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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 170

[EPA-HQ-OPP-2017-0543; FRL-9995-47]

RIN 2070-AK49

Pesticides; Agricultural Worker Protection Standard; Revision of the Application

Exclusion Zone Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing changes to the Agricultural Worker Protection Standard (WPS) to simplify the application exclusion zone (AEZ) requirements. The proposed changes described in this document are the only changes EPA is currently planning to make to the WPS provisions that are now in effect.

DATES: Comments must be received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2017-0543, by one of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

• *Hand Delivery*: To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <https://www.epa.gov/dockets/where-send-comments-epa-dockets>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Jackie Mosby, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 347-0224; email address: *OPP_NPRM_AgWorkerProtection@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this Action Apply to Me?

You may be potentially affected by this action if you work in or employ persons working in crop production agriculture where pesticides are applied. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Agricultural Establishments (NAICS code 111000).
- Nursery and Tree Production (NAICS code 111421).
- Timber Tract Operations (NAICS code 113110).
- Forest Nurseries and Gathering of Forest Products (NAICS code 113210).
- Farm Workers (NAICS codes 11511, 115112, and 115114).
- Pesticide Handling on Farms (NAICS code 115112).

- Farm Labor Contractors and Crew Leaders (NAICS code 115115).
- Pesticide Handling in Forestry (NAICS code 115310).
- Pesticide Manufacturers (NAICS code 325320).
- Farm Worker Support Organizations (NAICS codes 813311, 813312, and 813319).
- Farm Worker Labor Organizations (NAICS code 813930).
- Crop Advisors (NAICS codes 115112, 541690, 541712).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Action is the Agency Taking?

EPA is proposing to revise one requirement of the WPS (40 CFR part 170), adopted in 2015 (80 FR 67496, November 2, 2015) (FRL-9931-81). Information supporting the 2015 final rule, including the proposed rule, public comments and EPA's responses thereto, is available at <https://www.regulations.gov> under docket number EPA-HQ-OPP-2011-0184. The Agency is proposing changes to the regulation and soliciting additional information and public comment to inform its proposed revision of the rule's Application Exclusion Zone (AEZ) requirements. EPA is proposing to clarify and simplify the AEZ requirements based in part on input received as part of EPA's outreach efforts with state lead agencies (SLAs) and various stakeholders after the 2015 rule and through the Regulatory Reform Agenda process.

C. Why is the Agency taking this action?

As further described in Unit II.B., members of the agricultural community, including the US Department of Agriculture (USDA), State pesticide regulatory agencies and organizations, and several agricultural interest groups have expressed concerns with the AEZ requirements in the 2015 WPS rule. EPA began hearing general concerns about rule implementation and more

specific concerns about the rule's AEZ requirements from some State pesticide regulatory agencies responsible for WPS and pesticide enforcement (i.e., SLAs) during the Agency's extensive outreach and training efforts for those agencies after promulgation of the 2015 WPS rule. Comments about the AEZ included concerns about the complexity and enforceability. Similar concerns were expressed through the Regulatory Reform Agenda outreach process and are found in docket number EPA-HQ-OA-2017-0190 at <https://www.regulations.gov>.

EPA has also solicited comments on the AEZ requirements from the Pesticide Program Dialogue Committee (PPDC). The PPDC is a federal advisory committee that is broadly representative of EPA's stakeholders with members from environmental and public interest groups, pesticide manufacturers, trade associations, commodity groups, public health and academic institutions, federal and state agencies, and the general public. The PPDC meets biannually with the EPA's Office of Pesticide Programs to discuss regulatory, policy, and program implementation issues. PPDC members discussed the WPS requirements for the application exclusion zone in public meetings with EPA on November 2, 2017 and expressed both support and some concerns with the AEZ requirements of the WPS rule at the May 4, 2017 meeting. The transcripts for PPDC meetings can be found at <https://www.epa.gov/pesticide-advisory-committees-and-regulatory-partners/pesticide-program-dialogue-committee-ppdc>.

Clarifying and simplifying the WPS AEZ requirements was one of the most repeated requests from SLAs. These requests, together with comments received through the Regulatory Reform Agenda process and input from the PPDC, prompted EPA's decision to develop this proposed rule.

D. What is the Agency's Authority for taking this Action?

This action is issued under the authority of the Federal Insecticide, Fungicide, and

Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, particularly sections 136a(d), 136i, and 136w. Additionally, in accordance with the Pesticide Registration Improvement Extension Act of 2018 (Pub. L. 116-8), EPA is only proposing revisions to the AEZ requirements in the WPS.

E. What are the Estimated Incremental Impacts of this Action?

EPA has evaluated the potential incremental economic impacts and determined that these proposed changes will reduce existing burden. Cost savings from the changes are largely in terms of reducing management complexity both on and off establishment. However, EPA has not quantified the anticipated cost savings. EPA remains committed to ensuring the protection of workers and persons in areas where pesticide applications are taking place. The AEZ and no contact provisions aim to ensure such protections. EPA also has a strong interest in promulgating regulations that are enforceable, clear, and effective. See Units II.C. through II.F.

F. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit confidential business information (CBI) to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket.

Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

II. Proposed Changes to the WPS

A. Background and Existing Requirements

Under the WPS established in 1992 (57 FR 38101; August 21, 1992) (FRL-3374-6), the pesticide handler's employer and the pesticide handler are required to ensure that no pesticide is applied so as to 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. These requirements prohibit application in a way that contacts agricultural workers or other persons both on and off the agricultural establishment where the pesticide is being applied.

The 2015 WPS rule added requirements to reinforce existing requirements and enhance compliance with safe application practices to protect agricultural workers and bystanders from pesticide exposure through drift. The 2015 WPS rule established application exclusion zone requirements (AEZ) for outdoor production, defined as the area extending horizontally around application equipment from which persons generally must be excluded during pesticide applications. The AEZ moves with the application equipment. For aerial, airblast, and ground applications with fine or very fine droplet size, as well as fumigations, mists, and foggers, the area encompasses 100 feet from the application equipment in all directions. For ground applications with medium or larger droplet size and a spray height of more than 12 inches from the ground, the area encompasses 25 feet from the application equipment in all directions. For all other applications, there is no AEZ.

The 1992 WPS prohibited agricultural employers from allowing or directing any agricultural worker or other person other than a trained and equipped pesticide handler involved in the application to enter or remain in the treated area until after the pesticide application is complete. The 2015 WPS further prohibits the employer from allowing anyone in the part of the

AEZ (which can extend beyond the treated area) that is within the boundaries of the establishment. For example, employers and applicators have to ensure that workers in adjacent fields or buildings within their establishment move out of an AEZ as the pesticide application equipment passes; workers could return once the equipment has moved on and the Restricted Entry Interval is no longer in effect, if applicable. The 2015 WPS also requires a handler to “immediately suspend a pesticide application” if anyone other than a trained and equipped handler is within the AEZ, including any part of the AEZ beyond the boundaries of the agricultural establishment.

These restrictions were intended to reduce incidents, or the probability of incidents, in which people in areas adjacent to pesticide applications are affected by drift. The purpose of the AEZ was to reinforce the prohibition against applying pesticides in a manner that results in contact to others by establishing a well-defined area from which persons generally must be excluded during applications.

B. Stakeholder Engagement

EPA finalized revisions to the WPS in 2015 (80 FR 67496, November 2, 2015). During the Agency’s extensive outreach and training efforts for SLAs after promulgation of the 2015 rule, some SLAs raised concerns about the AEZ requirements. Comments about the AEZ included concerns about its complexity and enforceability.

In accordance with Executive Order 13777, *Enforcing the Regulatory Reform Agenda* (82 FR 12285, March 1, 2017), EPA solicited comments in the spring of 2017 on regulations that may be appropriate for repeal, replacement or modification as part of the Agency’s Regulatory Reform Agenda efforts. EPA encouraged entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental

organizations, and trade associations, to provide input and other assistance, as permitted by law. EPA received comments from stakeholders on the WPS rule as part of the public's response to Executive Order 13777.

These revisions are also in the spirit of Executive Order 13790, *Promoting Agriculture and Rural Prosperity in America* (82 FR 20237, April 25, 2017), which was designed to help ensure that regulatory burdens do not unnecessarily encumber agricultural production or harm rural communities. The Executive Order required USDA to assemble an interagency taskforce, including EPA, to identify legislative, regulatory, and policy changes to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life.

Information pertaining specifically to EPA's evaluation of existing regulations under Executive Order 13777, including the comments received, can be found at <https://www.regulations.gov> under docket number EPA-HQ-OA-2017-0190. Approximately 25 commenters provided input specific to the 2015 WPS AEZ requirements. Commenters included USDA, State pesticide regulatory agencies, State organizations, an organization representing Tribal pesticide regulators, a local government advisory committee, an agricultural coalition, farm bureau federations, growers, grower organizations, farmworker advocacy organizations, a public health association, a retailer organization and private individuals (Ref. 1).

Commenters discussed the need for changes to several WPS requirements, including the AEZ. Comments on the AEZ from organizations representing state regulatory agencies and agricultural interests raised concerns about the ability of states to enforce the requirement, expressed a need for clarity about how the requirement was intended to work, described problems with worker housing near treated areas, and the perception of increased burden on the

regulated community. EPA is proposing revisions to these requirements in light of the comments received from agricultural interests and State pesticide regulatory officials.

In addition to comments received through the Regulatory Reform Agenda process, EPA solicited feedback on the WPS and AEZ requirements from the Pesticide Program Dialogue Committee (PPDC). In May 2017, the PPDC discussed the implementation of the WPS (<https://www.epa.gov/pesticide-advisory-committees-and-regulatory-partners/pesticide-program-dialogue-committee-meeting-4>). On November 2, 2017, PPDC members discussed the WPS requirements for the application exclusion zone in a public meeting with EPA. (<https://www.epa.gov/sites/production/files/2018-01/documents/november-2-2017-ppdc-meeting-transcript.pdf>).

