

August 18, 2014

BY ELECTRONIC MAIL

Gina McCarthy, Administrator
United States Environmental Protection Agency
EPA East Bldg., Room 6428
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

RE: Comments on EPA's Pesticides; Agricultural Worker Protection Standard Revisions; Docket Nos. EPA-HQ-OPP-2011-0184.

Dear Administrator McCarthy:

The Office of Advocacy at the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the Environmental Protection Agency's (EPA) rulemakings on Agricultural Worker Protection Standard Revisions for pesticides.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.¹ The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),³ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"⁴ EPA is required by the Regulatory Flexibility Act to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,⁵ and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010⁶ requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any

¹ 15 U.S.C. § 634a, *et. seq.*

² 5 U.S.C. § 601, *et. seq.*

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601, *et. seq.*).

⁴ *See* 5 U.S.C. § 609(a), (b).

⁵ Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.C. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁶ Pub. L. No. 111-240, § 124 Stat. 2504 (2010).

explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

History of the Rulemakings

In 1974, the Environmental Protection Agency (EPA) promulgated the Worker Protection Standards (WPS), based on the 1972 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁷ Originally, the rule consisted of four basic requirements to protect farmworkers performing hand labor activities. In 1983, an agency review of the existing standards concluded that the regulations were inadequate to protect these workers. After an extensive public participation and comment process, a new final rule was promulgated in 1992 and went into effect in 1995. These revised regulations were intended to eliminate or reduce exposure to pesticides, mitigate exposures that do occur, and inform employees about the hazards of pesticides. After the 1995 implementation, EPA initiated a program assessment with stakeholders, the Government Accountability Office (GAO) and the Children's Health Protection Advisory Committee (CHPAC). The proposed rule is one of the responses to the recommendations from the program assessment. EPA is also considering a proposed rule to amend "Certification of Pesticide Applicators."

In the fall of 2008, EPA convened a SBREFA panel for two proposals, Worker Protection Standard for Agricultural Pesticides and Certification of Pesticide Applicators, during which 21 small entity representatives (SERs) reviewed the planned proposed rulemakings and submitted comments and recommendations to EPA for consideration during the rulemaking development process. The Panel Report was signed on November 3, 2008 and is available in the docket.⁸ EPA published the proposed rules on March 19, 2014.⁹

During the development of the proposed rules and subsequent to their publication, Advocacy spoke with several small businesses and small business representatives. Advocacy held a roundtable on May 16, 2014 at which EPA presented the proposed rule and responded to questions.

Summary

Small businesses support the broader role of the WPS to enhance worker protection by reducing the incidence of occupational pesticide exposure and related illnesses among agricultural workers and pesticide handlers. Many small businesses, however, have expressed concerns that the additional costs associated with the proposed revisions would impose unnecessary burden without improving worker safety. To reduce the burden on

⁷ Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 86 Stat. 973 (1972).

⁸ Panel Report of the Small Business Advocacy Review Panel on EPA Planned Revisions to Two Related Rules: Worker Protection Standards for Agriculture and Certification of Pesticide Applicators. U.S. Environmental Protection Agency, Office of Policy, Washington, D.C. [hereinafter Panel Report]

⁹ 79 Fed. Reg. 1544 (March 19, 2014).

small businesses, Advocacy urges EPA to follow the recommendations made by the SBREFA panel, to reconsider some of the alternatives and to consider providing regulatory flexibility for small businesses.

I. EPA's Economic Analysis does not Support its Certification

The RFA requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.¹⁰ When such impact is expected, agencies are also required to examine regulatory alternatives that may reduce adverse economic effects on significantly impacted small entities. EPA estimated that the proposed rule for WPS revisions will affect over 300,000 small entities. However, EPA, certified that this proposed rule will not have a significant adverse economic impact on a substantial number of those small entities.

EPA expects the impacts to be less than 0.1 percent of the annual value of sales or revenues for the average small entity. EPA considers a cost of up to one percent of annual sales to be non-significant. EPA also adds that the number of entities that may be impacted in excess of one percent could be over 40,000 given the number of small-small establishments,¹¹ but discounts this importance as an overestimate because it does not account for 5,000 small-small farms in California who would face impacts below the national average.¹² Many small businesses believe that EPA's anticipated impact of less than 0.1 percent is understated and recommend that EPA perform an additional sensitivity analysis related to small commercial entities before certifying the proposed action will not have a significant adverse economic impact on them.

