

December 21, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Petition for Rulemaking

Dear Administrator McCarthy:

Pursuant to the Administrative Procedure Act (5 U.S.C. § 553(e)), the National Association of State Departments of Agriculture (NASDA) and the American Farm Bureau Federation (AFBF) hereby petition the U.S. Environmental Protection Agency (EPA) to amend the worker protection safety (WPS) rule (40 CFR 170) by postponing the effective date of the rule from January 1, 2017 to January 1, 2018. Petitioners' arguments are related in greater detail in comments to the proposed rule filed by our respective organizations¹ but we base our appeal on two incontestable facts: (1) EPA failed to meet the requirements of law in promulgating the "designated representative" provision at 40 CFR 170.311(b)(9); and (2) EPA has violated its statutory obligations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)² in failing to finalize and deliver to state lead agencies (SLAs) the enforcement guidance, educational materials, and training resources necessary to effectively implement the rule changes and assist the regulated community with compliance activities. We discuss these two matters in greater detail below.

(1) EPA's Violation of 7 USC §136w(a)(3)

7 USC §136w(a)(3) requires the Administrator to provide to the Committee on Agriculture of the U.S. House of Representatives and to the Committee on Agriculture, Nutrition and Forestry of the U.S. Senate "a copy of the final form of regulations" at the same time such final regulations are provided to the Secretary of Agriculture.³ EPA has acknowledged in responses to questions from Congress that it failed to meet this statutory obligation and that the 'draft final' regulation submitted to Congress in May 2015 did not include the designated representative provision found at 40 CFR 170.311(b)(9). EPA's failure to meet its statutory obligations deprived Congress of its lawful expectation of examining the regulation before its promulgation. As promulgated, the "designated representative" provision exceeds the scope of the WPS rule by depriving farmers of reasonable expectation of privacy for confidential business information. Moreover, it subjects farmers to potential harassment and public criticisms for lawful use of EPA-approved pesticides. Given the problems associated with the "designated representative"

¹ NASDA's and AFBF's complete comments to the proposed rule can be found at <https://www.regulations.gov/document?D=EPA-HQ-OPP-2011-0184-1870> and <https://www.regulations.gov/document?D=EPA-HQ-OPP-2011-0184-2200>.

² 7 U.S.C. §136, *et. seq.*

³ At least 30 days before being signed by the Administrator

provision, the House of Representatives voted to suspend funding of the provision. Petitioners have met with EPA and identified problems of equity and implementation of the WPS rule. Yet, EPA has failed either to address these problems.

(2) EPA's failure to finalize and deliver to state lead agencies (SLAs) the enforcement guidance, educational materials, and training resources necessary to effectively implement the rule changes and assist the regulated community with compliance activities.

The state departments of agriculture have been working diligently with EPA program staff since the final rule was published in November 2015 to review, improve, and facilitate the expeditious development and delivery of these materials prior to the January 2, 2017 and 2018 implementation dates, respectively. Several of these critical compliance and enforcement tools remain incomplete and undelivered. For example, the final WPS Inspection Guidance, Final Checklist, and Interpretive Guidance are all still not available to SLAs. The "How to Comply Manual" and "Train-the-Trainer" documents were finalized within the last 60 days, but physical delivery of these materials to SLAs are still on-going.

Frustrating the development and delivery of these critical training, guidance, and compliance materials was EPA's insertion and final articulation of the Application Exclusion Zone (AEZ), which the Agency publicly acknowledged goes beyond EPA's stated intent. NASDA understands EPA's Office of General Counsel (OGC) is working to issue interpretive guidance clarifying the Agency's intent under the final regulation; however, Agency guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity to assist state regulatory agencies with compliance and enforcement activities.

In August 2016, the Association of American Pesticide Control Officials (AAPCO), which is a NASDA Affiliate Organization, sent a letter to EPA's Office of Pesticide Programs outlining their concerns with the lack of availability of Train-the-Trainer materials and the OGC's interpretive guidance regarding the AEZ. These concerns along with the lack of implementation materials remain unaddressed and further demonstrate the need for an extension to all pending WPS revisions until January 2018.

In September 2016, the NASDA membership voted and approved an Action Item⁴ during its Annual Meeting urging EPA to delay implementation of the revised WPS provisions. NASDA emphasized the new WPS regulations require significant additional staff time to provide outreach to workers, handlers, applicators, agricultural employers, trainers and other stakeholders. Under the WPS rule changes, trainers will now require retraining, and according to EPA's implementation timeline, this retraining must take place during the same period the state agencies are expected to conduct outreach and education to the producers in their states. In addition, the average actual on-site inspection under the

⁴ NASDA Action Item H: *Implementation of Revised Agricultural Worker Protection Standard* (Sept. 2016); <http://www.nasda.org/File.aspx?id=45396>

former WPS rule averaged three hours in duration, but under the new rule these same inspections are anticipated to require approximately 50% more time due to the enhanced record-keeping and site information requirements. These enhanced compliance and record keeping requirements require EPA's timely delivery of educational resources or training materials to assist SLAs and the regulated community in understanding, complying, and enforcing the new requirements.

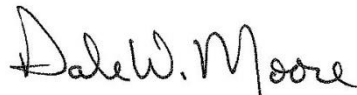
At this time, even if all of the compliance and enforcement materials were completed and distributed to all the appropriate state enforcement agencies, there is simply not enough time for the SLAs and the regulated community to successfully implement the provisions scheduled to take effect on January 1, 2017. In short, EPA has failed to develop and deliver the necessary resources for states to train the regulated community on the new requirements, and the Agency has failed to comply with its own WPS Implementation Timeline communicated to the SLAs in May 2015.

While NASDA appreciates EPA recognizing and reiterating the authority of SLAs to exercise prosecutorial discretion in enforcing these new provisions, NASDA notes this discretion is only available to states as long as third parties do not succeed in seeking judicial relief mandating SLAs begin enforcing the provisions codified in the Code of Federal Regulations. EPA can help states avoid this potential legal liability and protracted litigation by simply extending the implementation dates of the rule changes until January 2018.

In sum, petitioners believe that this Rule was promulgated in violation of FIFRA and fails to advance the purpose of furthering the safety of farmworkers. More urgently, the Rule's imminent effective date will result in a serious problem for administration of the Rule's requirements by NASDA members and the farmers and ranchers who must comply with its terms. We ask EPA to delay the effective date to give NASDA members adequate time to prepare for compliance with the rule and to avoid the unfair and unredressable harm to farmers and ranchers.

Sincerely,

Dale Moore



Executive Director
Public Policy, AFBF

Nathan Bowen



Director Public Policy
National Association of State Departments
of Agriculture