USDA Comments on Draft Final WPS rule – submitted July 8, 2015

EPA has formatted USDA's comments by numbering and breaking them down into separate units, for ease of reference.

1 # USDA Background

2 A healthy and strong agricultural workforce is one of the key factors in the success of American
3 agriculture. The labor force, whether employed in greenhouses, fields, orchards, nurseries, or other
4 productive agricultural enterprises, like employees in other industries, should be aware of all activities in
5 their workplace, particularly when there is potential occupational exposure directly to pesticides or their
6 residues, so that they can take appropriate measures to minimize those risks. Agricultural employers have
7 a responsibility to ensure that people working at an agricultural enterprise have the protections of a safe
8 workplace. The accountability of worker protection is not one-sided. To be successful, the labor force
9 and the employer share equally in the responsibility. USDA supports strong agricultural worker
10 protection standards as they are essential to successful, modern agriculture.
11
12 # Comments on EPA Worker Protection Standard Final Rule
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14 *USDA did not reference its comments by page number and line, because changing the display settings*
15 *for the tracked changes in the draft final rule USDA received from EPA resulted in varying page and*
16 *line number alignments. To prevent confusion, USDA is referencing its comments by unit and subunit*
17 *number for the preamble, and by section and subsection for the draft final rule.*
18
19 ## Comments on the Preamble

20 **1. USDA.** The draft final rule has an overall weakness in a number of places in the document in the
21 manner in which EPA justifies positions it takes in the document. This weakness is a lack of evidenced-
22 based scientific data. In these cases, the positions presented by EPA could have be greatly strengthened
23 to make the draft final rule more compelling in its justification for their proposed changes to the 1992
24 Worker Protection Standards. With the lack of evidenced-based scientific data, some of EPA's positions
25 tend to appear as opinions rather than factual determinations. Examples of language in the draft final
26 rule that demonstrate this lack of evidenced-based scientific data are listed below:
27 a) II.D.: "Even if the lack of quantitative data impairs the reliability of estimates of the total
28 number of chronic illnesses avoided, it is reasonable to expect that the proposed changes to the WPS
29 will reduce pesticide exposure, and thereby reduce the incidence of chronic disease resulting from
30 pesticide exposure."
31 b) IV.B.2.: "Although EPA cannot quantify the specific reduction in incidents from any single
32 change to the regulation, taken together, EPA estimates that the final rule will result in an annual
33 reduction of between 540 and 1,620 acute, health-related incidents."
34 c) V.H.2.: "2. *Benefits.* While EPA can estimate the costs of the changes to pesticide safety
35 training for workers and handlers, quantifying the benefits is more difficult. Nonetheless, as explained in

the NPRM, it is reasonable to expect that more frequent training would lead to better retention of information by workers and handlers, ultimately resulting in fewer incidents of pesticide exposure and illness in workers and handlers, improved decontamination procedures, reduced take-home exposure, and better protection of children."

EPA Response. The preamble discusses the best evidence and data that are available, including a detailed analysis of occupational pesticide incidents for the four most recent years in the SENSOR-Pesticides database. EPA believes the statements in the preamble -- including the ones USDA cited -- are accurate, and that the evidence and data adequately support these revisions to the WPS. EPA is not aware of any additional data sources that address the specific scenarios covered by the regulations and is interested in learning about any evidence-based scientific data that USDA has seen. EPA's decisions on training were based partially on the widely accepted idea that training people on worker safety decreases the number of incidents even though there is little research in how the training quantitatively translates to fewer incidents. As stated in Unit IV.B.2 of the preamble, EPA has seen a significant reduction in the number of estimated incidents since the 1992 rule even though EPA cannot determine the impact of each individual requirement in the rule, as well as other changes in agriculture, on that reduction in incidents.

2. Unit IV.B.2. ("Surveillance data")

USDA. Consider rewriting to improve clarity. The original statement is "Another example of potentially avoidable exposure is spray drift; labeling prohibits application that contacts other persons and handlers should be instructed to apply pesticides in a manner that does not contact other persons, but incidents continue to occur."

Consider revising to say: "Another example of potentially avoidable exposure is spray drift. Labeling instructs handlers to apply pesticides in a manner that does not contact other persons, but incidents continue to occur."

EPA Response. EPA has made this change to the preamble by revising it as follows: "…Another example of potentially avoidable exposure is spray drift.~~ l~~ Labeling ~~prohibits application that contacts other persons and~~ instructs handlers~~ must~~ to apply pesticides in a manner that does not contact other persons, but pesticide drift continues to cause exposure incidents."