EPA's Economic Analysis shows that the proposed rulemaking could pose a significant cost for smaller small entities. EPA finds that estimated costs would equal to almost two percent of smaller small entities' revenues¹³ independent of other costs and economic circumstances that might be associated with this rulemaking or the specific industry. Based on this average, which is greater than one percent,¹⁴ EPA's factual basis contained in the economic analysis does not provide adequate support for EPA's certification that the rule will not have a significant economic impact on a substantial number of small entities. EPA should, therefore provide a full initial regulatory flexibility analysis,

¹⁰ 5 U.S.C. § 605(b).

¹¹ Small-small is a term EPA used in the Economic Analysis to define subgroups within the category of small businesses. EPA defines a small-small to have annual sales less than \$10,000 per year.

¹² Economic Analysis of Proposed Agriculture Worker Protection Standard Revisions, U.S. Environmental Protection Agency, Office of Pesticides Program, Biological and Economical Analysis Division, Washington, D.C., p. 164 [hereinafter Economic Analysis], available at : <file:///C:/Users/Owner/Downloads/EPA-HQ-OPP-2011-0184-0102.pdf>

¹³ Economic Analysis, *supra*, p. 166. Table 5.4.3 indicates that the cost would be equivalent to 1.8 percent of sales for small-small farms.

¹⁴ 2006 EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act. "As the number of small entities that will be affected by a rule by more than one to three percent of sales or revenues approaches 1000 in number, the substantial number guidelines of 20 percent of affected small entities may become less relevant in determining whether a regulatory flexibility analysis or a certification should be prepared." p.24.

including regulatory alternatives to reduce the adverse economic effects on the smaller small entities.

Small businesses are concerned with the use of national averages across all farm sizes. This approach does not account for the seasonal nature of the workforce prevalent in most small entities. Small businesses are also concerned about the wage information that is used for the economic analysis. EPA used information from a 2007 National Agricultural Statistical Service (NASS) Farm Labor Report, which provided a \$9.40 average hourly wage.¹⁵ This data is, however, updated quarterly, and as of May 2014 the average hourly wage is approximately \$11.¹⁶ Advocacy recommends that EPA take these concerns into consideration and re-evaluate the costs, giving special considerations to the unique costs incurred by small businesses.

II. EPA Should Increase the Retraining Interval for Workers and Handlers as Recommended by the Panel

The SBREFA panel (Panel) for the proposed rule received comments from SERs on several provisions which are included in the proposed rule. The Panel Report includes comments and discussions on field posting for restricted-entry intervals (REIs), retraining intervals for workers and handlers, grace periods for worker training, shower facilities for handlers, a minimum age requirement, and hazard communication methods. The Panel Report also includes eight recommendations to EPA for consideration during drafting of the proposed rules.

EPA almost always follows the Panel consensus recommendations, unless there are “subsequent data findings or circumstances that warrant a change in the EPA’s position.”¹⁷ It is quite rare when EPA deviates from the consensus recommendations, and it is even rarer in the final rule. Advocacy urges EPA to promulgate a rule that is consistent with the consensus recommendations of the Panel. In this case, EPA, for the most part, accepted all of the Panel’s recommendations with one critical exception.

EPA did not follow the Panel’s recommendation for the provisions related to the retraining interval for workers and handlers. The Panel recommended that EPA consider less frequent training for small entities (fewer than 10 employees) if EPA proposes an annual retraining requirement when (1) there has been no worker turnover, (2) there is no new or different pesticide application information, and (3) workers and handlers have

¹⁵ Economic Analysis, *supra* 67, 98, 105.

¹⁶ See, May 2014 NAAS Report, available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/fmla0514.pdf

¹⁷ This point is consistent with the EPA discussion in Section 5.8.4 of the 2006 EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act, “Since an EPA program office representative signs the Panel Report, **it is generally recognized that any recommendations agreed upon by the entire Panel are acceptable to the Agency, whether as modifications to the regulatory proposal, or as issues to be discussed in the preamble. Even if there are subsequent data findings or circumstances that warrant a change in EPA’s position after the Panel closes, it is important to discuss the Panel’s recommendations and the Agency’s response in the NPRM**” (Emphasis in original) p. 67. Available at www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf.

been previously trained.¹⁸ The proposed rule, however, requires annual training for all workers and handlers regardless of the number of employees and regardless of whether these three conditions are met.¹⁹ In addition to increasing the frequency of training to every year, the proposed rule also expands the content of training (adding 15 minutes) and sets higher standards for trainers (e.g. requiring trainers to attend a train-the-trainer course).²⁰