Requests from SLAs to clarify and simplify WPS AEZ requirements, together with comments received through the Regulatory Reform Agenda process and input from the PPDC, prompted EPA's decision to develop this proposed rule.

C. Summary of Proposed Amendments

EPA is proposing to amend the AEZ requirements in the 2015 WPS rule to limit the AEZ to the boundaries of the agricultural establishment. EPA is also proposing to revise the provisions related to handlers suspending and resuming applications, and the presence of persons on the agricultural establishment during application who are not under the control of the owner or agricultural employer. EPA is proposing to simplify the criteria for determining the AEZ distances for outdoor applications based on application method. EPA is also proposing to amend the AEZ requirements for owners of agricultural establishments and their immediate family members by expanding the exemption at 40 CFR 170.601(a) to include the AEZ requirements at 40 CFR 170.405(a). EPA is not proposing any changes to the existing "do not contact" provision

in the WPS that prohibits a handler/applicator and the handler employer from applying a pesticide in such a way that it contacts workers or other persons directly or through drift (other than appropriately trained and PPE equipped handlers involved in the application).

D. Revisions to address issues raised about the AEZ extending beyond the boundary of the establishment.

1. *Proposed Changes.* EPA is proposing several changes to the AEZ, which are intended to work together to address concerns about the AEZ and improve the understanding and implementation of the AEZ requirements. The different AEZ proposals are discussed in Unit II.E. through Unit II.G.

EPA is proposing to revise the AEZ provision at 170.505(b) that requires handlers to “suspend the application” if a worker or other person is in the AEZ, which as currently described can extend beyond the boundaries of the agricultural establishment. The proposal would limit the AEZ to within the boundaries of the agricultural establishment. This change would bring the pesticide handlers’ duty to suspend applications in 170.505(b) in line with the agricultural employers’ duty to exclude persons from the AEZ in 170.405(a)(2) so the two requirements are more consistent.

The AEZ is an area surrounding pesticide application equipment that exists only during outdoor pesticide applications. The 2015 WPS added the AEZ requirements to supplement the “do not contact” requirements of the label and the old WPS to reduce the number of exposure incidents during agricultural applications. The existing requirement at 170.505(b) requires pesticide handlers (applicators) making a pesticide application to temporarily suspend the application if any worker or other person (besides trained/equipped handlers assisting in the application) is in the AEZ. The handler’s obligation to suspend applications applies if a worker

or other person is in any portion of the AEZ – on or off the establishment. EPA is proposing to revise 170.505(b) so the handler/applicator would not be responsible for implementing AEZ requirements off the establishment, where he/she lacks control over persons in the AEZ.

However, EPA is not proposing any changes to the existing provision in the 2015 WPS that prohibits a handler/applicator and the handler employer from applying a pesticide in such a way that it contacts workers or other persons directly or through drift (other than appropriately trained and PPE equipped handlers involved in the application). This provision will remain the key mechanism for ensuring the protections of individuals off the establishment from the potential exposures to pesticides from nearby agricultural pesticide applications.

After reviewing public input on the AEZ issues and concerns, EPA has concluded that the “do not contact” provision provides the more appropriate and enforceable regulatory mechanism to protect workers on nearby establishments and other people/bystanders that may be off the agricultural establishment but in close proximity to agricultural pesticide applications. EPA has determined that the current WPS provision extending the AEZ boundary beyond the agricultural establishment is confusing and unnecessary. EPA concludes the costs of including off the establishment areas in the AEZ do not outweigh the minimal benefits of including the additional area in the AEZ, so EPA is proposing to revise the WPS rule to limit the AEZ to the boundaries of the establishment.

These proposed revisions are intended to address the AEZ concerns noted in the Regulatory Reform Agenda docket (Ref 1). EPA received approximately 25 individual comments on the AEZ requirements in the Regulatory Reform Agenda docket from the U.S. Department of Agriculture, States, State organizations, a Tribal organization, farm bureau federations, grower associations, retailer organizations, an applicator organization, an

agricultural coalition, farmworker advocate organizations, public health organizations and individuals. Some of these concerns were also expressed by State regulatory agencies during training and outreach sessions that EPA conducted in 2016 and 2017. Most comments about the AEZ in the Regulatory Reform Agenda docket expressed concerns about the handler requirement to suspend applications for situations when the AEZ extends beyond the boundaries of the agricultural establishment and people are in the AEZ. A few commenters supported revising the AEZ requirements while other commenters urged EPA to completely eliminate the AEZ requirements in the 2015 WPS rule (Ref. 1). Some points made by the commenters included:

- The concept of a regulatory requirement to keep individuals out of varying widths of areas surrounding treated areas seems difficult for an agricultural employer to implement and next to impossible for a State trying to ensure compliance. The logic behind the requirement is understandable and supportable but making this a regulatory requirement with an expectation of compliance monitoring and enforcement is not.

