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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2011-0037; FRL-9904-18]

Final EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country; Notice of Implementation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In the **Federal Register** of May 18, 2011, EPA issued a notice of intent to implement a Federal program to certify applicators of restricted use pesticides (RUPs) in Indian country where no other certification plan applies. The program will be administered by EPA. In that notice, EPA solicited comments from the public on EPA's Proposed Federal Plan for Certifying Applicators of Restricted Use Pesticides within Indian Country (EPA plan). EPA received comments from four commenters. EPA also issued a notice of intent to implement a similar plan in EPA Region 8, the Proposed Federal Plan for Certification of Applicators of Restricted Use Pesticides Within EPA Region 8 Indian Country (EPA Region 8 plan) in the **Federal Register** of April 20, 2011. EPA received comments from seven commenters on the EPA Region 8 plan. A complete summary of the comments and the Agency responses is available in the docket. EPA has decided to merge these plans into one EPA plan and hereby implements the final EPA plan. Applicators must hold the appropriate Federal certification under the final EPA plan to apply RUPs in Indian country where no other EPA-approved or EPA-implemented certification plan applies.

FOR FURTHER INFORMATION CONTACT: Nicole Zinn, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-7076; email address: zinn.nicole@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This notice applies to individuals and businesses who are seeking certification to apply RUPs as defined by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in Indian country¹ where no EPA-approved or EPA-implemented plan applies. This action may, however, be of interest to those involved in agriculture and anyone involved with the distribution and application of pesticides for agricultural purposes. Others involved with pesticides and/or pest control applications in a non-agricultural setting may also be affected. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2011-0037, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental

¹ Indian country is defined at 18 U.S.C. 1151. Consistent with the statutory definition of Indian country, as well as Federal case law interpreting this statutory language, EPA treats lands held by the Federal Government in trust for Indian Tribes that exist outside of formal reservations as informal reservations, and thus as Indian country.

Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>. The final EPA plan and application form, EPA Form 7100-01, to apply for Federal certification under this final EPA plan can be found in the docket and at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

II. What Action is the Agency Taking?

EPA is implementing a Federal program to certify applicators of RUPs in Indian country where no other EPA-approved or EPA-implemented plan applies. This final EPA plan describes the process by which EPA will implement a program for the certification of applicators of RUPs in Indian country based upon the certification requirements enumerated at 40 CFR part 171. The entire final EPA plan is included in the docket.

III. Background

Under FIFRA, 7 U.S.C. 136 *et seq.*, the EPA Administrator has the authority to classify all registered pesticide uses as either “restricted use” or “general use.” Under FIFRA, pesticides (or the particular use or uses of a pesticide) that may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, shall be classified for “restricted use.” 7 U.S.C. 136a(d)(1)(C). If the classification is made because of hazards to the applicator or other persons, the pesticide may only be applied by or under the direct supervision of a

certified applicator. 7 U.S.C. 136a(d)(1)(C)(i), 136j(a)(2)(F). If the classification is made because of potential unreasonable adverse effects on the environment, the pesticide may only be applied by, or under the direct supervision of, a certified applicator or subject to such other restrictions as the EPA Administrator may provide by regulation. 7 U.S.C. 136a(d)(1)(C)(ii), 136j(a)(2)(F). To be certified, an individual must be determined to be competent with respect to the use and handling of the pesticides covered by the certification. 7 U.S.C 136i(a).

It was the intent of Congress that persons desiring to use RUPs should be able to obtain certification under programs approved by EPA, as reflected in FIFRA sections 11 and 23. 7 U.S.C. 136i, 136u. The regulations addressing tribal and State development and submission of certification plans to EPA are contained at 40 CFR part 171. It is EPA's position that tribal and State plans are generally best suited to the needs of that particular Tribe or State and its citizens; however, Tribes and States are not required to develop their own plans. Where EPA has not approved a State or tribal certification plan, the Agency is authorized to implement an EPA plan for the Federal certification of applicators of RUPs pursuant to FIFRA sections 11 and 23. 7 U.S.C. 136i, 136u; 40 CFR 171.11.

