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CERTIFICATION OF PESTICIDE APPLICATORS

State Plans for Certification of Commercial and Private Applicators

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 340-6]

PART 171—CERTIFICATION OF PESTICIDE APPLICATORS

Submission and Approval of State Plans for Certification of Commercial and Private Applicators of Restricted Use Pesticides

On January 13, 1975, notice was published in the FEDERAL REGISTER (40 FR 2528) proposing regulations for State plans for the certification of commercial and private applicators; for a plan to qualify certain Federal employees; and for plans for the certification of applicators on Indian reservations not subject to State jurisdiction. The following regulations are designed to ensure that the State and Indian plans for the certification of applicators and the Government Agency Plan (GAP) to qualify certain Federal applicators for certification satisfy all the requirements of Section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (86 Stat. 973), and the standards for the certification of applicators of restricted use pesticides (40 CFR 171.1-6) which were published on October 9, 1974, in the FEDERAL REGISTER (39 FR 36446).

STATUTORY AUTHORITY

Section 4(a)(2) of the Act provides that:

If any State at any time, desires to certify applicators of pesticides, the Governor of such State shall submit a State plan for such purpose. The Administrator shall approve the plan submitted by any State, or any modification thereof, if such plan in his judgment—

(A) designates a State agency as the agency responsible for administering the plan throughout the State;

(B) contains satisfactory assurances that such agency has or will have the legal authority and qualified personnel necessary to carry out the plan;

(C) gives satisfactory assurances that the State will devote adequate funds to the administration of the plan;

(D) provides that the State agency will make such reports to the Administrator in such form and containing such information as the Administrator may from time to time require; and

(E) contains satisfactory assurances that State standards for the certification of applicators of pesticides conform with those standards prescribed by the Administrator under [Section 4(a)(1) of the amended FIFRA].

Any State certification program under this section shall be maintained in accordance with the State plan approved under this section.

Section 4(b) of the Act further provides procedures for the rejection or acceptance of State plans by the Administrator, and for the notification of the State when it is determined that the certification program is not being administered in accordance with the approved State plan.

Section 25(a) of the Act provides that "the Administrator is authorized to prescribe regulations to carry out the provisions of this Act."

COMMENTS

Written comments on the proposed regulations for State plans were invited and received from interested parties. All of the comments have been reviewed and are on file with the Agency. Certain comments have been incorporated into the regulations for State plans. Some of the revisions involved editorial changes for purposes of clarification. Other clarifications are included in the explanatory remarks of the revised Preamble below. Significant comments, modifications, and policy issues are described below.

The comments fall into general comments and specific comments about particular sections of the proposed regulations. The significant comments and the Agency's responses to the comments are described below:

1. GENERAL COMMENTS

Guidelines/Regulations. A few State lead agency officials expressed regret that the proposed State plan requirements were issued as proposed regulations rather than proposed guidelines, as had been considered earlier. Apparently those expressing this view believe that issuance of these rules as guidelines would allow greater flexibility in their application, than would be the case if the rules were issued as regulations. It should be understood that the extent to which rules are flexible or prescriptive is controlled not by how they are titled, but rather by the language of the provisions themselves. Essentially, use of prescriptive language (i.e., "shall", "must") indicates prescription, while use of permissive language (i.e., "should", "may") indicates flexibility. This set of regulations contains provisions of both varieties. However, the Agency cautions that these regulations reflect its best judgment regarding the elements necessary for a well-rounded, State-administered certification program capable of satisfying the intent and purpose of Section 4 of the Act. Accordingly, States submitting plans lacking an element or elements which should be present pursuant to these regulations should be prepared to satisfy the Agency that the missing element or elements are not necessary for an effective applicator certification program in that State, because of special local circumstances, compensating provisions in the Plan, or other convincing reasons.

Private Applicator Certification. Comments from certain organizations expressed concern that the proposed regulations would have an adverse impact on the ability of farmers and ranchers to produce an abundance of healthful food and fiber at a reasonable cost to consumers. There was special concern about the possibility of great numbers of farmers being required to demonstrate their competency by passing a complicated written examination. It should be noted that the present regulations do not address such questions as the type of system to be used in certifying applicators or the standards to be applied in determining the competence of applicators. These subjects were dealt with in an earlier rulemaking proceeding pursuant to section 4(a)(1) of the amended FIFRA, which requires the Agency "to prescribe standards for the certification of applicators of pesticides." That rulemaking proceeding, which was concluded on October 9, 1974, resulted in the promulgation of 40 CFR 171.1-6. The present regulations incorporate these standards and make them elements of State plans. In doing so, however, the Agency is following the mandate of the amended FIFRA that the applicator certification programs described in the State plans must utilize procedures and standards conforming with and at least equal to the applicator certification standards promulgated by the Agency pursuant to section 4(a)(1) of the amended FIFRA.

