



December 4, 2020

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For Submission to EPA Docket ID No. EPA-HQ-OPP-2017-0543

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW  
Mail Code 1101A

**Re: Petition for Administrative Stay Pending Judicial Review of Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements**

Dear Administrator Wheeler,

Alianza Nacional de Campesinas, Comité de Apoyo a los Trabajadores Agrícolas (CATA), Farmworker Association of Florida, Migrant Clinicians Network, Pineros y Campesinos Unidos del Noroeste (PCUN), Rural Coalition, Rural & Migrant Ministry, United Farm Workers, and United Farmworkers Foundation, (“Farmworkers”) request that the U.S. Environmental Protection Agency (“EPA” or “Agency”) immediately stay the effective date of the Agency’s final rule, Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68,760-01 (Oct. 30, 2020) (“AEZ Rollback” or “Final Rule”). EPA may stay the effective date of a rule pending judicial review if it finds that “justice so requires.”<sup>1</sup> Farmworkers plan on filing a Court challenge to the rule shortly.<sup>2</sup>

The Final Rule weakens the Application Exclusion Zone (“AEZ”) provisions of the Agricultural Worker Protection Standard (“WPS”) by: 1) limiting the protection of the AEZ to areas within the agricultural establishment, even though pesticide drift does not recognize property lines; 2) eliminating the requirement that pesticide application be suspended when people are within the AEZ on the agricultural establishment if they are within an easement; and 3) decreasing the size of the AEZ for certain ground applications of pesticides. Justice requires

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<sup>1</sup> 5 U.S.C. § 705.

<sup>2</sup> Through this petition, Farmworkers satisfy their duty under Fed. Rule of App. Proc. 18(a)(1) to move the agency for a stay pending review of its decision. If EPA does not grant the stay, Farmworkers plan on moving for a stay in Court.

EPA stay the effective date of the Final Rule to prevent imminent and irreparable harm of pesticide poisoning to farmworkers and bystanders from the weakening of the AEZ.

### **I. There is a high likelihood that Farmworkers will prevail on the merits**

Justice requires staying the rule pending judicial review because Farmworkers are likely to succeed in their challenge. Farmworkers' comments on the proposed rule explain how the rule is unlawful in multiple respects.<sup>3</sup> In particular, the rule violates the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by allowing pesticides to be applied in a manner that poses an unreasonable risk of harm, and it also violates the Administrative Procedure Act ("APA") because it is an arbitrary and capricious reversal of EPA's 2015 determination that the AEZ is necessary to protect farmworkers from pesticide poisoning.

First, FIFRA requires that EPA ensure registered pesticides will not be applied in a manner that creates "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."<sup>4</sup> Ample evidence in the rulemaking record demonstrates that farmworkers and bystanders continue to be poisoned by off-target pesticide drift and that many of these incidents could be prevented through compliance with the AEZ. EPA cited to such evidence in its 2015 rulemaking establishing the AEZ.<sup>5</sup> Farmworkers presented additional evidence and documentation of such incidents in their comments on the proposed rule.<sup>6</sup>

In weakening the AEZ, EPA failed to properly consider the risk to farmworkers and bystanders that would result. Instead of considering the increased incidence of pesticide poisoning likely to occur as a result of the Final Rule, EPA claims that the existing "Do Not Contact" provision will sufficiently protect workers.<sup>7</sup> This is despite a mountain of evidence to the contrary and contrary to the position EPA took just a few years ago when it concluded that more was needed to protect farmworkers and surrounding communities. EPA's attempt to justify its reversal in position is unconvincing. While it acknowledges that the AEZ "was intended to act as a supplement or guide for applicators on the 'Do Not Contact' requirement by giving the applicator specific criteria for suspending applications,"<sup>8</sup> it now concludes that the "Do Not Contact" provision is sufficient. EPA now relies on "the changes to the WPS required training content in 2015, and the suite of requirements in the 2015 WPS rule" to "provide effective

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<sup>3</sup> See Comments of Alianza Nacional de Campesinas, California Rural Legal Assistance Foundation, Center for Food Safety, Earthjustice, Farmworker Association of Florida, Farmworker Justice, Migrant Clinicians Network, National Latino Farmers and Ranchers Trade Association, Pesticide Action Network, Rural Coalition, Texas RioGrande Legal Aid, Inc., UFW Foundation, United Farm Workers (UFW), Comment ID No. EPA-HQ-OPP-2017-0543-0136 (Jan. 30, 2020) ("Farmworker Comments").

<sup>4</sup> 7 U.S.C. § 136(bb); see 7 U.S.C. § 136a (c)(5)(D).

<sup>5</sup> See Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67,496, 67,520–21 (Nov. 2, 2015) ("2015 Rule").

<sup>6</sup> See Farmworker Comments at 23–27.

<sup>7</sup> See Final Rule at 68,765.

<sup>8</sup> Final Rule at 68,768–769.

protection from pesticide exposures during applications.”<sup>9</sup> In short, EPA finds *no* increased risk to farmworkers and bystanders from weakening the AEZ. This belies logic. The 2015 rulemaking record is replete with evidence of workers being sprayed in the absence of the AEZ’s specific mandate to suspend spraying in certain situations, even with the “Do Not Contact” provision in place.<sup>10</sup> By removing specific criteria for handlers to suspend spraying, and instead leaving the decision to their discretion, the rule is almost guaranteed to increase incidence of pesticide poisoning. Thus, because EPA failed to assess the increased risks and ensure they were not “unreasonable,” the Final Rule violates FIFRA.