3. Unit V.D. ("Expand the Content of Worker and Handler Pesticide Safety Training")

USDA. USDA is concerned that the draft final rule does not include any estimate for how much additional time, if any, will be required to teach the expanded content of Worker and Handler Pesticide Safety Training. Without these time estimates, one cannot compare the training times for the expanded content for workers or handlers versus the typical time needed to teach the current pesticide safety training covering specific content. The time required for training is a significant driver of costs to effectively implement the draft final rule. This apparent increase in training time needed to provide the expanded content appears to put in question EPA's marginal costs estimates of Impact on Jobs (page 10) of a typical farmworker to increase only $5/year and the marginal cost for a more skilled pesticide handler to increase only $50 per year. The "Economic Analysis of the Agricultural Worker Protection Standard Revisions" did not dispel this concern, because the analysis was based on the current training

78 time of 30 minutes per sessions without an analysis of how long the "expanded" training sessions will
79 require. This would also put into question EPA's estimate (Costs and Benefits of Revisions to Pesticide
80 Safety Training, page 53) of $62 to $80 per agricultural establishment per year.
81
82 EPA Response. In the Economic Assessment, Unit 3.3.1 Pesticide Safety Training, Step 1
83 Calculate Baseline Costs, EPA provides an estimate of 30 minutes for a full training session for workers
84 under the current rule. In the second paragraph on page 57, and under Table 3.3-7 on page 57, EPA
85 provides the estimate of 45 minutes for worker safety training with the expanded content, an increase of
86 15 minutes of training time.
87 For the handler training baseline, please refer to Table 3.3-3 for the estimate of 45 minutes.
88 Handler safety training covers more material than worker safety training. EPA estimated that the
89 additional content in the final rule will result in an additional 15 minutes for handler training, and EPA
90 includes that estimate in the narrative in the economic analysis.
91 The 15 minute estimate for the increases in worker and handler training time is based on the
92 length and content of current training videos.
93
94 **4. Unit V.H.1. ("Costs and Benefits of Revisions to Pesticide Safety Training: Costs")**
95 The expanded training is good from a safety standpoint and is necessary. However, it does not
96 appear that the economic analysis addresses the impact of the time spent for training on worker/handler
97 income particularly if the training is performed at the field prior to a work day. For many laborers,
98 wages are earn based on their volume of work and not on the hours worked. Are they paid for the time
99 spent training or does the time spent training significantly impact their earned wages for that day?
100
101 EPA Response. EPA does not require employers to pay workers for their time spent in training,
102 although some employers do pay workers for that time. This is addressed in the EA as follows:
103 Training, Step 1 Calculate Baseline Costs: "Action is required by two actors, the WPS farm, which
104 provides or arranges the training, and the workers, who take the training. We consider these actors
105 separately, although we assume the WPS farm incurs the training costs and implicitly pays the
106 worker to take the training at the same wage he or she earns doing field work. However, some
107 workers may bear the opportunity cost of taking the training. Workers who are hired to harvest
108 fruits and vegetables are often paid by the quantity harvested; thus, time spent in training is time
109 they are not earning pay."
110 Because EPA estimates that under the final rule worker training will last 45 minutes, workers who are
111 not paid for by the hour would incur an average opportunity cost of less than $10 annually due to the
112 training requirement.
113
114 **5. Unit VII.A.2. ("Hazard Information – Location and Accessibility: Final rule")**
115 USDA. Please define the term "valid" in this context and describe how an employer will be able
116 to determine that the request and employee's signature is authentic. [In regards to the following
117 sentence: "When the employer is presented a valid request, the employer must provide a copy of, or
118 access to, all of the requested information that is applicable within 15 working days from the receipt of
119 the request."]

EPA Response. In this context, the term “valid” was used to mean the request contains all of the required information. The agricultural employer is required to provide the information only when the designated representative presents a complete request. However, for clarity, EPA will replace “valid” with more descriptive language. Specifically, the sentence in Unit VII.A.2 has been revised as follows: “When the employer is presented a ~~valid~~ request that contains all of the necessary information specified in the regulations, the employer must provide a copy of, or access to, all of the requested information that is applicable within 15 working days from the receipt of the request.”

The employer will have access to the employee’s signature in training records. The pesticide use information is not confidential Personally Identifiable Information, and it should be readily provided to anyone with a plausible claim to be a designated representative. See §170.401(d)(1) for details.

6. Unit VII.B.3. (Paragraph on “Comments on inconsistencies in information between labels and SDSs”)

It is surprising that EPA is not acknowledging that it is common for SDSs to show PPE requirements that are different from the pesticide labels, since the two documents are intended for different audiences. EPA states here that since the label is not required to be posted, they do not “expect issues with a perception of conflict between labeling and SDSs.” USDA questions whether this is correct. Many Forest Service employees have reported finding differences between the PPE listed in the SDSs compared to the label. At a minimum, EPA should address this issue in the preamble.

EPA Response. EPA’s intention with requiring agricultural employers to display the Safety Data Sheets (SDSs) is to provide farm workers and handlers with information regarding chronic, developmental and reproductive toxicity that is usually found on SDSs and not the label. Much of the technical information on SDSs, such as the chemical and physical properties of the pesticide, is designed for use by multiple professionals such as manufacturers, transporters, medical personnel and firefighters.