- The AEZ concept was presented in the 2014 WPS proposal as an “entry restricted area.” In the final 2015 WPS rule (80 FR 67495), EPA replaced the term “entry restricted area” with “application exclusion zone” to make it more distinct from the requirements regarding Restricted Entry Interval. However, this change was not clear to the commenters. The commenters suggested that the concept of the AEZ was not proposed; and neither was the idea of the AEZ extending beyond the boundary of the establishment. They suggested that this approach was not well thought out, was not open for public comment, and was not in the spirit of co-regulating with States and Tribes.

- Burdens and economic impacts upon agricultural operations and employers were not considered or addressed. One commenter likened this provision of the rule to an unlawful taking

of private property.

- The AEZ requirement to cease application if a passing vehicle is within 25 or 100 feet of the property could be problematic.

- EPA guidance addressing the implementation concerns does not carry the weight of regulation and is not sufficiently clear for growers and the state regulatory agencies to implement the requirement.

The main revision being proposed is to revise the handler's responsibility to suspend applications in 170.505(b)(1). In addition, EPA is proposing to revise the handler training content in 170.501(c)(3)(xi) to reflect that proposed change.

2. Anticipated Effects. The primary benefit of changing the AEZ requirements is a reduction in the complexity of applying a pesticide. The monetized benefits are difficult to quantify due to the variability of off establishment activities that could be within the AEZ (Ref. 2).

3. Options Considered but Not Proposed. The Agency considered keeping the WPS AEZ provision at 170.505(b) that requires handlers to "suspend the application" as it is in the current rule but adding provisions to the rule to better clarify the scope of the AEZ, as well as issuing additional outreach material, and guidance if necessary, about the handler AEZ requirements. However, such an approach would not fully address all concerns with the applicability of the AEZ off the establishment and would require more resources from EPA without necessarily providing any additional benefits or protection. EPA issued AEZ guidance in April 2016 (Ref. 3) which was revised in February 2018 (Ref. 4) in an attempt to address concerns raised by stakeholders, but this guidance has not fully resolved all concerns. The intent of the AEZ guidance was to provide further explanation of the AEZ requirements in the WPS

and to confirm that the AEZ requirements supplement the “do not contact” requirement by defining specific areas from which people generally must be excluded during a pesticide application. However, an exception of the AEZ beyond the boundary of the establishment where handlers do not have the ability to control the movement of people off the establishment or within easements (e.g., utility workers), which commenters argued can effectively suspend an application activity, can only be accomplished through regulation.

EPA also considered the option of making no changes to the AEZ provision at 170.505(b). However, that option would not address concerns with the AEZ or the concerns from State and Tribal pesticide regulators with compliance and enforcement issues related to the AEZ applying off the establishment. Some State and Tribal pesticide regulators have stated that the AEZ requirements applicable to situations where people are in the AEZ but off the establishment are unenforceable because the AEZ provisions do not apply if the applicator does not see the persons off the establishment, and it would be difficult if not impossible to prove the applicator saw persons in the AEZ. State and Tribal pesticide regulators state that it is easier for them to prove that a person has been contacted by pesticides from an application and take action to enforce the do not contact provision. This option would still leave EPA needing to address existing AEZ issues through additional guidance and to address future issues needing clarification through guidance related to the “off establishment” provisions. Therefore, EPA has elected to propose the revision to 170.505(b) as described above.

E. Revisions to address issues raised about when handlers may resume an application that has been suspended.

1. *Proposed Changes.* EPA is proposing to revise the AEZ provision at 170.505(b) to add a paragraph clarifying conditions under which a handler may resume the application after having

to suspend an application if people are in the AEZ on the agricultural establishment. The proposed revision of 170.505(b) would also clarify how the AEZ applies to persons not employed by the agricultural establishment who may be working on or in easements (e.g., gas, mineral, utility, wind/solar energy) that may be within the boundaries of the establishment. These people are generally not within the control of the owner or agricultural employer so their presence could disrupt and prevent pesticide applications. EPA is not proposing any changes to the existing “do not contact” provision in the WPS.

The 2015 WPS rule was silent on if and when a handler could resume an application after it has been suspended because workers or other people were present in the AEZ. EPA never envisioned that the AEZ requirement would lead to an application being suspended permanently, and the proposed change makes EPA’s expectations explicit. EPA is proposing to revise the WPS to clarify that handlers may resume a suspended application when no workers or other persons (other than appropriately trained and equipped handlers involved in the application) remain in an AEZ within the boundaries of the establishment.