The Agency is fully aware of the need to implement the applicator certification program in a manner that is reasonable and which causes minimum disruption to the agricultural community. At the same time, the Agency must assure that State programs adhere fully to the mandates of the amended FIFRA to protect man and the environment from the possible harmful effects of pesticide use. It is essential to understand that the amended FIFRA, if properly implemented, will be beneficial and not detrimental to farmers and the nation in ensuring an abundance of food, feed and fiber for the future, as well as the present. Certification, for example, will allow the use of pesticides that might not otherwise be available if there were no assurances that such highly toxic products are to be used only by individuals who have demonstrated their competence to use them properly and safety. In addition, it is important to realize that the use of pesticides by competent individuals will protect crops, as well as life and the environment. Misuse of pesticides not only threatens life and the environment, but results in damage to crops and may well keep the very products the farmer is trying to protect off the market because of damage and illegal pesticide residues.

The Agency believes that most farmers who are currently using pesticides in a proper, safe manner will experience little difficulty in meeting the certification standards (40 CFR 171.1-6). For example, § 171.5 which established procedures for certifying private applicators, provides that farmers may be certified by a written or oral testing procedure, or such other equivalent system as may be approved as part of a State plan. EPA is currently working with State officials and others to develop acceptable "equivalent" systems. States may also wish to submit, if necessary, procedures for interim certification with specific plans for upgrading on a specific time schedule. Some States have indicated that it may be necessary to take this route. Such procedures could allow for step-by-step implementation which will lessen the impact on both the farmers and the State agencies during the first years of implementing the certification program. It

should be recognized, however, that these interim procedures may in the long run be more costly and troublesome. Nevertheless, the Agency is making every effort to allow States flexibility in developing certification programs that meet their own situations and needs, within the limits of the intent and purpose of section 4 of the amended FIFRA.

Enforcement Provisions. Comments were received expressing the position that the Agency has no authority to include any enforcement provisions as elements of an approvable State plan. Apparently, it is the view of these commenters that Congress intended that State programs under section 4(a)(2) of the Act would only determine competence of applicators and issue credentials, and that the other necessary components of a meaningful regulatory program would be performed by EPA. In the Agency's view, it is clear that Congress intended that State programs under section 4(a)(2) of the Act be full, well-rounded, and meaningful regulatory programs with enforcement elements—not partial programs requiring supplementation by this Agency. Moreover, it is apparent that the enforcement elements set out in these regulations (e.g., provisions for denial, suspension, and revocation of certification, criminal or civil penalties, record keeping, and right-of-entry) are reasonable and necessary for the administration of an applicator certification program which will serve the purpose and the intent of the Act.

Changing Technology and Continuing Competency. Pest control companies and associations expressed objections to § 171.8(a)(2) which requires provisions to ensure that certified applicators continue to meet the requirements of changing technology and to assure a continuing level of competence and ability to use pesticides safely and properly. These commenters questioned EPA's authority to include these provisions as an element of an approvable State plan, and voiced even stronger objection to the preamble discussion of "special examinations" or "periodic reexaminations" as optional approaches to meet the needs of changing technology. The concern was that mentioning these approaches as options would "mislead" State officials into thinking they were requirements, notwithstanding the fact that the preamble discussion indicated that other options, including a continuing training program, may be preferable.

The Agency regards as clear its legal authority to require as an element of a State plan some provision to ensure that certified applicators continue to meet the requirements of changing technology and to assure a continuing level of competence and ability to use pesticides safely and properly.

In the discussion of optional approaches in the preamble to the proposed regulations, the Agency was following its policy of providing States with as much flexibility as possible in implementing Section 4 of the amended FIFRA. The Agency regrets industry's expressed concern that the preamble discussions were mistaken by State officials and others as constituting requirements. However, EPA felt an obligation to surface the various optional approaches in the preamble in order to invite a wide range of comments and reactions to assist in making a final decision.

The program of certification under FIFRA is designed to provide a continuing mechanism whereby the country can now and in the future avail itself of a broad spectrum of pesticides. The assumption must be that new types of pesticides, new methods of application, and new precautionary procedures will evolve. It is essential for the maintenance of program quality, in terms of effective use and safety to man and his environment, that applicators continue to keep abreast of their profession and of changing technology. Because of the numerous categories of pesticide applicators, flexibility, both in terms of approach and content of training programs, is needed in planning and implementing this provision of the plan.

The Agency reiterates the previous preamble statement that continuing training programs may well be preferable to reexamination. Properly conducted training programs concurred with and periodically reviewed by the State lead agency may be an effective method of assuring that applicators continue to meet these requirements. There are a number of approaches that a State may encourage and no one approach is expected to suffice for all situations. Between now and October 1976, great emphasis will be placed on training programs. Although the extent and intensity of this training may not remain at this high level, in some cases it may evolve into well conceived programs of continuing education. Proper State coordination at this time will help assure that this occurs. There are a number of options open for meeting the needs of changing technology. These include commercial and other private training programs, ongoing programs of the State Cooperative Extension Service, required attendance at State sponsored conferences and workshops, and the accumulation by the applicator of continuing education units through participation in conferences, closed circuit educational TV programs, correspondence courses, and other identified training programs. It is anticipated that industry will take an active part in providing programs consistent with changing technology. This approach would distribute much of the cost of such training activities to private industry rather than placing the burden upon State governments. In addition, trade associations and certain commercial organizations now offer training programs which could be utilized by commercial applicators who do not have in-house training programs. All such private sector training programs would need to be approved by the State and would be subject to State monitoring.