Second, EPA’s conclusion is directly contrary to its 2015 position, yet EPA fails to provide evidence supporting its changed position. Though EPA may lawfully reverse its position on a particular policy choice, it must provide a “reasoned explanation. . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>11</sup> When, as here, the “new policy rests upon factual findings that contradict those which underlay its prior policy” the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>12</sup> EPA fails to do this.

In 2015, after reviewing the rulemaking record—which contained numerous examples of workers and bystanders being exposed to pesticide due to drift—EPA expressly determined that it “disagree[d] with the assertion that the ‘do not contact’ requirements, along with the other protections on pesticide labels, are by themselves sufficient to protect workers and bystanders from being directly contacted by pesticides that are applied.”<sup>13</sup> EPA now completely reverses this finding, saying “EPA disagrees with commenters on the assertion that enforcing the ‘Do Not Contact’ provision does not prevent harm in the first place.”<sup>14</sup> But EPA provides no new evidence or satisfactory reasoning for disregarding the evidence underlying its 2015 conclusion and decision to enact the AEZ. EPA itself admits that comments it received on the proposal to rollback the AEZ were overwhelmingly opposed—demonstrating that the need for protections has not diminished since the 2015 rulemaking. Final Rule at 68765 (“Of the 126 unique submissions to the docket, approximately 16 commenters submitted comments in support of EPA’s efforts. . .”). The Final Rule is therefore unlawful under the APA.<sup>15</sup>

## **II. Farmworkers and their members will suffer irreparable injury if the rule is allowed to go into effect**

As Farmworkers have documented in detail – through accounts, photographs, videos, and maps – pesticide applications frequently occur in close proximity to farmworkers laboring on adjacent properties, near schools and day cares, and near homes where farmworkers’ children

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<sup>9</sup> Final Rule at 68,770.

<sup>10</sup> See 2015 Rule at 67,523–525.

<sup>11</sup> *Fed. Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

<sup>12</sup> *Id.* at 515.

<sup>13</sup> 2015 Rule at 67,521.

<sup>14</sup> Final Rule at 68,768.

<sup>15</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); see also *Fox Television Stations, Inc.*, 556 U.S. at 515.

live and play.<sup>16</sup> The close distances between workers and bystanders, including children, and pesticide application emphasize the need for the AEZ to be enforced beyond the perimeters of the agricultural establishment. If EPA allows the Final Rule to go into effect, farmworkers and near-sited communities will immediately be put at increased risk of being sprayed by pesticides. Such exposure is especially health-threatening for these communities who live in rural areas and often have limited access to health care.<sup>17</sup> Such harm is irreparable – even if Farmworkers succeed in their challenge, any injury that they or bystanders suffer as a result of exposure while the rule was effective cannot be undone.

### **III. There is low possibility of harm to other parties if relief is granted**

EPA and regulated parties will incur no harm if EPA stays the Final Rule. A stay will only preserve the status quo while review proceedings take place. EPA’s main justification for the Final Rule is that EPA’s guidance on compliance with the AEZ “does not carry the weight of regulation, and [] handlers and handler employers may be concerned about state or federal authorities taking a strict reading of the regulation. In addition, handlers unaware of the existing guidance may interpret the AEZ provision more strictly than necessary.”<sup>18</sup> EPA also states that a reason for the rulemaking is to limit the AEZ to areas where the agricultural employer has control to avoid situations where application needs to be halted for “extended periods of time.”<sup>19</sup>

Importantly, there is no evidence that regulated parties or enforcement agencies have experienced any harm since the AEZ provision went into effect. Specifically, there are no cited incidents of lost profits or other injuries to business entities from having to suspend spraying to comply with the AEZ, or any examples of regulated parties facing burdens due to enforcement actions taken against them for failing to comply with the AEZ. EPA itself notes that: “EPA is not aware of any AEZ violation having been enforced without pesticide [] contact occurring first. . . .”<sup>20</sup> Thus, staying the Final Rule will not adversely impact other parties, and the balance of equities clearly favors granting the stay.

### **IV. The public interest weighs in favor of granting the stay**

As explained above, the public interest favors granting a stay of the effective date, as this will keep the AEZ in place to continue protecting farmworkers, children, and communities working and living in close proximity to pesticide applications. The public has a strong interest in preventing pesticide poisoning, and the stay will serve this interest.

### **V. Conclusion**

The Rule is unlawful and likely will be set aside as a result of judicial review. Because Farmworkers and their members will face irreparable harm if the Final Rule is permitted to go

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<sup>16</sup> See Farmworker Comments at 9–16.

<sup>17</sup> See Farmworker Comments at 7–9.

<sup>18</sup> Final Rule at 68,767.

<sup>19</sup> Final Rule at 68,770.

<sup>20</sup> Final Rule at 68,769.

into effect, Farmworkers petition for a stay of the Final Rule pending judicial review. We request that EPA provide a response to this petition by December 14<sup>th</sup>, 2020.

Respectfully submitted,

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