

December 8, 2015

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 Proposed Rule for the Certification of Pesticide Applicators; Docket No. EPA-HQ-OPP-2011-0183.**

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) proposed changes to the existing regulations for the certification of applicators of restricted use pesticides (RUPs). Small businesses are concerned that the rule will impose unnecessary and unjustified burdens on them and that alternatives exist that would reduce the economic impact of the rule on small entities while still accomplishing the agency's objectives.

**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.<sup>1</sup> The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),<sup>3</sup> 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,"<sup>4</sup> EPA is required by the RFA to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,<sup>5</sup> and to consider less burdensome alternatives.

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<sup>1</sup> 15 U.S.C. § 634a, *et. seq.*

<sup>2</sup> 5 U.S.C. § 601, *et. seq.*

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

<sup>4</sup> See 5 U.S.C. § 609(a), (b).

<sup>5</sup> 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

The Small Business Jobs Act of 2010<sup>6</sup> requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any 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 and 1975, EPA promulgated the Certification of Pesticide Applicators rule under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>7</sup> Based on a taskforce report from 1985, EPA proposed changes to the regulations in 1990. These changes, however, were never finalized. In 1996 a Certification and Training Assessment Group (CTAG) was established to define the national direction of the pesticide applicator certification and training program, which made several recommendations to improve the program. The proposed rule addresses some of the CTAG recommendations.

In the fall of 2008, EPA convened a SBREFA panel (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.<sup>8</sup> EPA published this proposed on August 24, 2015.<sup>9</sup>

During the development of the proposed rule and subsequent to its publication, Advocacy spoke with several small businesses and small business representatives. Advocacy also held a roundtable on October 28, 2015, at which EPA presented the proposed rule and responded to questions from small business stakeholders.

### **Summary of Proposed Agency Action**

The proposed rule would apply stricter standards to certified applicators of restricted-use pesticides (RUPs), which are not available for purchase by the general public, require special handling, and may only be applied by a certified applicator or someone working under his or her direct supervision. The proposal increases the competency standards for private applicators, commercial applicators and adds new requirements for noncertified

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(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.

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

<sup>7</sup> Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§136-136y (1996).

<sup>8</sup> 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]

<sup>9</sup> Pesticides; Certification of Pesticide Applicators, 80 Fed. Reg. 51356 (proposed August 24, 2015) (to be codified 40 C.F.R. pt. 171).

applicators working under the direct supervision of a certified applicator. The proposal requires applicators to renew their certification every three years (requiring that half of the credits be obtained within eighteen months). Finally, the proposed rule would establish a minimum age requirement of eighteen for certified applicators and for persons working under their direct supervision.

### **Advocacy Comments**

Small businesses and their representatives have expressed several concerns with EPA's proposed changes to the existing regulation of the certification of applicators using RUPs.

- EPA's proposed requirements for recertification will increase costs for small businesses and result in decreased training and education rather than the agency's goal of increased training and education.
- EPA did not follow the recommendations of the Panel with respect to reducing the minimum age requirements for private applicator family members and noncertified applicators under the supervision of private applicators
- EPA's requirement for obtaining half the required training within eighteen months of the recertification period will be difficult to manage for both the applicators and the state regulatory agencies.

To reduce the burden on small businesses, Advocacy urges EPA to follow the recommendations made by the SBREFA panel and to consider small business' recommendations to address these important concerns.

#### **I. EPA Should Follow the Recommendations of the SBREFA Panel with Respect to the Minimum Age Requirements**

The 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 the addition of categories for high-risk scenarios, the minimum age requirement for certification of all applicators, recertification requirements, and changes to the competency standards. The Panel Report also includes 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."<sup>10</sup> It is quite rare for EPA to deviate from the consensus recommendations. In