Government Agency Plan (GAP). The Federal Working Group on Pest Management (FWGPM), as well as some individual Federal agencies, objected to parts of the preamble discussion on § 171.9 which refers to Federal applicators qualified under the Government Agency Plan (GAP). While stressing that the objection is not to the regulations themselves nor to the idea of Federal employees presenting their documentation to State authorities, FWGPM indicated specific objection to the preamble statement that "the Federal form issued to these employees will provide an opportunity for States that have requirements in addition to the GAP to specify other qualifications needed to apply restricted use pesticides in that State. The form would also permit the appropriate State official to indicate acceptance of the applicator's qualifications, thus authorizing the applicator to use restricted use pesticides within the State * * *." Some members of the FWGPM believe that this is an administrative procedure with which Federal agencies are not obliged to comply, according to Executive Order 11752.

This and many other comments concerning the GAP assume that the GAP is a mechanism for certification of applicators. This is *not* the case. Instead, Federal agency employees who satisfy GAP requirements have demonstrated their competence, and are *eligible* for certification. They are not, however, certified, and hence are not authorized to use or supervise the use of restricted use pesticides until a State with an approved State plan accepts them, either on the basis of the GAP acceptance alone, or GAP acceptance plus other State-imposed requirements. Thus, in requiring compliance with its State plan, the State, as the entity authorized to certify applicators pursuant to Section 4 of the amended FIFRA, is implementing the Federal law. For these and other reasons, EPA has concluded that State acceptance of the Federal form (when GAP acceptance alone does not meet all State requirements) constitutes a "substantive" rather than an "administrative" requirement. Further, Executive Order 11752 is concerned with situations at Federal facilities. GAP has been designed to relate in large part to the Federal employee, who in the course of his work, is involved in pesticides use on State and private property.

Some pest control companies and an industry association objected to any special provision for Federal employees, i.e., the GAP. The major concern expressed was that some Federal facilities may use the GAP as an instrument for excluding private industry certified applicators from contracting for pest control service on Federal installations. Although EPA would not attempt to tell another Federal agency that it cannot impose its own higher standards upon any applicators operating on Federal facilities, the Agency wants to make it clear that the GAP was not designed to encourage the build-up of a large cadre of Federal employee certified applicators or to inhibit or prevent private industry applicators from servicing Federal facilities. The GAP was established to accommodate the special needs of certain Fed-

eral employees, primarily those Federal employees who many be called upon to move frequently or on short notice to distant localities to conduct special pest control programs mandated by Congress, or in some cases those Federal employees who apply restricted use pesticides only at Federal facilities. As indicated in the preamble, there is no requirement (and no real or implied pressure from EPA) that Federal agencies utilize the GAP. The appropriateness of GAP for any given situation should be the determining factor.

EPA will continue to work with Federal agencies to resolve remaining differences. This effort, however, should not influence the preparation of State plans and should not, therefore, delay the promulgation of these regulations.

Mandatory Accident Reporting. The preamble to the proposed regulations specifically invited comments on the desirability of including mandatory accident reporting by commercial applicators as an element of an approvable State plan. A number of comments were received in response to this invitation, the majority of which opposed mandatory accident reporting.

As developed in the discussion in the preamble to the proposed regulations, it is important that actual use data about a pesticide be gathered in order to assist the Agency in carrying out its regulatory responsibilities under the amended FIFRA. Such information is useful in a variety of ways. For example, data indicating that a pesticide has or may have adverse effects in actual use alerts the Agency to investigate thoroughly the efficacy and environmental behavior of the product. On the other hand, if information gathered through laboratory research indicated that a pesticide should be suspended or cancelled, reliable data reflecting that the pesticide had not caused problems in use might persuade the Agency that suspension or cancellation was unnecessary.

However, a number of States have commented that it would be extremely difficult for them to implement an accident reporting requirement (including the enactment of necessary legislation) between now and October 21, 1976, because most of their resources must be devoted to the establishment of an applicator certification program during this period. EPA accepts this view, and has decided not to include provisions for a mandatory accident reporting system as a State plan requirement at this time. However, the Agency intends to continue to consider various alternative mechanisms for the gathering of pesticide use data. Part of this inquiry will involve an evaluation of the adequacy of the Agency's voluntary Pesticide Episode Reporting System (PERS). PERS was revised in recent weeks and the Agency is currently seeking the active support of other Federal Agencies, State organizations, and the private sector in order to make it work effectively. In addition, there is a possibility that a few States may institute mandatory accident reporting programs on their own initiative. Such programs could provide useful information concerning the practical problems and pitfalls in administering a mandatory accident reporting system. This inquiry will be completed by November 1976. If it is determined at that time that voluntary accident reporting is not providing the information needed, it may be necessary to reconsider the need for mandatory pesticide episode reporting by commercial applicators.

2. SECTION-BY-SECTION COMMENTS[1]

Section 171.7(a). A State agency suggested that one word ("State") in this provision be changed to ("governmental") to allow for the inclusion of other cooperating agencies. This revision has been made to provide for the naming and describing of other agencies involved in certification programs.

This change is made only to accommodate a State needing the assistance of local authorities in implementing and maintaining its certification programs, and provided that such assistance is uniform throughout the State and is totally responsive to State direction. It is not the intention of the Act or these regulations to authorize political subdivisions below the State level to further regulate pesticides.