EPA also is proposing language to allow applications to be made or resume while persons not employed by the establishment are present on easements that may exist within the boundaries of agricultural establishments because, depending on the terms of the easement, the owner or agricultural employer may be unable to control the movement of people (e.g., utility workers) within an easement. The existing AEZ requirement at 170.405(a) precludes an application from being made on an agricultural establishment while workers or other people are in the AEZ within the boundaries of the establishment. In developing the original AEZ requirement, EPA presumed that all persons on an agricultural establishment would be subject to the control of the owner or agricultural employer, not recognizing the prevalence of easements which deprive the

landowner of the ability, in whole or in part, to control the movements of persons within the easement. The proposed revisions at 170.505(b) would address this situation by allowing handlers to make or resume an application despite the presence within the AEZ of persons not employed by the establishment in an area subject to an easement that would otherwise prevent the agricultural employer from temporarily excluding those persons. These individuals will still be protected by the “do not contact” provision, so even though they could remain in an easement in the AEZ, the handler and the handler employer would be prohibited from allowing the pesticide application to result in any contact to these persons. The proposed revision to the regulatory text would be codified at 170.505(b).

These proposed revisions are intended to address the AEZ concerns raised by stakeholders during WPS implementation efforts and those noted above from the Regulatory Reform Agenda docket (Ref 1).

2. Anticipated Effects. The primary benefit of clarifying the AEZ requirements about resuming a suspended application is providing certainty about when and how a pesticide application can occur. EPA does not anticipate the proposed revision about when a handler can resume an application when people are in the AEZ on the establishment to increase costs to handlers or employers or to change the intended protections to workers or other persons because this revision simply clarifies how the requirement was intended to be implemented in the 2015 WPS. The proposal to address people not employed by the establishment who are in an area subject to an easement (e.g., utility workers) provides regulatory relief to handlers and agricultural employers and may prevent pesticide applications from being disrupted. However, EPA does not anticipate a change in the protections provided by WPS to the people in the easements because the handler must still apply the pesticide in a way that does not contact them,

either directly or through drift.

3. Options Considered but Not Proposed. The Agency considered the option of making no changes to the AEZ provision at 170.505(b). However, that option would not address concerns about when a suspended application may be resumed and could prevent pesticide applications from being made when people are in areas subject to an easement. Therefore, EPA has elected to propose the revision to 170.505(b) as described above.

F. Revisions to clarify and simplify the AEZ requirements for outdoor production.

1. Proposed Changes. EPA is proposing to revise the criteria and factors for determining AEZ distances at 170.405(a). EPA is proposing the following revisions to simplify the AEZ requirements while maintaining the protections intended under the 2015 WPS:

- Eliminating the language and criteria pertaining to spray quality and droplet size and volume median diameter and using only “sprayed applications” as the criterion for determining the appropriate AEZ distance for outdoor production.
- Limiting the criteria for 100-foot AEZ distances for outdoor production to pesticide applications made by any of the following methods: 1) aerially; 2) by air blast or air-propelled applications; or 3) as a fumigant, smoke, mist, or fog.
- Establishing a 25-foot AEZ for all sprayed applications made from a height greater than 12 inches from the soil surface or planting medium, and no longer differentiating between sprayed applications based on the spray quality or other factors for setting different AEZ distances for outdoor production.

During repeated outreach and training events during WPS implementation efforts, it became clear to EPA that there was a great deal of confusion and misunderstanding regarding the AEZ requirements and the criteria for determining the appropriate AEZ distance. This was also

reflected in comments to EPA from some members of the PPDC and submitted through the Regulatory Reform Agenda process. Some of the specific points made by the commenters on the complexity of the AEZ distance criteria included the following:

- It would be very difficult to enforce the AEZ requirements in many circumstances because it would be challenging to determine what the AEZ should have been during an application in many situations unless it is simplified or there were additional recordkeeping requirements (not recommended).

- The current rule refers to factors and criteria for determining the AEZ (i.e., droplet size and “volume median diameters”) that are no longer appropriate based on new information from the American Society of Agricultural and Biological Engineers (ASABE). In July 2018, ASABE revised the standards regarding the criteria for the droplet size classification system (Ref. 5). With this proposed rule, EPA seeks to make it easier for the regulated community to comply with the requirement while still maintaining protections for bystanders and other persons. The current rule and criteria for determining the AEZ are no longer appropriate based on information from ASABE. The AEZ distances are currently based on factors that make it difficult for some applicators to determine their required AEZ. This has resulted in confusion and difficulty in complying with the AEZ requirement.

- The AEZ distances are currently based on factors that make it difficult for some applicators to determine their required AEZ, making it difficult to comply with the requirement. The complexity has resulted in many calling for the elimination of the AEZ altogether.

- Although there is a good rationale and basis for the AEZ requirement, it needs to be simplified to make it more practical, understandable, and easier to implement.

EPA acknowledges that some pesticide labels will have restrictions for applications that

are different than the existing or proposed AEZs. For example, the restrictions on soil fumigant labels are more restrictive than the AEZ of 100 feet. In situations like this, pesticide users must follow the product-specific instructions on the labeling. As stated in 170.303(c) and 170.317(a), when 40 CFR Part 170 is referenced on a pesticide label, pesticide users must comply with all the requirements in 40 CFR Part 170, except those that are inconsistent with product-specific instructions on the pesticide product labeling.