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<sup>10</sup> 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

this case, the Panel recommended that EPA consider a minimum age requirement of: eighteen for commercial applicators, eighteen for hired private applicators and sixteen for family members, eighteen for individuals applying RUPs under the supervision of a commercial applicator, and sixteen for those applying RUPs under the supervision of a private applicator.<sup>11</sup> In addition, due to concerns expressed in the SERs' comments on the cost of replacing current younger applicators, the Panel recommended including a grandfather clause to allow currently certified private and commercial applicators to retain their certifications after any minimum age requirement becomes effective.<sup>12</sup>

EPA did not follow the Panel's recommendation to provide a minimum age requirement of sixteen for family members and for noncertified applicators using RUPs under the supervision of a private applicator.<sup>13</sup> The proposed rule establishes a minimum age requirement of eighteen for all applicators including commercial, private and noncertified applicators under the direct supervision of a certified applicator.<sup>14</sup> EPA also does not allow the grandfathering of currently certified applicators to be able to retain their certification after the minimum age requirement would become effective.

*Recommendation:*

Advocacy urges EPA to promulgate a rule that is consistent with the consensus recommendations of the Panel. Accordingly, EPA should lower the minimum age to sixteen for private applicators that are family members and for noncertified applicators applying RUPs under the supervision of private applicators as recommended by the Panel. EPA should also include a grandfather clause to allow currently certified applicators to retain certification after a minimum age requirement becomes effective as recommended by the Panel. By including the flexibilities suggested in the Panel's recommendations, EPA could reduce a sizeable burden to small entities while still achieving its regulatory goals.

## **II. EPA Should Modify the Requirements for Recertification by Reducing the Number of CEUs Required and by Encouraging Training over Re-testing**

The proposed rule requires both commercial and private applicators to demonstrate continued competency to use RUPs every three years by either passing written exams for each certification or completing specific training in a continuing education program.<sup>15</sup> Under the proposal commercial applicators are required to demonstrate continued competency in the core standards and for each category they intend to maintain their certifications.<sup>16</sup> The private applicators would be required to demonstrate continued general competency and competency in each relevant application method-specific

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recommendations and the Agency's response in the NPRM" (Emphasis in original) p. 67. Available at [www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf](http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf).

<sup>11</sup> Panel Report, *supra*, p. 28.

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

<sup>13</sup> 80 Fed. Reg. at 51386-513867.

<sup>14</sup> *Id.* at 51357.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

category.<sup>17</sup> The agency is proposing to establish minimum standards for continuing education programs by establishing a minimum number of continuing education units (CEUs) required for recertification.<sup>18</sup> For private applicators, EPA is proposing a requirement of a minimum of six CEUs.<sup>19</sup> For commercial applicators, the agency is requiring a minimum of six CEUs for the core certification and six CEUs for each specific category.<sup>20</sup> EPA is also proposing to set fifty minutes of active training time as the standard for all CEUs.<sup>21</sup>

Small businesses and their representatives have several issues with EPA's proposed changes to the recertification systems for all pesticide applicators. Their concern is that EPA's proposal will result in decreased training and education rather than the agency's goal of increased training and education. Small businesses have expressed concerns that the increase in the competency standards are excessive and will be unreasonably burdensome. According to the small entities, the time required to obtain the additional certifications and the increased time required per credit will reduce the time available to perform their tasks without justified benefits.

Many small businesses have noted that the existing state requirements for CEUs are sufficient to provide the necessary training and information for a safe application of RUPs. According to small businesses and their representatives, obtaining the proposed number of CEUs will impose excessive costs in operating their businesses as a result of increased time away from the job, travel expenses to attend recertification trainings, and the class fee for the attending the CEUs. For instance, EPA did not estimate travel expenses for applicators to obtain training or take exams for certification or recertification.<sup>22</sup> In its Economic Analysis, the agency acknowledges that there will be travel expenses, but does not go further to analyze them.<sup>23</sup> These additional costs will be specifically problematic for small entities, with limited number of employees, as it will add to the disruptions and delays at work if applicators are required to be in training for a longer period of time than is currently required. Small businesses also predict that the additional costs resulting from the economic impact of the proposed requirements will have to be recovered through price increases to their customer base, which may result in loss of business.