Section 171.7(b)(1). Several commenters wanted clarification of the provision calling for an opinion by the State Attorney General or Legal Counsel of the designated State Agency that the State has the legal authorities necessary to carry out the Plan. What is desired is a legal opinion reflecting that a State has the legal authorities to carry out the provisions of these regulations, supported by a sufficiently detailed analysis to enable the Agency to understand the reasoning behind the opinion.

Section 171.7(b)(1)(ii). Comments generally endorsed the concept of contingency approval to accommodate the practical problem that some State legislatures, because of the timing of legislative sessions, may not be able to enact the necessary legislation prior to October 21, 1975. However, some commenters were critical of the Agency's attempt in the proposal to set down rigid conditions concerning the terms attached to contingency approval, including the availability of a hearing under section 4(b) of the amended FIFRA in the event that the requested legislative authorities were not enacted. Other commenters objected to the statement in the preamble which said that contingency approval would lapse if a "special" legislative session were held, and the proposed legislation upon which contingency approval had been granted was not enacted. In support of this objection, it was pointed out that the agenda of special sessions frequently is inflexible, and that it may not be possible to consider pesticide legislation at such a special session. These comments generally point out the difficulty and undesirability of attempting to prescribe the terms and conditions of contingency approval before an actual application for contingency approval is presented. Obviously, there is a wide range of possible circumstances wherein contingency approval would be appropriate, and the terms and conditions which are appropriate to one case may not be appropriate in another. The Agency has, therefore, redrafted this section to allow maximum flexibility in dealing with contingency approval applications. Such applications will be dealt with on a case-by-case basis, and if approval is granted, terms and conditions appropriate to that particular case will be detailed. One of the factors to be considered in acting upon applications for contingency approval shall be the applicability of section 4(b) of the Act in the event that any terms or conditions of approval are not met during the period of contingency approval.

Section 171.7(b)(1)(iii)(A). Several State regulatory officials commented that this section should be changed to require only authority to deny and revoke certifications, and to leave the authority to suspend and to impose criminal or civil penalties optional. After careful consideration, EPA decided not to adopt this suggestion. In the opinion of the Agency, the effective administration of a certification program requires a reasonable range of enforcement options to allow the responsible State agency flexibility to respond appropriately to the wide range of situations which may arise. Lacking authority to suspend certification and to initiate criminal or civil penalty actions, States would be left without an appropriate response in many enforcement situations. The quality of such programs would consequently suffer.

Several changes have been made in the language of this section to eliminate ambiguity. In the proposed regulations, it was unclear whether misuse of a pesticide and falsification of required records should be grounds both for denial, suspension, and revocation of certification, and for the imposition of criminal or civil penalties. This section has been revised to reflect clearly that the State should have authority to take any of the above enforcement actions for misuse or falsification of required records. This section has been further modified to eliminate the reference to other unspecified enforcement mechanisms. The Agency has determined that this provision was unsuitable in a section designed to specifically outline the enforcement procedures which should be included in a State plan. Any additional enforcement procedures which are available to the State should, of course, be described under § 171.7(f), as other regulatory mechanisms contributing to the administration of the State plan.

Section 171.7(b)(1)(iii)(B). Several State lead agency officials objected to this provision on the basis that it required a State to automatically initiate revocation or suspension action after the conclusion of a Federal enforcement proceeding. This was not the intent of this provision. All that is required is that the

[1] Section numbers beginning each new paragraph refer to the original section numbers in the proposed rules unless prefaced with the term "new".

State have authority to suspend or revoke certification in the event that a certified applicator is convicted or is subject to a final order imposing a civil penalty pursuant to section 14 of the amended FIFRA. The decision whether to initiate suspension or revocation procedures will in all cases remain a matter of the State's discretion. In the view of the Agency, this subsection is necessary to ensure effective coordination between Federal and State enforcement of the amended Act.

Section 171.7(b)(1)(iii)(C). The Agency viewed with merit the objections raised on the inclusion of the word "surveillance." The term has been deleted; it has essentially the same intended meaning as "observation" and, therefore, was redundant. Additionally, EPA has inserted the term "sampling" in order to more adequately reflect the purpose and intent of a right-of-entry provision. Sampling authority is a requisite for assuring compliance with the law, in that effective enforcement often hinges on the ability of State officials to sample pesticides before, during, and/or after application.

Section 171.7(b)(1)(iii)(E). Several commenters offered different viewpoints on the provision requiring certified commercial applicators to keep and maintain records for two years. One industry spokesman objected to the provision, describing it as a "monumental economic burden." Another industry commenter questioned the Agency's authority to require record keeping by commercial applicators. On the other hand, certain environmental groups requested that commercial applicators be required to maintain records for three years since this longer holding period would ensure that the records would be available in any resulting litigation. The Agency recognizes that record keeping places some burdens on commercial applicators. However, such burdens are justified by the great need for records on the use of restricted use pesticides in order to manage an effective and meaningful regulatory program. As for the Agency's authority to require record keeping by certified commercial applicators, it is clear that Congress authorized the imposition of such a requirement, although it expressly prohibited the Agency from requiring record keeping by certified private applicators. It is the Agency's feeling that the two year requirement for record keeping is a reasonable provision but that the additional year would be unnecessary. In cases involving litigation, records can be protected for a longer period, if necessary, by court orders or other methods. Thus, the two-year requirement is retained in the final regulations.