Most of Indian country is not covered by an EPA-approved or EPA-implemented plan, and therefore, applicators do not have a mechanism to become certified. The current lack of approved mechanisms for use of RUPs in Indian country is a concern to EPA for reasons of equity, safety, and enforcement. EPA believes the same pest control tools that are available in State areas should also be available to growers in Indian country. Lack of access to these pesticides could put growers in Indian country at an economic

disadvantage to growers in States, who do have access to these pesticides. Without access to certification programs, applicators may not have the competence needed to safely use RUPs, nor would they be legally allowed to use them.

Federal, State, and tribal governments may impose additional, different requirements on the purchase and application of RUPs. Applicators are encouraged to research these particular requirements to determine how they may affect their ability to purchase and apply RUPs, and consider any restrictions or requirements as they decide if this EPA certification will serve their needs.

IV. Summary of the Final EPA Plan

1. *Applicability.* EPA intends to implement this final EPA plan in Indian country, as defined in 18 U.S.C. 1151, where no other EPA-approved or EPA-implemented plan applies.

2. *Provisions of this EPA plan--a. Why is EPA developing an EPA plan?* The EPA plan will allow the certification of applicators and legal use of RUPs in those parts of Indian country where there are currently no mechanisms in place for such certification and use. RUPs cannot be legally used in Indian country unless EPA has explicitly approved a mechanism of certification for such an area. EPA-approved State plans do not cover use of RUPs in Indian country. There are very few areas of Indian country for which there are approved non-Federal plans and only one area that is currently covered under a Federal plan.

b. *To whom will the EPA plan apply?* The EPA plan will only apply to persons who intend to apply RUPs in Indian country not covered by another EPA-approved or EPA-implemented plan. Tribes may continue to pursue options available under 40 CFR

171.10 for their areas of Indian country, including seeking EPA approval of tribal plans for such areas under 40 CFR 171.10(a)(2) or the utilization of a State's certification program under 40 CFR 171.10(a)(1). An option implemented under 40 CFR 171.10 would replace this final EPA plan for the relevant area of Indian country.

Applicators must hold the appropriate Federal certification under this final EPA plan to apply RUPs in Indian country where no other EPA-approved or EPA-implemented certification plan applies. During the 6-months after publication of this notice announcing this final EPA plan, EPA will allow applicators to apply RUPs under the final EPA plan in Indian country only for the categories for which they already have a valid State, tribal, or Federal certificate² if they submit a complete application to the relevant EPA Region showing proof of a valid State, tribal, or Federal certification.³ Beginning [*insert date 6 months after date of publication in the **Federal Register***], applicators who are covered under this EPA plan and have not received a written Federal certification from the relevant EPA Region are prohibited from applying RUPs in Indian country located in that EPA Region. Failure to hold the appropriate Federal certification after [*insert date 6 months after date of publication in the **Federal Register***] may result in Federal enforcement action in accordance with FIFRA section 12(a)(2)(F).

c. Certification procedures. The appropriate EPA regional office will administer this EPA plan for each covered area of Indian country. To become certified to use RUPs in Indian country, applicators must submit an application form, EPA Form 7100-01, to

² Please see section IX of the EPA plan for applicator categories recognized under the EPA plan, as there are exceptions for sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars. These exceptions will also apply during the 6-months after publication of this notice announcing the final EPA plan.