The existing standards require worker and pesticide handlers to receive training and retraining at least every five years.²¹ We are informed that most small businesses, however, retrain every year because they are unable to verify previous training due to high turnover. However, EPA's proposed regulations include a mandatory training verification recordkeeping to aid in keeping track of workers who have been previously trained.²² The proposed rule requires the employer to maintain records of worker training and to provide the worker with a record of the training, if and when they leave.²³ EPA should reconsider the Panel's recommendation for reduced training requirements for small entities, allowing them to rely on the required records. Moreover, there is a lack of evidence to support an annual training requirement to reduce worker exposures. By reducing the training requirement for small entities, EPA could reduce a sizeable burden to small entities while still achieving their regulatory goals.

In addition, small businesses have also flagged an annual full training requirement as a concern, identifying it as an onerous requirement, especially for well-trained workers who have remained with an operation for over a year or those who only temporarily left a facility during the off-season and returned later in the year or the following year. The first year of the new training requirements will be accompanied by greater costs since it will likely take more time and practice to cover additional topics that EPA has proposed. EPA has dismissed this as a minimal cost; however, for a small businesses every little increase in cost, compounded by the need to provide annual training and other new requirements in the proposed rule, will result in a significant adverse economic impact. Small businesses recommend that full training should be reserved for new employees only and that an annual "refresher" course, equivalent to the abbreviated training required during the grace period,²⁴ should be required for workers that have been employed for over a year. Advocacy recommends that this reduced requirement should be considered for all small farms, not just those with fewer than 10 employees.

III. Small Businesses are Have Specific Concerns with the Rule

Advocacy has also heard from small businesses and their representatives on several other matters, some of which were discussed during the Panel process, but not included in the

¹⁸ Panel Report, *supra*, p. 27.

¹⁹ 79 Fed. Reg. 15459.

²⁰ 9 Fed. Reg. 1564, 15467.

²¹ 40 C.F.R. § 1701.130(a).

²² 79 Fed. Reg. 15461.

²³ *Ibid.*

²⁴ 79 Fed. Reg. 15504-05.

recommendations made in the Panel Report, and others arising only following the publication of the proposed rule.

Small businesses have told Advocacy that the proposed rule's revisions to the WPS appear to be focused on increasing and improving enforceability, rather than improving and ensuring actual worker protection. They see this rule as a one-size-fits-all approach, which is oftentimes impractical and in other instances, poses a significant burden on small entities. Others have characterized the proposal as an unnecessary rule creating a problem rather than fixing one or one that is crafting solutions for problems that do not exist.

Many have expressed that EPA has failed significantly in balancing benefits with increased costs and as a result should not go forward with the rule. For instance, many small businesses are concerned that the proposed rule will increase costs, which will place an additional burden on producers because they will not be able to recover the regulatory costs by increasing prices. It is difficult to raise prices for perishable commodities with a 24-hour to 48-hour shelf life. This problem is exacerbated for small businesses. Large farms or bigger entities have the management structure and personnel to handle compliance issues; in contrast, the compliance costs fall disproportionately on smaller entities who lack the resources and time given the limited number of employees.

1. EPA should consider flexibility for small farms for the Restricted-Entry Interval (REI) posting requirement.

The Panel recommended that EPA should consider a requirement for posting at routine or usual points of entry to the field or treated area and to consider flexibility to permit only oral notifications for those pesticide applications with restricted-entry intervals (REIs)²⁵ of 48 hours or less. Advocacy commends EPA for allowing oral notifications for products with REIs of 48 hours or less unless the pesticide label specifically requires both oral and posted notifications.

The proposed rule also includes a requirement that a visual reminder must be provided to workers not to enter the specific pesticide-treated area without proper protection.²⁶ Small businesses have suggested that EPA consider providing flexibility for small entities because obtaining and posting multiple signs in every treated area will pose a special burden given the limited number of employees. In addition posting the signs for every treatment will consume a higher percentage of labor time.

Advocacy recommends that EPA retain the existing central posting requirement for small entities or, alternatively, provide an exemption for small entities if all workers are certified and notified at the time of spraying. EPA justified removing the central posting

²⁵ A Restricted-entry Interval (REI) is the period during which people are prohibited from entering the treated area, to allow the pesticide residues to reach an acceptable level before worker reentry is permitted.