A few State officials, in commenting further on this provision, requested the addition of alternate procedures for State officials to obtain access to required records. The proposal required that the records be available to State officials at reasonable times, at the commercial applicator's establishment where they are maintained. The commenters suggested that a procedure be included in the regulation requiring the submission of the records to the State agency upon request. The Agency has concluded that the interests of FIFRA, as amended, are served if the records are accessible to the State by some procedure, and that the precise procedure to be used can be left to the State's discretion. The language of the section has been redrafted to achieve this objective.

Section 171.7(b)(2). Several State officials questioned the need for this section which requires the State to supply information concerning the staffing of its program. Pursuant to section 4(a)(2)(B) of the amended FIFRA, the Administrator must determine that the State has given satisfactory assurances that the State agency has qualified personnel necessary to carry out the plan. Section 171.7(b)(2) is designed to provide the information necessary to allow the Administrator to make the determination required of him in the Act. In addition, such information will give both EPA and the State Agency a better grasp on what funds are necessary to carry out the plan.

Section 171.7(c). Several State officials expressed concern over the requirement that they give assurances that the State would devote adequate funds to administer the plan. This requirement comes directly from section 4(a)(2)(C) of the amended FIFRA. As stated in the Preamble to the proposed regulations, in the interest of reducing the volume of required data from the State, budgetary detail will not be required. However, the State should provide sufficient information concerning the proposed funding for its program from both State and Federal sources to give the Administrator a basis upon which to make the finding that the statute requires him to make in this area.

Section 171.7(d). Several State officials expressed concern that this section would be utilized to burden States with numerous requests for non-essential information. Specifically, there was criticism of the requirement that reports shall be submitted "from time to time to meet specific needs", because this wording allowed EPA too much discretion in requesting information. The Agency is well aware that excessive and unnecessary reporting requirements are burdensome and could impede the development of an effective certification program. However, as most State officials agree, the reporting requirements included in these regulations are minimal and reasonable. In addition, the broad language "from time to time" to which objections were made, was taken verbatim from section 4(a)(2)(D) of the amended FIFRA. EPA assures the State that its authority under this provision of the Act will be employed judiciously, and that requests for information will be made with sufficient lead time so as not to interfere unduly with the States' other responsibilities.

Section 171.7(d)(1). Comments from several State officials expressed concern about the purpose of including provisions requiring reports on enforcement aspects of a State plan. The Agency's position is that such information is valuable in evaluating the effectiveness of a State certification program, and could assist in isolating problem areas. Moreover, in order for these purposes to be served, it is necessary to have information concerning a broad range of enforcement activities, such as investigations, monitoring, information concerning administrative and judicial proceedings, and other activities supporting the effective administration of a certification program. The proposed § 171.7(d)(1)(iii) required reports only on enforcement "actions," which would not encompass all relevant information. Accordingly, this section has been revised. In order to broaden the scope of reportable information, §§ 171.7(d)(1)(iii) and 171.7(d)(1)(v) have been revised to place emphasis on the use of restricted use pesticides, rather than on certified applicator conduct.

Section 171.7(e)(2). This section brought objections from several commenters. State officials objected to the idea of indicating how they would certify applicators for special competency standards not now in existence. In addition, they indicated that § 171.7(e)(1) was the logical place to indicate any special State competency standards. The Agency accepts these views, and has omitted this section from the final regulations. If EPA establishes any special standards pursuant to the reserve § 171.4(d), or revises State plan requirements in any other respect, States will be given adequate time to make appropriate amendments to their State plans.

Section 171.7(e)4)(ii). The lead paragraph in this subsection has been changed to reflect the fact that some private applicators may have been certified by procedures "equivalent" to examination that are determined to be acceptable by the Administrator. (New § 171.7(e)(3)(ii)).

Section 171.7(e)(5). State lead agency officials questioned how they would be able to indicate whether or not they accept Federal employees qualified under GAP as fully meeting their certification requirements or to describe any additional requirements they may impose on GAP qualified employees until they have had an opportunity to study the final, approved GAP. This issue, of course, basically involves timing. States which move ahead quickly with the development of their plans and submit them prior to approval of the GAP would rightfully hesitate to indicate their acceptance of a program still in the developmental stage. A subparagraph has been added to clarify this situation. (New § 171.7(e)(4)).

Section 171.7(e)(6). This section was changed by deleting "arrangements a State has made" and substituting "cooperative agreements a State has made with any Indian Governing Body." These modifications were made so this section would conform with changes which have been made in § 171.10, and which are fully discussed in that portion of the preamble. (New § 171.7(e)(5)).

Section 171.7(e)(7). A number of States commended the Agency for providing a place for States to indicate any arrangements they have with other States. On the other hand, several State agencies misinterpreted this provision and criticized the Agency for "requiring" the development of State programs for reciprocity. The Agency reiterates the position it took in the proposed regulations that such provisions are *not* required but that where there is sufficient similarity (among State programs) to warrant it, States are encouraged to develop programs for reciprocity. Development, now or in the future, of such programs, will ease the certification burden on interstate farming operations and commercial businesses involving pesticide applications across State lines. To further the goal of reciprocity, and in response to comments received from Indian groups, this section (New § 171.7(e)(6)) has been revised to permit reciprocal arrangements between a State and an Indian reservation submitting a plan for certification of applicators pursuant to § 171.10.