³ Although predicated in part on the applicator's existing valid certification, any use permitted under this EPA plan is allowed by and will be enforced only under Federal authority.

the EPA regional office that covers the Indian country where they wish to apply RUPs, as well as proof of the valid Federal, State, or tribal certification upon which their Federal certification will be based. The final EPA plan and form to apply for Federal certification under the final EPA plan can be found in the docket (see Unit I.B. of this notice) and on EPA's website at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

The certification on which the Federal certificate will be based must be from a State or Tribe with a contiguous boundary to the relevant area of Indian country.⁴ The EPA regional offices also have limited discretion to allow Federal certification under the final EPA plan based on a valid certification from another nearby State or Tribe that is not directly contiguous to the area of Indian country at issue. The Federal certification based on a valid Federal, State, or tribal certification, will expire when the underlying Federal, tribal, or State certificate expires, unless the certificate is suspended or revoked.

In lieu of submitting proof of a valid Federal, State, or tribal certification, private applicators also have the option of completing the online training developed by EPA. An interim option to use available State training to obtain private applicator certification in lieu of a valid Federal, State, or tribal certificate was developed and included in the plan and on the application form for private applicator certification. However, since EPA has developed online training, this option will not be used while the online training is available. Federal certification under this option is valid for 4 years from the date of issuance, unless suspended or revoked.

d. *Applicator categories.* EPA will recognize the categories authorized in the Federal, State, or tribal certification upon which the Federal certification is based, and

⁴ The area of Indian country where the applicator intends to apply must be within, or the border must be touching, the State or Tribe that issued the underlying Federal, tribal, or State certificate.

applicators will be authorized to apply RUPs in Indian country for uses covered by those categories. See Unit VI. of this notice for specific information on categories for sodium cyanide capsules used with ejector devices for livestock predator control and for sodium fluoroacetate used in livestock protection collars.

e. Implementation. EPA will administer routine maintenance activities associated with implementation of this final EPA plan (e.g., application processing, database management, recordkeeping) and will conduct inspections and take enforcement actions as appropriate.

V. Response to Comments

EPA received comments from the Tribal Pesticide Program Council (TPPC); Cherokee Nation; Kashia Band of Pomo Indians; the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS); the Colorado Department of Agriculture; the Montana Department of Agriculture; and some pesticide applicators. EPA sought comment on several topics for the proposed EPA plan and the proposed EPA Region 8 plan: Issuing Federal certification to applicators with certificates from contiguous States or Tribes, a request to include a notification provision in the EPA plan, the private applicator certification option, and a suggestion from the Tribes to include an opt-out provision in the EPA plan.

All comments on these issues, as well as additional comments received, and EPA's responses are available in the docket. EPA has also made changes to the final EPA plan based on some of the comments received. These changes are described in Unit VI. of this notice.

VI. Highlights of Changes Made in the Final EPA Plan

EPA adjusted the final EPA plan based on questions and comments received on the proposed EPA plan. Below are some noteworthy clarifications. Please refer to the Response to Comments document and the final EPA plan for details.

A. Change to Title

The title of the final EPA plan has been changed from “Federal Plan for Certification of Applicators of Restricted Use Pesticides within Indian Country” to “EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country” to align it with 40 CFR 171.11 and to differentiate it from non-EPA Federal agency plans. EPA also merged the EPA Region 8 plan with this final EPA plan since the plans were very similar in nature and goals. Indeed, the EPA Region 8 plan, which was developed first, was the basis for the national EPA plan. Further, the two plans ended up with similar expected timeframes for implementation.

B. Notification of Tribes Prior to RUP Use

The Agency received comments suggesting the inclusion of a provision in the final EPA plan that would require applicators to notify a Tribe prior to application of RUPs in their Indian country. Further, it was suggested that EPA should create an “opt-in” process for Indian Tribes that want to be notified in advance of an RUP application on their land. Tribes that wanted notification prior to RUP use would be expected to identify a contact person to whom advance notification of a pesticide application should be provided. The commenters also believed EPA should develop a form for applicators to use to notify the Tribes about proposed pesticide applications.

It was also requested that EPA make a database publicly available that lists applicators with their contact information and current certifications by State and EPA

Region. The database would provide Indian Tribes with a better sense as to the applicators with Federal certificates who might potentially apply RUPs in their Indian country.

