groups, farmworker advocates, state lead agencies for pesticide regulation, etc., participated.

- In 1997, the Certification and Training Assessment Group (CTAG) was formed of state lead agency and agricultural extension representatives to assess the Applicator Certification Program.
- A workgroup from the Pesticide Program Dialogue Committee (PPDC) has reviewed preliminary options for both rules and provided data, recommendations for change, and comments. The PPDC is an advisory committee to EPA's Office of Pesticide Programs, with membership including stakeholders with diverse interests in the benefits and risks associated with pesticides.
- State Lead Agencies have reviewed preliminary options for both rules and provided comments.

Prior to convening the Panel, EPA conducted outreach with small entities that will potentially be affected by these regulations. In June 2008, EPA invited SBA, OMB, and 20 potentially affected small entity representatives to a conference call, in which information on the rules and the Agency's planned proposals were shared, and solicited preliminary comments from them. EPA shared the small entities' written comments with the Panel as part of the Panel convening document.

After the SBAR Panel was convened, the Panel distributed additional information to the small entity representatives (SERs) on September 12, 2008, for their review and comment and in preparation for another outreach meeting. On September 25, 2008, the Panel met with the SERs to hear their comments on the information distributed in these mailings. The SERs were asked to provide written feedback on ideas under consideration for the proposed rulemaking and responses to questions regarding their experience with the existing WPS and Certification rule requirements. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials. See Section 8 of the Panel Report for a complete discussion of SER comments. Their full written comments are also attached. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFEA and developed the findings and discussion summarized below.

PANEL FINDINGS AND DISCUSSION

Under section 609(b) of the RFA, the Panel is to report its findings related to these four items:

- 1) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.
- 2) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
- 3) Identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.

- 4) A description of any significant alternatives to the planned proposed rule which would minimize any significant economic impact of the proposed rule on small entities consistent with the stated objectives of the authorizing statute.

The Panel's most significant findings and discussion with respect to each of these items are summarized below. To read the full discussion of the Panel findings and recommendations, see Section 9 of the Panel Report.

A. Number and Types of Entities Affected

For the WPS rule, there are approximately 956,000 small farms, nurseries, greenhouses, forests and related support businesses that are potentially affected by the proposed regulatory revisions. For the applicator certification rule, the potentially affected businesses include most of the same businesses as the WPS rule, but also include a number of businesses involved in non-agricultural pest control. For the certification rule, there are approximately 2,147,000 firms potentially affected. See section 5, Tables 1 and 2 of the full Panel Report for a complete listing of the affected industry types and the Small Business Administration definitions. Though the SBAR Panel did not receive specific comments on the number and types of entities that may be affected by the two rulemakings, the Panel believes that the SERs are in agreement with EPA on this matter.

B. Recordkeeping, Reporting, and Other Compliance Requirements

Both the Worker Protection Standard and the Certification of Pesticide Applicators rules are enforced by state agencies, owing to FIFRA section 26, which allows the states primary enforcement responsibility for pesticide use violations. EPA has received considerable feedback from our state regulatory partners indicating difficulty enforcing the rules, particularly the WPS, due primarily to a lack of records or information. Reporting requirements under the WPS are entirely third party reporting; that is, employers provide information to their employees to enable them to protect themselves, and do not report to EPA. Reporting requirements under the Certification rule are also primarily third party, other than state reports to EPA.

EPA would like to improve enforcement capability as a means of fostering compliance, and thereby improving protections. The improvements that EPA is considering for the WPS may include additional or more specific recordkeeping and reporting. These potential proposals include improved requirements for posting of pesticide treated areas, training, hazard communication, and emergency information.

See Tables 4 and 5 in the Panel report for summaries of SER comments on potential reporting, recordkeeping, and compliance requirements for major comment generating issues. See Appendix B of the report for complete SER comments. Some SERs commented on the added burden of recordkeeping requirements. There were also comments that suggested added recordkeeping because it would reduce other compliance burdens. For example, one SER

suggested requiring recordkeeping for training, as currently many employers train more frequently than required since they cannot determine when or if a worker has been trained.

C. Related Federal Rules

The Panel is aware of regulations promulgated by the Occupational Safety and Health Administration (OSHA) to protect employees of firms affected by the WPS and Certification rules. The Hazard Communications Standard (HCS) is the main federal regulation designed to protect employees from chemical hazards in the workplace. However, OSHA established a policy agreeing not to cite employers who are covered under EPA's final WPS rule with regard to HCS requirements for pesticide hazards. The Field Sanitation Standard also provides certain protections for employees in agriculture. With respect to the Certification rule, OSHA defers to EPA for requirements for employees who use restricted use pesticides.

The proposed rules are being developed and considered within the context of the OSHA rules and current coordination between the agencies. Entities affected by the WPS and Certification rules will also need to consider OSHA's regulatory requirements for protection of employees, particularly with respect to non-pesticide hazards.

Section 2 of the Panel report discusses related federal rules promulgated by OSHA. The SBAR Panel did not receive any comments from SERs on related federal rules.

D. Regulatory Flexibility Alternatives

As described in the report, EPA is seeking to improve the standards for protection of agricultural workers from pesticide exposure and for the certification of applicators of restricted use pesticides. Because of the potential burdens and costs of meeting these standards, the Panel recommends that EPA consider and seek comments on the flexibility options described below.

As one SER commented generally about compliance with the rules, flexibility is key for small entities. The Panel believes that the following flexibility options collectively have the potential to significantly reduce compliance burden without significantly compromising intended protections for human health and the environment.

Field Posting for Restricted Entry Intervals

Restricted-entry intervals (REIs) must be specified on WPS-covered pesticide product labels. Workers are excluded from entering a pesticide treated area during the REI, with only narrow exceptions. EPA is considering a proposal to require agricultural establishments to post treated areas during a REI following pesticide applications, to warn workers of the existence and duration of the REI and to stay out.