Section 171.7(e)(7)(ii). The word "examined" was deleted, and the phrase "determined to be competent" was substituted to reflect the fact that some private applicators may have been certified by procedures "equivalent" to examination. (New § 171.7(e)(6)(ii)).

Section 171.10. A State with a large number of Indian reservations objected to the wording of this section and the preamble discussion on the basis that it implies that an Indian Governing Body can make a unilateral decision as to whether or not it will utilize a particular State's certification program or develop its own plan and program. It was pointed out that the State involved should have a voice in the matters since it would have to expend funds for the certification program and would also need the proper authority for enforcement purposes. This section has been revised to indicate that the concurrence of the State (by way of a cooperative agreement) would be needed in the event that the Indian Governing Body of an Indian Reservation not subject to State jurisdiction desires to utilize a State's certification program to certify Indian applicators. EPA emphasizes that the development of State plans should not be delayed because the cooperative agreements have not been completed. The latter can be submitted as amendments to the State plan at a later date.

Section 171.10(b) has been modified to substitute the language "where the State has assumed jurisdiction under other Federal laws," for the language "subject to the jurisdiction of a State." This change brings this regulation into conformity with the treatment of this subject in regulations issued by EPA in other substantive areas (see 40 CFR 52.21(c)(3)(v)).

Some State officials also objected to § 171.10(d) (New § 171.10(c)), which states that non-Indian employees contracted to apply restricted use pesticides on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan. These officials felt that non-Indian applicators not living on such a Reservation should be required to have State certification. While some aspects of the legal relationships between States and Indian Reservations remain to be resolved, it is the Agency's position that in those instances where a State has not assumed jurisdiction over a reservation under other Federal laws, that the Indian Governing Body should have the opportunity to choose a certification plan covering all applicators on the reservation. This procedure should provide adequate coverage of all restricted use pesticide applicators on such Indian Reservations pending final resolution of any outstanding legal questions. To further clarify the Agency's intent, § 171.10(d) (New § 171.10(c)) has been modified to cover all non-Indians applying pesticides on Indian Reservations not subject to State jurisdiction, and appropriate changes have been made in other subsections of § 171.10. In addition, § 171.10(c) in the proposal has been deleted from the final regulations. This section provided that Indians applying restricted use pesticides outside a reservation must be certified under the appropriate State certification plan. In the Agency's view, this section was unnecessary, as certifications issued pursuant to Indian plans necessarily are valid only within the limits of the territorial jurisdiction of the Indian Governing Body, just as in the case with certifications issued by States. EPA will, of course, encourage reciprocity between all certifying entities to reduce the administrative burden and to facilitate interstate commerce. Finally, the Agency observes that most, if not all, non-Indian applicators contracted to apply restricted use pesticides on Indian Reservations will also be conducting such applications outside the reservation. In those instances, State certification plan requirements would have to be met, providing the States with adequate procedures with which to regulate these applicators.

EFFECTIVE DATE

Pursuant to section 4(d) of the Administrative Procedure Act, 5 U.S.C. 553(d) the effective date of a regulation must be at least 30 days after its publication, unless the Agency finds "good cause" for specifying an earlier date. The Agency finds that in this case there is good cause for providing that these regulations are effective immediately upon publication. Any delay in the effectiveness of the regulations may severely prejudice the efforts of some states with legislative sessions currently in progress to pass legislation necessary to implement programs for applicator certification. In addition, it is apparent that no prejudice will result to anyone if these regulations are effective immediately, as they do not either directly or indirectly impose any duties or obligations on anyone. Finally, the Agency notes that the final regulations do not differ substantially or materially from the proposed regulations, which were published more than thirty days previous to the publication of the final regulations.

Accordingly, effective on March 12, 1975, Part 171 is amended by adding §§ 171.7 through 171.10.

Dated: March 3, 1975.

RUSSELL E. TRAIN,
Administrator.

40 CFR Part 171 is amended by adding §§ 171.7 through 171.10 to read as follows:

Sec.
171.7 Submission and approval of State plans for certification of commercial and private applicators of restricted use pesticides.
171.8 Maintenance of State plans.
171.9 Submission and approval of Government Agency Plan.
171.10 Certification of Applicators on Indian Reservations.

AUTHORITY: Secs. 4, 25(a), Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 86 Stat. 973.

§ 171.7 Submission and approval of State plans for certification of commercial and private applicators of restricted use pesticides.

If any State, at any time, desires to certify applicators of restricted use pesticides, the Governor of that State shall submit a State plan for that purpose. The Administrator shall approve the plan submitted by any State, or any modification thereof, if the plan in his judgment—

(a) Designates a State agency as the agency responsible for administering the plan throughout the State. Since several other agencies or organizations may also be involved in administering portions of the State plan, all of these shall be identified in the State plan, particularly any other agencies or organizations responsible for certifying applicators and suspending or revoking certification. In the extent that more than one governmental agency will be responsible for performing certain functions under the State plans, the plans shall identify which functions are to be performed by which agency and indicate how the program will be coordinated by the lead agency to ensure consistency of programs within the State. The lead agency will serve as the central contact point for the Environmental Protection Agency in carrying out the certification program. The numbers and job titles of the responsible officials of the lead agency and cooperating units shall be included.