²⁶ 79 Fed. Reg. 15475.

by citing concerns for legibility of the posted information since it is currently required to be available for 30 days.²⁷

In addition, several SERs expressed concerns that field posting could be time consuming and difficult; it may get too expensive to orally notify and post all applications. Others recommended that posting should only be required for products with labels that require both oral and written notification regardless of the REI. Some expressed concerns with numerous small fields of different crops making posting signs difficult for each REI.

2. EPA should retain the five day grace period for training.

The Panel recommended that EPA carefully weigh potential burdens and consider flexibilities for small entities to provide a grace period. A grace period is the time between hiring a worker and providing full pesticide safety training. The proposed rule reduces the existing five-day grace period to a two-day grace period.²⁸ The seasonal nature of the crop protection and farming business requires a massive influx of temporary and new employees. A sufficient grace period is necessary to be able to comply with regulations. Small businesses have asserted that a reduced grace period would require earlier hiring of employees and increased costs per hire. Some have also expressed concerns that the retention of the existing grace period is necessary for flexibility around busy schedules and to ensure continuity of operations. EPA has not provided an adequate explanation to justify the increased burden on small entities. Advocacy recommends that EPA retain the existing five-day grace period to provide regulatory flexibility for small businesses.

3. Recordkeeping and retention should be limited.

The proposed rule imposes new recordkeeping requirements for agricultural employers and handlers to obtain and maintain records for two years including employee training verification,²⁹ pesticide-specific hazard communication materials,³⁰ and records of oral notification for early-entry workers.³¹ Small businesses have expressed to Advocacy that the two-year recordkeeping and retention requirement will present a significant burden and therefore, it should be limited. Small entities do not have the administrative staff to be able to maintain the required type of recordkeeping; often the same individual responsible for recordkeeping tasks is required to be out in the field.

²⁷ Ibid. "EPA estimates that employers currently purchase new signs every 2 years because weather and outdoor exposure renders the signs unusable after this period." However, EPA admitted that a central posting is an alternative that is feasible for small farms. EPA added that one of the primary concerns in removing this requirement was because not all workers are present in a central area on large farms. (K. Davis, Filed and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, personal communication, August 7, 2014).

²⁸ 79 Fed. Reg. 15504.

²⁹ 79 Fed. Reg. 15462.

³⁰ 79 Fed. Reg. 15477.

³¹ 79 Fed. Reg. 15485.

The hazard communication provision which requires the employer to maintain copies of the pesticide product labeling, the safety data sheet (SDS) for the pesticide product applied and a record of the pesticide application is considered to be a burdensome recordkeeping requirement by small businesses.³² Small businesses have also expressed concerns with the pesticide labeling requirement. Under FIFRA, labeling means “all labels and other written, printed, or graphic matter” that accompany the pesticide at any time or to which reference is made on the label or in literature accompanying the pesticide.³³ The term “label,” on the other hand, simply means “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”³⁴ Based on this definition, the universe of labeling materials for any pesticide can be enormous, while the information required for “label” will be readily available with the product and therefore will not require the agricultural employer to obtain and store extra materials. Advocacy recommends that “labeling” should be replaced with “label” to lessen the burden on small businesses to avoid a requirement to retain an excessive amount of information that pesticide “labeling” can potentially trigger under FIFRA.

Small businesses have also reported difficulty in obtaining SDSs from the manufacturers citing that they often lack the manpower to obtain them and often do not have the purchase power to require manufacturers to provide them. Concerns were also expressed regarding the added hours spent in finding and printing sheets, finding space to file them, and generally the added time, effort and management it would require for a small business to develop and maintain a recordkeeping system. EPA clarified that the Agency will not require paper copies to be provided upon request; instead EPA intends only a requirement that the agricultural employer provide access to the SDSs. Currently, the proposed regulations state that the information must be made “available.”³⁵ Advocacy recommends that the regulatory language be clarified to reflect EPA’s explanation in only requiring *access* to the requested information.

4. EPA underestimates the costs and should provide flexibility for small business in meeting the OSHA requirements for respirators.

Current regulations require the handler employer to confirm that a respirator is fitted correctly.³⁶ The proposed regulations will require fit test, training and medical evaluation conforming to Occupational Safety and Health Agency (OSHA) requirements and recordkeeping.³⁷ Advocacy has learned that meeting the new requirements for respirators will pose significant additional costs for the small entities. EPA has estimated \$25 to \$30 per year for this purpose;³⁸ this is viewed to be an underestimation by many small businesses.

³² 79 Fed. Reg. 15477, FR 15518-19.

³³ 7 U.S.C. § 136(p)(2).