After reviewing public input on the AEZ issues and concerns, EPA concludes these proposed revisions will maintain essentially the same level of protection as provided by the AEZ provisions in the current rule, while addressing the concerns raised about the complexity of the AEZ requirements and criteria. EPA expects that this proposal would address the major concerns of stakeholders (when combined with other options from issues discussed above) and could increase compliance by making the AEZ requirements easier to understand and implement. The proposed revision to the regulatory text would be codified at 170.405(a).

Some of these proposed revisions are intended to address the AEZ concerns noted in the Regulatory Reform Agenda docket. Commenters raised concerns related to the general and/or overall complexity of the AEZ requirements in 170.405(a) (i.e., that establish the criteria and factors for determining AEZ distances) and the difficulty this creates in being able to comply with these requirements and enforce them.

2. Anticipated Effects. In 2015, EPA estimated that the cost to the agricultural employer for implementing an AEZ around application equipment would be negligible. These proposed revisions are simplifying the existing provisions and not adding any new requirements or burden. Therefore, the proposed changes would not result in any added costs for the agricultural employer based on EPA's cost estimate of the 2015 WPS rule.

EPA concludes these proposed revisions will maintain essentially the same level of protection as provided by the AEZ provisions in the current rule because they maintain the same general distances. These changes could increase compliance by making the AEZ requirements easier to understand and implement. Also, the requirement for the handler (applicator) to apply in a manner that does not contact workers or other people continues to apply.

3. Options Considered but Not Proposed. The Agency considered making no changes to the AEZ provision at 170.405(a) or issuing guidance to clarify and potentially simplify these AEZ requirements for outdoor production. One member of the PPDC expressed concern that the size of the AEZ was already minimal for aerial, air-blast, fumigation, smoke, mist, and fog applications, and stated that the existing AEZ should be upheld so that workers and their families do not lose any level of protection. However, making no changes would not address concerns from State and Tribal pesticide regulators related to the complexity of the AEZ requirements and the confusion and consternation in the regulated community caused by that complexity. Making no changes to the AEZ provisions would not address concerns raised about WPS compliance and would require more extensive training and outreach, without added benefits or protection. EPA requests comments and supporting data to inform EPA's proposed changes to the AEZ requirements, on other options considered and any other suggested changes that could simplify the regulatory requirements around the AEZ, help SLAs improve their compliance monitoring and enforcement efforts, and maintain appropriate protections for workers, handlers, and other persons during applications.

EPA issued interpretive guidance on February 15, 2018 addressing the AEZ (Ref. 4) that explains what the AEZ is, describes the responsibilities of agricultural employers and pesticide handlers for the AEZ, identifies the actions that should be taken by the pesticide applicator when

someone enters the AEZ both when on and when off the establishment, explains the circumstances under which a pesticide applicator may resume a pesticide application after suspending application as a result of a person entering the AEZ, and provides instruction on how to determine the size of the AEZ. While helpful, the EPA guidance has not fully resolved all concerns, does not carry the weight and authority of a codified federal regulation, and may not provide the necessary clarity to assist state regulatory agencies with compliance activities for all AEZ issues. Therefore, EPA has elected to propose the revision to 170.405(a) as described above.

G. Proposed revisions to expand the exemption for owners of agricultural establishments and their immediate families to exempt them from the requirements of 170.405(a)

1. Proposed Changes. EPA is proposing to amend the AEZ requirement for owners of agricultural establishments and their immediate families by expanding the exemption at 170.601 to include entry restrictions during outdoor production pesticide applications (170.405(a)), to relieve burdens on family owned agricultural establishments during pesticide applications.

EPA is proposing this revision to address issues that arose during implementation of the 2015 revisions resulting from the unforeseen impacts of the AEZ requirements in certain situations. Stakeholders raised concerns related to the AEZ requirement in 170.405(a) (i.e., that employers must not allow workers/people to remain in the AEZ on the establishment other than properly trained and equipped handlers involved in the application) applying to workers or other persons that are in buildings, housing, or shelters on the establishment. When workers or other people are in closed buildings, housing, or shelters that are within the boundaries of the establishment, the employer cannot legally apply the pesticide if those people are within the boundary area of the AEZ – it is a violation of the WPS. There is no choice under the current

rule but to remove them from the AEZ before the application can take place, regardless of whether the buildings are closed or the handler can ensure the pesticide will not contact the people. This raises specific concerns for owners of agricultural establishments and their immediate families.

In the case of owners of agricultural establishments and their immediate families, family members cannot stay in their own home during pesticide applications if the home is within the AEZ. Even though the owner/applicator may be taking all the appropriate steps to ensure he or she will not contact other family members in their home during applications, it would still be a violation for them to stay in their home within the AEZ during applications if this exemption is not expanded. Although EPA acknowledges that there is an exposure risk for owners and immediate family members present within the AEZ during pesticide applications, EPA anticipates that family members will take appropriate steps to protect other family members to ensure they will not be contacted during pesticide applications, and that the AEZ requirement therefore subjects owners of agricultural establishments and their immediate families to unnecessary burdens. Accordingly, EPA proposes to revise 170.601 so that owners and applicators would be exempt from the provisions of 170.405(a) in regard to members of their immediate families who are inside closed buildings, housing, or shelters on the establishment. This should not impact WPS protections for workers and handlers because owners would still have to observe AEZ requirements for non-family member employees on the establishment. Because the proposed exemption is limited to 170.405(a), family members will still be subject to all other AEZ requirements.

