



May 12, 2023

Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Re: Docket ID No: EPA-HQ-OPP-2022-0133-0002; Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments

The National Association of State Departments of Agriculture (NASDA) appreciates the opportunity to submit comments on the Environmental Protection Agency's Reconsideration of the Application Exclusion Zone Amendments as they pertain to the Agricultural Worker Protection Standard (WPS).

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all 50 states and 4 U.S. territories. State departments of agriculture are responsible for a wide range of programs, including food safety, combating the spread of disease, and fostering the economic vitality of our rural communities. Conservation and environmental protection are also among our chief responsibilities. In 43 states, the state departments of agriculture are co-regulators with EPA and responsible for administering, implementing, and enforcing the production, labeling, distribution, sale, use, and disposal of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

General Overview

NASDA shares the Agency's goal of ensuring sufficient protection of farmers and farm workers, and the need to carefully evaluate all relevant factors when determining appropriate regulatory frameworks. This includes economic costs, social costs, the enforceability of requirements, and the feasibility of rules for compliance. NASDA supports the underlying goals of the WPS rule and continues to advocate for the EPA to consult with states prior to any revisions. NASDA has repeatedly raised concerns about the feasibility of EPA's approach and were pleased that the 2020 version of this rule adequately addressed our concerns. We assert that a more restrictive, blanket approach to regulation is not an appropriate response any more today than when this was first proposed in 2015, and that this ping-pong approach to regulation does a disservice to EPA, state regulators, and regulated entities.

Overall, we do not support the proposed revision to 40 CFR 170.505(b). Our understanding is that, as written, the current boundary of an AEZ is limited to the property boundary of the Agricultural establishment. Specifically, § 170.505(b)(1) states that "any handler performing a pesticide application must immediately suspend the pesticide application if any worker or other person is in an application exclusion zone described in § 170.405(a)(1) that is within the boundaries of the agricultural establishment or the area specified in column B of the Table in § 170.405(b)(4)..." Altering this rule to allow for the AEZ to extend beyond the boundaries of an establishment codifies unnecessary challenges to the enforcement of this provision. Additionally, we do not support the proposal to remove language from the 2020 AEZ rule provisions at 40 CFR 170.405(a)(2)(ii) and 170.505(b)(1)(ii) and (b)(2)(ii) that make the AEZ requirements inapplicable in easements within the agricultural establishment.

NASDA is broadly supportive of the decision to retain the changes from the 2020 AEZ rule that clarify that suspended applications can resume after people leave the AEZ, and the “immediate family exemption” that allows farm owners and their immediate family (defined in 170.305) to remain inside enclosed structures or homes.

Revisions to Address AEZ Extending Beyond the Boundaries of the Agricultural Establishment

AEZ measurements are defined in reference to the application equipment, meaning that the AEZ “halo” will move with the equipment as it advances its application. If the 2023 Reconsideration of the AEZ Amendments moves forward, it is not only possible, but in many cases guaranteed, that the halo will extend beyond the boundaries of an establishment. Upon the AEZ halo becoming applicable outside of the establishment, the pesticide handler will now become responsible for controlling the actions of individuals over which they have no control, or in some cases involving individuals harboring a specific intent to cause disruption to agricultural operations. This can cause substantial enforcement challenges and is seemingly very unfair to the farmer or applicator.

The timeliness of pesticide applications is of utmost importance, particularly to ensure that possible ecological impacts are mitigated (e.g., applying products when pollinators are less active, when wind speed and/or direction is optimal to minimize drift, or ensuring that runoff concerns are minimized). By enabling individuals to interrupt the application by standing in the AEZ outside the boundary, critical windows can be missed.

It is important to highlight and remind us all that pesticide handlers have long been required to comply with a number of safety factors under FIFRA and WPS. One such measure is the “Do Not Contact” requirement, in which the pesticide handler’s employer and the pesticide handler are required to ensure that no pesticide is applied in a manner that may contact, either directly or through drift, any agricultural worker or other person, other than an appropriately trained and equipped pesticide handler involved in the application. This prohibition is applicable in all situations, without limitations on the distance or location of the individual. The restricted-entry interval (REI) is an additional safety measure in place to protect agricultural workers and others after pesticide application. The REI provides a science-backed timeframe in which entry into a treated area is restricted; in some cases, the REI is as long as 12 hours. So, as the agency contemplates AEZ amendments, the existence of these long-held requirements should be seen as additive in protecting humans and should not be overlooked.

Protecting both agricultural workers and the general public from potential adverse effects of pesticides is an important function of state departments of agriculture, who serve as primary co-regulators of FIFRA with the EPA. NASDA is supportive of the EPA’s WPS measures to meet our shared goals; however, the extension of the AEZ beyond the boundary of an establishment represents a duplicative and unnecessary challenge to compliance and enforcement.

Resuming Applications

The 2015 rule did not provide much-needed clarity on if and when a handler could resume an application after it had been suspended due to people being present in the AEZ, likely because it was not envisioned that AEZ requirements could result in the permanent suspension of the application due to scenarios outlined above. NASDA supports the Agency’s choice to include the 2020 revisions that explicitly state that handlers may resume a suspended application when no workers or other people remain in an AEZ within the boundaries of the establishment. As co-regulators charged with the enforcement of these provisions, NASDA members support this clarity to ensure that pesticide safety provisions are properly followed.

Immediate Family Exemptions

NASDA is broadly supportive of the decision to retain the 2020 AEZ Rule change that allows for an immediate family exemption in 40 CFR 170.601, exempting owners and their immediate family members from having to leave the AEZ when they remain inside closed buildings, housing, or shelters on the establishment during pesticide applications. As a part of this exemption, handlers must receive confirmation from the owner of the establishment prior to the application and cannot assume that ~~only~~ the owner's family are inside without assurance.

We continue to be supportive of this provision and look forward to ensuring that the thoughtful enforcement of this provision can be carried out with minimal additional burden to regulators or pesticide handlers.

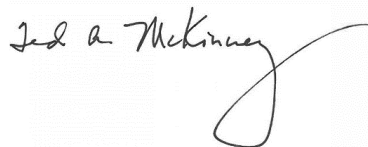
Communication

NASDA urges the EPA to work with USDA, NASDA, and state lead agencies as it contemplates changes to current standards. As co-regulators, we stand ready to provide insight into potential challenges and opportunities to the understanding, compliance, and enforceability of provisions. We look forward to ongoing dialogue to ensure that farm workers and the public remain protected, while also ensuring a durable, enforceable regulatory framework is in place.

Conclusion

NASDA appreciates the EPA's work, and we look forward to our partnership as we work together on important issues impacting food and agriculture. Should you have any questions, please contact Josie Montoney-Crawford, Manager of Public Policy, at josie.montoney-crawford@nasda.org. Thank you for your consideration of our comments on this important topic.

Sincerely,

A handwritten signature in black ink that reads "Ted McKinney". The signature is written in a cursive style with a large, sweeping flourish at the end.

Ted McKinney
Chief Executive Officer
NASDA