³⁴ 7 U.S.C. § 136(p)(1).

³⁵ 79 Fed. Reg. 15519.

³⁶ 40 C.F.R. § 170.240(c)(9).

³⁷ 79 Fed. Reg. 15499, 15526.

³⁸ Economic Analysis, *surpa*, p.135.

EPA stated that the fit test would require the use of a small test kit that would be of minimal cost; the medical evaluation consist of a survey that has to be sent to the healthcare professional, which can be faxed; and the training will last 20 minutes and can be provided by the employer. EPA also stated that the respirator will only be required for a few pesticides and that some products already require this.

Small businesses have expressed that the cost of a fit test kit is an unnecessary expense because respirator manufacturers include detailed instructions in their packaging for proper fit testing enabling employers to easily demonstrate how to properly determine if a respirator fits and works properly. While fit testing and evaluation are important components of the effective use of respirators, small businesses are especially concerned with the medical evaluation requirement. The rule requires employers to identify a physician or other licensed health care professionals to perform medical evaluations using a medical questionnaire or an initial medical examination. The employer is required to obtain written recommendations regarding the employee's ability to use a respirator from the physician or medical professional. This requirement is burdensome and prohibitively expensive for small businesses. EPA's cost of \$54 per agricultural establishment per year is excessively low given the costs of a medical professional's time. Advocacy recommends that EPA give special consideration for the cost implications for small businesses.

5. EPA should consider exempting farms from the restricted-entry area requirement.

EPA is proposing to establish entry-restricted areas (ERAs) during applications on farms and in forests.³⁹ An ERA is a specific area adjacent to those targeted for pesticide application.⁴⁰ The current regulations require agricultural employers to restrict only nursery and greenhouse workers and other persons on those establishments from ERAs.⁴¹ The ERA applies only during application.⁴² The size of the ERA depends on the type of product applied and the application method.⁴³ EPA requires a 25-foot ERA for downward application and 100-foot ERA for practically everything else.⁴⁴ EPA intends to avoid exposures resulting from spray drift and off-target application.⁴⁵ The 100-foot ERA requirement presents unique problems for small farms with smaller fields adjacent to one another, where the work that is necessary may be located in an area adjacent to one that is being treated with pesticides. In addition, an ERA can block ingress and egress to the operation, disrupting normal agricultural business. On a small farm, applications are likely to occur in close proximity, likely between 25 feet to 100 feet of rural roads or egress points of farms. Sometimes these roads are the only points of entry to gain access to the rest of the agricultural operation.

³⁹ 79 Fed. Reg. 15489, 15521.

⁴⁰ 40 C.F.R. § 170.110.

⁴¹ Ibid.

⁴² 79 Fed. Reg. 15490.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

Furthermore, this requirement may create regulatory confusion. For instance, EPA already requires that pesticide labeling include a statement that such a product cannot be applied or drift outside of the target area.⁴⁶ Current regulations already require handlers and applicators to take actions necessary to ensure bystanders and other unauthorized persons are not exposed to spray or spray drift.⁴⁷ As part of the regulatory process, EPA conducts conservative exposure and risk assessments for applicators and handlers as well as agricultural workers before approving any conventional pesticide product and the detailed, enforceable conditions of its label. Advocacy recommends that EPA remove this requirement because EPA already has control over this in another regulatory framework (i.e., regulation of pesticide labeling) where spray is restricted to the targeted area.

6. EPA should revise or remove the authorized representative provisions.

In addition to requiring agricultural employers to provide workers with pesticide-specific hazard information on the products,⁴⁸ the proposed rule also requires the agricultural employer to make the information available to a worker's "authorized representative."⁴⁹ EPA has defined an "authorized representative" to mean "a person designated by the worker or handler, *orally* or in writing, to request and obtain *any* information that the employer is required to provide upon request to the worker or handler."⁵⁰ This has the effect of essentially making these records available to anyone who may request them, without a method to verify the handler's authorization. The definition of an "authorized representative" is overly broad and unacceptable because it presents concerns for liability incurred by small businesses to provide information to persons other than emergency medical personnel, law enforcement, and legal representatives. The requirement to provide access to a third party may conflict with state laws and regulations. For instance, some states⁵¹ already have disclosure laws which classify pesticide use information as private.