Several SERs raised concerns about the number and placement of signs. Based on those comments, the Panel recommends that EPA consider a requirement for posting at routine or usual points of entry to the field or treated area.

Several SERs commented that the burden for numerous posting events could be high. The Panel believes that oral notification of workers is an acceptable substitute for posting for REIs of shorter duration (e.g., 48 hours or less), as workers can more easily remember the notice for a shorter period. Therefore, the Panel recommends that EPA consider the flexibility to permit only oral notification for those pesticide applications with REIs of 48 hours or less.

Re-training Interval for Workers and Handlers

The current WPS requires that workers and pesticide handlers receive pesticide safety training, and that they be re-trained at least every 5 years. EPA is considering a requirement for more frequent re-training, possibly annually.

A few SERs commented that they already re-train every year, as they cannot verify whether or when employees have been previously trained, in part due to turnover in the workforce. Several SERs, including one that said most workers are re-trained annually, suggested that EPA retain the current five year re-training interval, as it is sufficient.

The Panel recognizes that there is value in re-training workers as it serves to emphasize and remind the worker of important safety principles. If EPA proposes an annual re-training requirement the Panel recommends that EPA consider flexibility for less frequent training for small entities, e.g., entities with less than 10 employees that have written documentation of the following:

1. no worker turnover
2. no new or different pesticide application information from previous years
3. previous training of workers and handlers.

Elimination of Grace Period for Worker Training

The current WPS requires pesticide safety training for agricultural workers but allows them to work up to five days before receiving the full training if they are given a shorter, basic training. EPA is considering eliminating this grace period for full training. Elimination of the grace period would effectively eliminate the basic training requirement.

Several SERs indicated that the grace period allows flexibility in work schedules and should not be eliminated. The Panel recommends that EPA carefully weigh the potential burden and consider flexibilities for small entities. EPA should consider programmatic flexibilities for small entities such as the Agency working with the states to increase use of training verification programs to reduce the need for unnecessary re-training and use of the grace period.

Shower Facility for Handlers

EPA is considering a requirement that employers of pesticide handlers make available a shower facility for their use. A few SERs said that when showers are available that employees do not

use them. Several SERs commented that a shower facility would be very expensive, with some suggesting that the benefits would not be justified.

In light of SER comments, the Panel recommends that EPA limit consideration of shower facility requirements to establishments with permanent pesticide mixing/loading sites. Such a limitation would eliminate the costly requirement for many smaller entities, and limit it to establishments where pesticide use and potential for exposure is likely to be higher. Also, establishments with permanent pesticide mixing/loading sites would potentially have a lower incremental cost of adding a shower facility at that site, since such sites typically already have running water.

Minimum Age for Certified Applicators and Those Applying Restricted Use Pesticides (RUPs) Under Their Supervision

Currently there is no federal minimum age requirement to become certified as a commercial applicator or private applicator, or for individuals to apply RUPs under the supervision of a certified applicator. EPA is considering a proposal to require a minimum age for each of these categories of applicators. The Agency's concerns for younger applicators includes their increased vulnerability to the adverse effects of pesticides, potentially lower level of competence in applying pesticides, as well as potentially poorer judgment and level of responsibility.

SERs were not in agreement on this potential proposal. Two SERs suggested no minimum age for commercial certification, as long as they can pass the examination. One SER suggested a minimum age of 14 for commercial applicators. Several SERs suggested a minimum age of 18 for all categories. A few SERs suggested 18 as a minimum age, with a lower age for family members of the employer. A few other SERs suggested 15 or 16 as the minimum on farms.

Given the SERs' comments, the Panel recommends that EPA consider a minimum age requirement of: 18 for commercial applicators; 18 for hired private applicators and 16 for family members; 18 for individuals applying RUPs under the supervision of a commercial applicator; and 16 for those applying RUPs under the supervision of a private applicator. Also, based on SER comments on the cost of replacing current younger applicators, the Panel recommends including a grandfather clause to allow currently certified private and commercial applicators to retain their certification after any minimum age requirement becomes effective.

Communication Method Between Certified Applicator and Individuals Applying RUPs Under Their Supervision

The current Certification rule allows non-certified applicators to apply RUPs "under the direct supervision" of a certified applicator, but does not specifically require a means of communication between the supervising certified applicator and the supervised applicator during the application. EPA is considering a proposal to require that a means of instant communication be available during such applications.

Several SERs indicated that a means of communication is necessary and/or desirable, while two cautioned that in some remote areas, communication devices do not always work well. One SER

suggested that communication may not be necessary with proper training, and another said a distance requirement could replace a communication requirement.

The Panel agrees with the majority of SER comments that there should be communication capability between certified applicators and those under their supervision during RUP applications. The Panel recommends that EPA consider proposing a requirement that a means of communication between certified applicators and individuals applying RUPs under their supervision be available and employed during RUP applications.

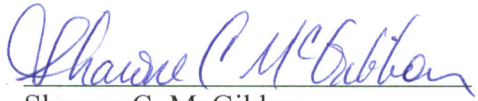
Sincerely,



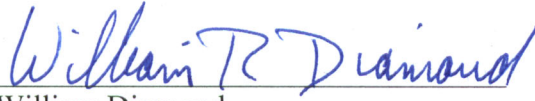
Alexander Cristofaro
Small Business Advocacy Chair
Office of Policy, Economics and Innovation
U.S. Environmental Protection Agency



Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
U.S. Office of Management and Budget



Shawne C. McGibbon
Acting Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration



William R. Diamond
Director, Field and External Affairs Division
Office of Pesticide Programs
U.S. Environmental Protection Agency

Enclosure