While some commenters pointed to the notification process for soil fumigants as a precedent for EPA requiring notification of Tribes prior to the application of RUPs, the justification and authorities that supported the notification requirements for soil fumigants are not available to support applicator notification requirements under a Federal certification plan. In the case of the soil fumigants, notification is required as part of the reregistration risk mitigation decision to assure the soil fumigants meet the FIFRA registration standard. EPA generally has not made that determination for other RUPs. Under FIFRA section 11, which provides the authority for issuing Federal certification plans, rulemaking is the mechanism required for commercial applicator reporting, which would include a notification requirement. Additionally, FIFRA section 11 does not provide EPA authority to require any reporting from, or recordkeeping by, private applicators. Development of a rulemaking to require commercial applicators to notify Tribes prior to RUP application could take several years. EPA does not believe that we should delay the benefits of proceeding with the final EPA plan while rulemaking is considered to require commercial applicators to notify Tribes prior to use. Therefore, EPA will proceed with finalizing this EPA plan at this time. As the Agency gains experience implementing the final EPA plan, the Agency will re-evaluate if rulemaking to implement a tribal notification requirement is advisable or needed.

In the meantime, to assist Tribes in identifying and communicating directly with applicators certified under this final EPA plan, EPA will implement the suggestion to

make a database publicly available that lists applicators (with their location and current certifications) by State upon which the Federal certification is based. EPA expects to implement this recommendation by posting a list of federally certified applicators at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

EPA also recognizes that tribal notification requirements may exist under tribal law. Federal certifications issued by EPA under this EPA plan will explicitly inform applicators that they should take steps to determine if there are additional requirements under tribal law for RUP application, including tribal notification requirements.

C. Private Applicator Option

EPA sought comment on the proposed private applicator “no-test” certification option required by FIFRA section 11. There was a concern raised that it may be difficult for an applicator to obtain the training necessary to apply for a private applicator certification if not relying on the State certification. In addition, several commenters were concerned that the training that pesticide applicators receive through States does not specifically require applicators to demonstrate that they are competent to apply pesticides in Indian country. Also, commenters stated that EPA-approved training should include a discussion of tribal government, cultural practices, natural resources, examples of tribal regulations, information about the website identifying Tribes that want to be notified prior to a RUP application, and other pertinent tribal information.

The Agency revised the private applicator certification option. For individuals seeking certification as a private applicator under the final EPA plan, EPA will exercise its authority contained in 40 CFR 171.11(d)(1) and (e) to issue certifications if the applicator completes one of two requirements:

1. The applicator may submit documentation of a current and valid certification as a private applicator authorized to apply federally designated RUPs through a Federal plan or an EPA-approved State or tribal plan with a contiguous boundary to the relevant area of Indian country. The EPA Region also has limited discretion to allow certification under the plan based on a valid certification from another nearby State or Tribe that is not directly contiguous to the area of Indian country at issue.

2. The applicator may submit documentation of completion of the online training course provided by EPA. An interim option to use available State training to obtain private applicator certification in lieu of a valid certification was developed and included on the application form for private applicator certification. Since EPA has developed online training, this option will not be used while the online training is available.

EPA did not include in the online training all of the information relevant to Indian country requested by commenters because of the many differences among federally recognized Tribes. Rather, EPA indicates that Tribes may have more stringent requirements and refers applicators to the relevant Tribe(s) for details.

a. *Length of certification.* A private applicator certificate issued under the first option will expire at the expiration date of the underlying certificate, unless suspended or revoked. A private applicator certificate issued under the second option is valid for 4 years.

b. *Renewal/recertification.* Applicators may apply to be recertified through the options listed in the final EPA plan during the 12 months preceding the expiration of their current certificate.