After reviewing public input on the AEZ issues and concerns, EPA concludes this proposed revision will maintain essentially the same AEZ protections provided in the current

rule for owners and immediate family members because of their interest in protecting each other. The proposed revision to the regulatory text would be codified at 170.601(a).

2. *Anticipated Effects.* This proposed revision is considered regulatory relief and should decrease costs and burden associated with the rule while maintaining essentially the same benefits by exempting owners of agricultural establishments and their immediate families from some regulatory requirements. The benefits of this change are not necessarily monetary. However, some owners of agricultural establishments and their immediate families may see more tangible benefits if they are able to avoid costs of moving families from housing or the costs of new equipment to change application methods.

3. *Options Considered but Not Proposed.* EPA considered addressing the AEZ issues by developing an exception to the AEZ requirement that would identify appropriate conditions for allowing people to remain in a building or structure in the AEZ. EPA also considered the option of making no changes to the owner exemption at 170.601(a). However, the Agency decided that it would be complicated to develop a national regulatory approach in the WPS that would address the many variables across the country where people might be in a building or structure in the AEZ on the agricultural establishment. Making no changes would not substantively address concerns identified by stakeholders (Ref.1). Therefore, EPA has elected to propose the revision to 170.601(a) as described above.

III. Request for Comment

EPA requests comments and supporting data to inform EPA's proposed changes to the AEZ requirements, on other options considered and any other suggested changes that could simplify the regulatory requirements around the AEZ while maintaining appropriate protections for workers, handlers, and other persons during applications. To ensure that EPA is able to give

your comments the fullest consideration, please provide the rationale and data or information that support your position.

IV. Severability

The Agency intends that the provisions of this rule be severable. In the event that any individual provision or part of this rule is invalidated, the Agency intends that this would not render the entire rule invalid, and that any individual provisions that can continue to operate will be left in place.

V. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. *Reference List of Public Comments Regarding the Worker Protection Standard Submitted to Docket EPA-HQ-OA-2017-0190*.

2. EPA. *Cost Analysis for Revisions to the Application Exclusion Zone in the Worker Protection Standard*, 2019.

3. EPA. WPS Guidance on the Application Exclusion Zone. *Q&A Fact Sheet on the Worker Protection Standard (WPS) Application Exclusion Zone (AEZ) Requirements*. April 14, 2016.

4. EPA. *Worker Protection Standard Application Exclusion Zone Requirements: Updated Questions and Answers*. Available at <https://www.epa.gov/sites/production/files/2018->

02/documents/aez-qa-fact-sheet-final.pdf. February 15, 2018.

5. American National Standards Institute (ANSI)/American Society of Agricultural Engineers (ASAE). *Spray Nozzle Classification by Droplet Spectra*. ANSI/ASAE S572.2. July 2018.

VI. FIFRA Review Requirements

Under FIFRA section 25(a), EPA has submitted a draft of the proposed rule to the Secretary of the Department of Agriculture, the FIFRA Scientific Advisory Panel (SAP), and the appropriate Congressional Committees. USDA completed review of the draft proposed rule during the interagency review mentioned in Unit VII.A., and the SAP waived its review.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review; and, Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket. EPA prepared a cost analysis associated with this action, which is available in the docket (Ref. 2).

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is expected to be a deregulatory action as specified in Executive Order 13771 (82 FR 9339, February 3, 2017). The EPA cost analysis associated with this action is available in the docket (Ref. 2).

C. Paperwork Reduction Act (PRA)

This action does not impose any new or modify information collection activities under the PRA, 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection activities contained in the existing regulations under OMB control number 2070-0190 (EPA ICR No. 2491.02). This proposal does not impose an information collection burden because the application exclusion zone requirements are not associated with any of the existing burdens in the approved information collection request.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under RFA, 5 U.S.C. 601 *et seq.* In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves burden or has no net burden on the small entities subject to the rule. These proposed changes would reduce the impacts on all small entities subject to the rule, so there are no significant impacts to any small entities. We have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The proposed rule requirements would primarily affect agricultural employers and commercial pesticide handler employers. This action is also expected to be a burden-reducing action and does not result in net costs exceeding \$100 million. EPA does not estimate the cost savings of the burden reduction in this proposed rule. However, removing the requirements should reduce the

complexity of arranging and conducting a pesticide application. If anything, these corrections should improve understanding of the requirements, which would facilitate compliance. The cost analysis associated with this action is available in the docket (Ref. 2).