Advocacy recommends that EPA restrict the availability of the records to emergency medical personnel, law enforcement and legal representation as well as the workers, or handlers, themselves, permitting the worker or handler to share the information with whomever they wish. As proposed, small businesses have expressed concerns that this provision of the rule may lead to indiscriminate requests for information. This presents a unique problem for small entities that often lack the legal resources required to respond appropriately to such requests. Given the often limited number of employees, these types of requests have the potential to severely disrupt the small farms. EPA has acknowledged that issues can be created as a result of its incomplete definition of an

⁴⁶ 40 C.F.R. § 156.206.

⁴⁷ Ibid.

⁴⁸ Pesticide-specific information includes Safety Data Sheets (SDSs) and pesticide labeling.

⁴⁹ 79 Fed. Reg. 15519 .

⁵⁰ 79 Fed. Reg. 15516.

⁵¹ See, for example, Minnesota, MN Stat. 18B.37. Available at <https://www.revisor.leg.state.mn.us/statutes/?id=18B.37>.

“authorized representative” but cited California regulations allowing such a disclosure as a supporting example. EPA has not explained how the California experience would apply to the various regions across the country.

7. EPA should retain the “prompt” requirement for providing transportation for medical assistance.

The proposed regulation requires an agricultural employer to provide emergency medical assistance within thirty minutes after learning an employee has been poisoned or injured by exposure to pesticides.⁵² The existing regulations, on the other hand, provide a flexible time limitation by requiring that agricultural employers provide “prompt” transportation to an emergency medical facility to workers who may have been exposed to pesticides.⁵³ EPA has characterized the change as a “technical clarification” and has concluded that it will impose minimal burden.⁵⁴ Small businesses have expressed that the new “within thirty minutes” requirement will be unrealistic particularly for smaller farms that are further away from medical facilities and cannot obtain emergency transportation “within thirty minutes.” For example, emergency services in rural settings may require more than thirty minutes travel to arrive and transport an injured worker. Advocacy has learned that it will be especially burdensome for smaller farms with limited personnel and equipment including limited or no transportation available at the time of an emergency and therefore, must rely on emergency services to transport an injured worker.

Advocacy recommends that EPA retain the current flexibility to require “prompt” transportation. An absolute time limit of thirty minutes, while it provides certainty and clarity, is counterproductive from an enforcement perspective. It has the potential of unnecessarily and unjustifiably punishing small businesses on a technicality, who may be doing their best to provide immediate access to transportation but are constrained by limited resources. EPA should reconsider the alternative option to replace “prompt” with “immediate” to provide regulatory flexibility.⁵⁵ Using “immediate” will convey the urgency of the situation and encourage agricultural employers to transport exposed workers as quickly as possible without imposing an unfair and unreasonable timeframe.

8. EPA should further expand the “immediate family” definition to accurately reflect existing ownership patterns.

The proposed rule retains the exemption for owners of agricultural establishments from providing certain exemptions to themselves and their immediate family members, including worker training.⁵⁶ EPA is, however, proposing to expand the definition of “immediate family” to better reflect the range of familial relationships that could occur.⁵⁷ Under existing regulations, “immediate family” only includes “spouse, children,

⁵² 79 Fed. Reg. 15495, 15518.

⁵³ 79 Fed. Reg. 15494.

⁵⁴ 79 Fed. Reg. 15496.

⁵⁵ See, 79 Fed. Reg. 15496.

⁵⁶ 79 Fed. Reg. 15502.

⁵⁷ 79 Fed. Reg. 15502.

stepchildren, foster children, parents, stepparents, foster parents, brothers, and sisters.”⁵⁸ The revised definition will include fathers-in-law, daughters-in-law, grandparents, grandchildren, brothers-in-law, and sisters-in-law.⁵⁹ Through conversations with small businesses, Advocacy has learned that even with the new change, the definition of “immediate family” will not be truly reflective of the existing ownership patterns. Other important relatives such as cousins, nieces and nephews should also be included as they are frequently employed by small entities.

Conclusion

Small businesses are concerned that the rule will impose unnecessary burdens on them and that alternatives exist that will reduce the economic impact of the rule on small entities while still accomplishing the agency’s objective. Advocacy urges EPA to follow the recommendations made by the SBREFA panel, and to consider providing flexibility based on the concerns of the small businesses. Advocacy looks forward to continuing to work with EPA on this important matter.

If you have any questions or need any further assistance, please contact me or Assistant Chief Counsel Tayyaba Waqar, at (202) 205-6790 or twaqar@sba.gov.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy



Tayyaba Waqar
Assistant Chief Counsel
Office of Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

⁵⁸ 40 C.F.R. §170.3.

⁵⁹ 79 Fed. Reg. 15507, 15516.