(b) Contains satisfactory assurances that such lead agency has or will have the legal authority and qualified personnel necessary to carry out the plan:

(1) Satisfactory assurances that the lead agency or other cooperating agencies have the legal authority necessary to carry out the plans should be in the form of an opinion of the Attorney General or the legal counsel of the lead agency. In addition:

(i) The lead agency should submit a copy of each appropriate State law and regulation.

(ii) In those States where any requisite legal authorities are pending enactment and/or promulgation, the Governor (or Chief Executive) may request that a State plan be approved contingent upon the enactment and/or promulgation of such authorities. Plans approved on a contingency basis will be subject to such reasonable terms and conditions, concerning the duration of the contingency approval and other matters, as the Administrator may impose. During the period of the contingency approval, the State will have an approved certification program and may proceed to certify applicators, who will then be permitted to use or supervise the use of pesticides classified for restricted use under FIFRA, as amended.

(iii) The State plan should indicate by citations to specific laws (whether enacted or pending enactment) and/or regulations (whether promulgated or pending promulgation) that the State has legal authorities as follows:

(A) Provisions for and listing of the acts which constitute grounds for denying, suspending, and revoking certification of applicators, and for assessing criminal and/or civil penalties. Such grounds should include, at a minimum, misuse of a pesticide and falsification of any records required to be maintained by the certified applicator.

(B) Provisions for reviewing an applicator's certification to determine whether suspension or revocation of the certification is appropriate in the event of criminal conviction under section 14 (b) of the amended FIFRA, a final order imposing civil penalty under section 14 (a) of the amended FIFRA, or conclusion of a State enforcement action.

(C) Provisions for right-of-entry by consent or warrant by appropriate State officials at reasonable times for sampling, inspection, and observation purposes.

(D) Provisions making it unlawful for persons other than certified applicators or persons working under their direct supervision to use restricted use pesticides.

(E) Provisions requiring certified commercial applicators to keep and maintain for the period of at least two years routine operational records containing information on kinds, amounts, uses, dates, and places of application of restricted use pesticides; and for ensuring that such records will be available to appropriate State officials.

(2) Satisfactory assurances that the lead agency and any cooperating organizations have qualified personnel necessary to carry out the plan will be demonstrated by including the numbers, job titles and job functions of persons so employed.

(c) Gives satisfactory assurances that the State will devote adequate funds to the administration of the plan.

(d) Provides that the State agency will make reports to the Administrator in a manner and containing information that the Administrator may from time to time require, including:

(1) An annual report to be submitted by the lead agency, at a time to be specified by the State, to include the following information:

(i) Total number of applicators, private and commercial, by category, currently certified; and number of applicators, private and commercial, by category, certified during the last reporting period.

(ii) Any changes in commercial applicator subcategories.

(iii) A summary of enforcement activities related to use of restricted use pesticides during the last reporting period.

(iv) Any significant proposed changes in required standards of competency.

(v) Proposed changes in plans and procedures for enforcement activities related to use of restricted use pesticides for the next reporting period.

(vi) Any other proposed changes from the State plan that would significantly affect the State certification program.

(2) Other reports as may be required by the Administrator shall be submitted from time to time to meet specific needs.

(e) Contains satisfactory assurances that the State standards for the certification of applicators of pesticides conform to those standards prescribed by the Administer under §§ 171.1–171.6. Such assurances should consist of:

(1) A detailed description of the State's plan for certifying applicators and a discussion of any special situations, problems, and needs together with an explanation of how the State intends to handle them. The State plan should include the following elements as a minimum:

(i) For commercial applicators:

(A) A list and description of categories and subcategories to be used in the State, such categories to be consistent with those defined in § 171.3.

(B) An estimate of the number of commercial applicators by category expected to be certified by the State.

(C) The standards of competency elaborated by the State. These shall conform and be at least equal to those prescribed in § 171.4 for the various categories of applicators utilized by the State. The standards shall also cover each of the points listed in the general standards in § 171.4(b) and the points covered in the appropriate specific standards set forth in § 171.4(c).

(D) For each category and subcategory listed under § 171.7(e) (1) (i) (A), either submission of examinations or a description of the types and contents of examinations (e.g., multiple choice, true-false) and submission of sample examination questions; and a description of any performance testing used to determine competency of applicators.

(ii) For private applicators:

(A) An estimate of the number of private applicators expected to be certified by the State.

(B) The standards of competency elaborated by the State. These shall conform and be at least equal to those prescribed in § 171.5(a), including the five requirements listed in § 171.5(a) (1)–(5).

(C) Types and contents of examinations and/or submission of detailed description of methods other than examination used to determine competency of private applicators.

(D) A description of any special procedure of testing that a State develops to determine the competency of a private applicator who is unable to read the label as prescribed in § 171.5(b) (1).

(2) A provision for issuance by the State of appropriate credentials or documents verifying certification of applicators.