Many small businesses view EPA's training hours for its proposed CEU requirements as arbitrary. Small businesses are concerned that due to the higher investment of time, travel and class cost in satisfying the new CEU requirements, applicators may choose to opt out of recertification classes and retest annually instead. Opting out of recertification

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<sup>17</sup> 80 Fed. Reg. 51357.

<sup>18</sup> *Id.* at 51390.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Economic Analysis of Proposed Amendments to 40 CFR Part 171: Certification of Pesticide Applicators, U.S. Environmental Protection Agency, Office of Pesticide Programs, Washington, D.C., [hereinafter Economic Analysis], available at: <http://www.regulations.gov#!documentDetail;D=EPA-HQ-OPP-2011-0183-0043>.

<sup>23</sup> *Id.* at p. 32.

classes is viewed by many to be the equivalent of opting out of receiving current and updated information. The concern is that applicators who take tests over and over will receive the same information without the necessary updates or changes. This is understood to be a poor method of trying to ensure that pesticides are applied in the safest manner possible because tests and manuals, unlike workshops and recertification programs, cannot be easily re-written or changed to provide updated information.

Re-taking an exam is not considered, by many, to be an adequate way of ensuring that applicators stay abreast of the latest knowledge, technology and skills as compared to recertification seminars. When a test is re-taken in order to re-certify, the individual is essentially demonstrating mastery of the same knowledge as when they took the test the first time. Annual or semi-annual recertification seminars, on the other hand, not only offer a review of the basic knowledge, but they also add new information on technology, pest biology, regulations, and current trends in pests and pest control.

In addition, small businesses have identified that retesting is very expensive in terms of the amount of time required to prepare for the test. Small businesses have expressed concerns that adding excessive testing burdens can be a barrier to entry and oppressive to those already in the industry. It disproportionately burdens small businesses, who are either not equipped with or have limited staff, expertise, time and resources in preparing their employees to test for recertification. These kinds of requirements favor large businesses who are better positioned to manage, afford and comply with these types of regulations.

*Recommendation:*

To address the concerns of the small businesses with the regulatory burdens of the proposed recertification requirements, EPA should consider reducing the number of CEUs required for both private and commercial applicators by consolidating or streamlining the required CEUs. Alternatively, the agency should consider accepting the states' requirements for recertification for their RUP applicators. The agency should also consider quantifying the costs for the travel expenses or should at least include a qualitative description of these costs in the Economic Analysis. In addition, EPA should eliminate the fifty minute requirement for each CEU; this requirement should be based on the subject matter of the CEU, as some might require less than or more than fifty minutes. Finally, the agency should encourage states to require recertification by training rather than testing.

**III. EPA Should Allow Applicators to Obtain the Required CEUs at Any Time Within the Recertification Period**

Under the proposed rule, EPA is requiring that at least half of the required CEUs be obtained during the eighteen month period preceding the expiration of the applicator's certification.<sup>24</sup> EPA reasons that this requirement will ensure that the applicator maintains an ongoing level of competence throughout the certification period.<sup>25</sup> Small

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<sup>24</sup>80 Fed. Reg. at 51390.

<sup>25</sup> *Id.*

businesses have expressed that this requirement is unreasonable and unnecessary arguing that it may lead to confusion for applicators. In addition, there is concern that this requirement will make it harder for both the applicators and the state agencies to keep track of and document the CEUs. In addition, small entities have also pointed out that the proposal does not include any prohibition against obtaining all CEUs within the first eighteen months; this will undermine EPA's goal of ensuring that there is an ongoing level of competence throughout the certification period.

*Recommendation:*

To address the concerns of the small businesses, the agency should allow applicators to obtain the required CEUs at any time within the recertification period.

**Conclusion**

Advocacy urges EPA to follow both the Panel and the small business' recommendations, provided above, to address the small business concerns with EPA's proposed rulemaking. 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](mailto:twaqar@sba.gov).

Sincerely,



Claudia Rayford Rodgers  
Acting Chief Counsel



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