F. Executive Order 13132: Federalism

This action does not have “federalism implications” as that term is defined in Executive Order 13132 (64 FR 43255, August 10, 1999). It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The proposed rule would change the requirements around AEZs. There are no costs to Tribes associated with the proposed changes because the WPS is implemented through the pesticide label, so changes to the regulation do not impose any new obligations on the part of Tribes. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. This rulemaking will not result in increased risk to children. The minimum age requirements in WPS will ensure that children are not allowed to handle pesticides or engage in early-entry work, helping to prevent children’s exposure to pesticides as handlers or early-entry workers.

I. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, this rule is not likely to have any adverse energy effects because it does not require any action related to the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards that would require Agency consideration under NTTAA section 12(d), 15 U.S.C. 272.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629; February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.

List of Subjects in 40 CFR Part 170

Environmental protection, pesticides, agricultural worker, pesticide handler, employer, farms, forests, nurseries, greenhouses, worker protection standard.

Dated: October 24, 2019.

Andrew R. Wheeler,

Administrator.

Therefore, EPA proposes to amend 40 CFR chapter I, subchapter R, as follows:

PART 170--[AMENDED]

1. The authority citation for part 170 continues to read:

Authority: 7 U.S.C. 136-136w.

2. Amend § 170.305 by revising the definition of *Application Exclusion Zone* to read as follows:

§ 170.305 Definitions

Application exclusion zone means the area surrounding the application equipment from which persons generally must be excluded during pesticide applications.

3. Amend § 170.405 by removing paragraph (a)(1)(i)(D), and revising paragraphs (a)(1)(i)(B), (a)(1)(i)(C), (a)(1)(ii), and (a)(2) to read as follows:

§ 170.405 Entry restrictions associated with pesticide applications.

* * * * *

(a) * * *

(1) * * *

(i) * * *

(A) * * *

(B) Air blast or air-propelled applications.

(C) As a fumigant, smoke, mist, or fog.

(ii) The application exclusion zone is the area that extends 25 feet horizontally from the application equipment in all directions during application when the pesticide is applied as a spray from a height greater than 12 inches from the soil surface or planting medium and not as in

paragraph (a)(1)(i) of this section.

(2) During any outdoor production pesticide application, the agricultural employer must not allow or direct any worker or other person to enter or to remain in the treated area or an application exclusion zone that is within the boundaries of the establishment until the application is complete, except for:

(i) An appropriately trained and equipped handler involved in the application, and

(ii) A person not employed by the establishment who is in an area subject to an easement that prevents the agricultural employer from temporarily excluding the person from that area.

* * * * *

3. Amend § 170.501 by revising paragraph (c)(3)(xi) to read as follows:

§ 170.501 Training requirements for handlers.

* * * * *

(c) * * *

(3) * * *

(xi) Handlers must suspend a pesticide application if workers or other persons are in the application exclusion zone within the boundaries of the agricultural establishment and must not resume the application while workers or other persons remain in the application exclusion zone within the boundaries of the agricultural establishment, except for an appropriately trained and equipped handler involved in the application, and a person not employed by the establishment who is in an area subject to an easement that prevents the agricultural employer from temporarily excluding the person from that area.

* * * * *

4. Amend § 170.505 by revising paragraph (b) to read as follows:

§ 170.505 Requirements during applications to protect handlers, workers, and other persons.

* * * * *

(b) *Suspending applications.* (1) Any handler performing a pesticide application must immediately suspend the pesticide application if any worker or other person, other than an appropriately trained and equipped handler involved in the application, 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), except for:

- (i) An appropriately trained and equipped handler involved in the application, and
- (ii) A person not employed by the establishment who is in an area subject to an easement that prevents the agricultural employer from temporarily excluding the person from that area.

(2) A handler must not resume a suspended pesticide application while any workers or other persons (other than appropriately trained and equipped handlers involved in the application) remain 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), except for persons not employed by the establishment in an area subject to an easement that prevents the agricultural employer from temporarily excluding those persons from that area.

* * * * *

5. Amend § 170.601 by revising paragraph (a)(1) to read as follows:

§ 170.601 Exemptions.

(a) * * *

(1) On any agricultural establishment where a majority of the establishment is owned by one or more members of the same immediate family, the owner(s) of the establishment are not required to provide the protections of the following provisions to themselves or members of their immediate family when they are performing handling activities or tasks related to the production of agricultural plants that would otherwise be covered by this part on their own agricultural establishment.

- (i) Section 170.309(c).
- (ii) Section 170.309(f) through (j).
- (iii) Section 170.311.
- (iv) Section 170.401.
- (v) Section 170.403.
- (vi) Section 170.405(a).
- (vii) Section 170.409.
- (viii) Sections 170.411 and 170.509.
- (ix) Section 170.501.
- (x) Section 170.503.
- (xi) Section 170.505(c) and (d).
- (xii) Section 170.507(c) through (e).
- (xiii) Section 170.605(a) through (c), and (e) through (j).

* * * * *