(3) If appropriate, a description of any existing State licensing, certification or authorization programs for private applicators or for one or more categories of commercial applicators may be included. If these programs are determined by EPA to meet standards of competency prescribed by §§ 171.1 through 171.6, States may certify applicators so licensed, certified or authorized without any additional demonstration of competency provided:

(i) The commercial applicators who were licensed, certified, or authorized have demonstrated their competency based on written examinations and, as appropriate, performance testing, conforming to the standards set forth in § 171.4, and

(ii) The private applicators who were licensed, certified, or authorized have demonstrated their competency by written or oral testing procedures or other acceptable equivalent system, conforming to the standards set forth in § 171.5.

(4) A statement that the State accepts Federal employees qualified under the Government Agency Plan (GAP) as fully meeting the requirements for certification by that State; or a description of any additional requirements these employees must meet to apply restricted use pesticides in that State. Any such additional requirements shall be consistent with and shall not exceed standards established for other comparable applicators in that State.

(i) Until such time as the GAP has been fully developed and approved by EPA, this statement (§ 171.7(e) (4)) is not required. However, within 60 days after final approval of the GAP, the State should forward such a statement for inclusion in its State plan.

(5) A description of any cooperative agreements a State has made with any Indian Governing Body to certify or assist in the certification of applicators not subject to State jurisdiction. (§ 171.10).

(6) A description of any arrangements that a State has made or plans to make relating to reciprocity with other States or jurisdictions for the acceptance of certified applicators from those States or jurisdictions. However, those arrangements should meet these conditions:

(i) The State according reciprocity should provide for issuance of an appropriate document verifying certification based upon the certifying document issued by the other States or jurisdictions.

(ii) The State according reciprocity should have enforcement procedures that

cover out-of-State applicators determined to be competent and certified within the State or jurisdiction.

(iii) The detailed State or jurisdiction standards of competency, for each category identified in the reciprocity arrangement should be sufficiently comparable to justify waiving an additional determination of competency by the State granting reciprocity.

(f) In responding to the preceding requirements, a State may describe in its State plan other regulatory activities implemented under State laws or regulations which will contribute to the desired control of the use of restricted use pesticides by certified applicators. Such other regulatory activities, if described, will be considered by the Administrator in evaluating whether or not a State's certified applicator program satisfies the requirements of § 171.7 (a) through (e).

§ 171.8 Maintenance of State plans.

(a) Any State certification program approved under § 171.7 shall be maintained in accordance with the State plan approved under that section. Accordingly, the State plan should include:

(1) Provisions to assure that certified applicators comply with standards for the use of restricted use pesticides and carry out their responsibility to provide adequate supervision of noncertified applicators.

(2) Provisions to ensure that certified applicators continue to meet the requirements of changing technology and to assure a continuing level of competency and ability to use pesticides safely and properly.

(b) An approved State plan and the certification program carried out under such plan may not be substantially modified without the prior approval of the Administrator. A proposed change may be submitted for approval at any time but all applicable requirements prescribed by these Regulations must be satisfied for the modification to be eligible for approval by the Administrator.

(c) Whenever the Administrator determines that a State is not administering the certification program in accordance with the State plan approved under § 171.7, he shall so notify the State and provide for a hearing at the request of the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of the plan.

§ 171.9 Submission and approval of government agency plan.

This section is included to provide for certain Federal employees including those whose duties may require them to use or supervise the use of restricted use pesticides in a number of States.

(a) Sections 171.1 through 171.8 will, with the necessary changes, apply to the Government Agency Plan (GAP) for determining and attesting to the competency of Federal employees to use or supervise the use of restricted use pesticides.

(b) Federal employees qualified under the GAP shall:

(1) Be prepared to present the Federal form issued tc them attesting to their competency to appropriate State officials.

(2) Fulfill any additional requirements States may have enumerated in their State plans as provided for under § 171.7 (e) (4).

(c) The employing Federal agency shall ensure that certified employees using or supervising the use of restricted use pesticides within a Federal facility are subject to the same or equivalent provisions prescribed under § 171.7(b) (1) (iii) (A)–(E).

§ 171.10 Certification of Applicators on Indian Reservations.

This section applies to applicators on Indian Reservations.

(a) On Indian Reservations[1] not subject to State jurisdiction the appropriate Indian Governing Body[2] may choose to utilize the State certification program, with the concurrence of the State, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.

(1) If the Indian Governing Body decides to utilize the State certification program, it should enter into a cooperative agreement with the State. This agreement should include matters concerning funding and proper authority for enforcement purposes. Such agreement and any amendments thereto shall be incorporated in the State plan, and forwarded to the Administrator for approval or disapproval.

(2) If the Indian Governing Body decides to develop its own certification plan, it shall be based on either Federal standards (§§ 171.1 through 171.8) or State standards for certification which have been accepted by EPA. Such a plan shall be submitted through the United States Department of the Interior to the EPA Administrator for approval.

(b) On Indian Reservations where the State has assumed jurisdiction under other Federal laws, anyone using or supervising the use of restricted use pesticides shall be certified under the appropriate State certification plan.

(c) Non-Indians applying restricted use pesticides on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan.

(d) Nothing in this section is intended either to confer or deny jurisdiction to the States over Indian Reservations not already conferred or denied under other laws or treaties.

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[1] The term "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

[2] The term "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

Just Released

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