D. Categories for Sodium Cyanide Capsules Used with Ejector Devices and Sodium Fluoroacetate Livestock Protection Collars

While a written comment was not submitted on either of the proposed plans, several States noted during meetings that they would be interested in becoming registrants on behalf of a Tribe, if the Tribes are interested in allowing the sodium cyanide capsules used with ejector devices or sodium fluoroacetate used in livestock protection collars to be used within their Indian country. States questioned how applications of these products will occur if Tribes do not have a pesticide program and cannot monitor the usage in their Indian country, making them ineligible to become a registrant.

States cannot serve as a registrant of these products on behalf of an Indian Tribe. Under the terms of the registrations for sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars, the registrant of these products must be able to supervise the use, and enforce against the misuse, of the product. Since the registrant needs to be able to supervise the use and enforce against the misuse of the product, it would not be appropriate for the State to act as a registrant, since States are not generally approved to administer programs in Indian country under FIFRA.

Because a registrant of one of these products must have the ability to provide a supervisory role in the application of these products and be able to inspect and enforce against any misapplication of the product (see the **Federal Register** of February 10, 1977 (42 FR 8406)), some Tribes will not have the capacity to serve as a registrant of these products. If a Tribe is not in a position to serve as the registrant but would like to allow

use of these products, that Tribe could work with APHIS, which is the only Federal agency that is currently a registrant of these products. APHIS employees, once certified under the EPA plan, can apply sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars within the relevant Indian Tribe's Indian country. EPA expects that an agreement between the Tribe and APHIS that includes application of sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars will be in effect prior to any application. If another Federal agency were to become a registrant for one or both of these products, it is likely there could be a similar arrangement between that Federal agency and a Tribe seeking applications of these products.

E. Private Applicator Categories

Several States asked if EPA would allow categories in the Federal plan for private applicators. EPA clarified that the private applicator Federal certificate will reflect any categories found in the underlying certificate used to demonstrate applicator competence. For both private and commercial certifications, EPA recognizes that underlying certificates issued pursuant to different State, tribal, and Federal plans may have different categories, and therefore the categories recognized by the EPA will not be uniform.

VII. Consultation with Tribal Governments

Given the absence of an EPA-approved certification program in areas of Indian country, EPA, consistent with its statutory authorities and the Federal government's trust responsibility to federally recognized Tribes, has worked with Tribes on a government-to-government basis to develop a certification program that will help ensure the protection of human health and the environment in Indian country. EPA consulted with

Tribes on November 29 and December 13, 2010, to help ensure development of a Federal plan that effectively meets their needs and those of RUP applicators in Indian country.

EPA Region 8 also held three formal consultations with the Tribes in EPA Region 8. In addition to the consultations dedicated specifically to this EPA plan, EPA has also worked closely with the TPPC while developing this EPA plan.

EPA developed the Federal plan in consultation with Tribes consistent with, among other things, the following policies, orders, and guidance: “EPA Policy for the Administration of Environmental Programs on Indian Reservations,” November 8, 1984; “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy,” January 17, 2001; Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” November 6, 2000, which was reaffirmed by Presidential memorandum, “Tribal Consultation,” November 5, 2009; and the “EPA Policy on Consultation and Coordination with Indian Tribes,” May 4, 2011.

VIII. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA) (44 U.S.C.3501 *et seq.*), the information collection activities described in this notice and the revised Information Collection Request (ICR), OMB Control No. 2070-0029, were approved by the Office of Management and Budget. As part of this process, EPA proposed to implement a revised form designed specifically for pesticide applicators who wish to be certified in Indian country. EPA estimates the paperwork burden associated with completing this form to be 10 minutes per response. Under PRA, “burden” means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. For this collection it includes the time needed to

review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. The information collection activities and the form are included in a separate docket. See <http://www.regulations.gov>, docket ID number EPA-HQ-OPP-2010-0723.

List of Subjects

Environmental protection, Business and industry, Education, Indians-lands, Indians-tribal government, Pesticides and pests.

Dated: January 31, 2014.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

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