EPA maintains our position that we do not anticipate issues with a perception of conflict between labeling and SDSs. First, many SDSs include a reference to the pesticide label in the section on exposure controls and personal protection. Second, the persons who would wear PPE are handlers who are trained that they must follow labeling instructions, including those regarding PPE. However, EPA has amended the preamble to clarify that pesticide applicators and handlers must always follow the instructions on the labeling regardless of any differences between information on the labeling and the SDS, and will make a point of including in future training materials warnings against reliance on SDS provisions regarding PPE.

EPA has adjusted the response to this comment in Unit VII.B.3 of the preamble as follows: “…The SDS provides succinct information about the known health hazards of the product that typically is not presented as part of the product label or labeling. Such information can be invaluable to medical professionals for the diagnosis and treatment of certain pesticide-related illnesses and injuries. Because EPA is not requiring the employer to display the labeling, EPA does not expect issues with a perception of conflict between labeling and SDSs. The persons who would wear PPE are handlers who receive more thorough training than ordinary workers. If pesticide handlers encounter conflicting information on labeling and SDSs, such as the PPE identified, they should know that they must follow the

162 instructions on the pesticide labeling, as they are trained to do. For information on OSHA's adoption of
163 the Globally Harmonized System of Classification and Labeling of Chemicals for SDSs and the
164 pesticide product labeling …"
165
166 **7. Unit XVIII.E. ("Equivalency provisions" and "Clarifications")**
167 There are two subsections labeled "E." The second one, "E. Clarifications" should be relabeled
168 "F. Clarifications".
169
170 EPA Response. The correction has been made.
171
172 **Comments on the Rule**
173
174 **8. §170.305**
175
176 a. USDA. The definition for "agricultural plant" depends on the definition for "commercial
177 production," and the definition for "commercial production" depends on the definition for "agricultural
178 plant." Similar issues exist in the definitions of "agricultural establishment" and "farm," "forest
179 operation," and "nursery." USDA recommends resolving these circular dependencies by defining at least
180 one of the terms in each pair independently.
181
182 EPA Response. EPA agrees that these definitions are somewhat circular, and while EPA is not
183 convinced that serious confusion would result, EPA has eliminated some definitions and revised others
184 to address USDA's concern. The terms "commercial production," "farm," "nursery," and "forest
185 operation" appear only in the definition section and are not used elsewhere in the regulation.
186 Accordingly, EPA will delete these definitions and merge their substantive content into the definitions
187 of "agricultural establishment" and "agricultural plant," as follows:
188
189 "Agricultural establishment" means any farm, forest operation, or nursery engaged in the outdoor
190 or enclosed space production of agricultural plants. An establishment that is not primarily
191 agricultural is an agricultural establishment if it produces agricultural plants for transplant or use
192 (in part or their entirety) in another location instead of purchasing the agricultural plants.
193 "Agricultural plant" means any plant, or part thereof, grown, maintained, or otherwise produced
194 for commercial purposes, including growing, maintaining or otherwise producing plants for sale
195 or trade, for research or experimental purposes, or for use in part or their entirety in another
196 location. "Agricultural plant" includes, but is not limited to, grains, fruits and vegetables; wood
197 fiber or timber products; flowering and foliage plants and trees; seedlings and transplants; and
198 turf grass produced for sod. "Agricultural plant" does not include pasture or rangeland used for
199 grazing.
200
201 b. USDA. The definition of "handler employer" is very broad, because it includes *both*
202 agricultural employers and commercial pesticide handler employers (CPHEs), even in a situation where
203 both are simultaneously present on the agricultural establishment. This causes significant concerns and

confusion as to who is ultimately responsible for providing the protections in Subpart F (see additional comments on Subpart F below).

As currently written, a "handler employer" is anyone who employs any handler, as well as self-employed handlers. The definition of "handler employer" uses the verb "to employ," which is also defined in §170.305, as "to obtain, *directly or through a labor contractor*, the services of a person in exchange for a salary or wages . . . without regard to who may pay or who may receive the salary or wages" (emphasis added). This definition in turn uses the term "labor contractor," whose definition would include any CPHE hired by an agricultural employer to provide handlers. Reading these definitions together, it becomes clear that agricultural employers can be "handler employers" even when they do not *directly* employ a single handler, because they are employing handlers through a labor contractor/CPHE.

In a situation where an agricultural employer hires a CPHE, who in turn hires handlers, both the agricultural employer and the CPHE meet the definition of "handler employer," since both employ handlers under the WPS definition of "employ": the CPHE does so "directly," while the agricultural employer does so "through a labor contractor" (i.e., the CPHE). In other words, a handler that is *directly* employed by a commercial pesticide employer handler is simultaneously "employed" by both the CPHE and the agricultural employer, leading to confusion over who has ultimate responsibility.

A solution to this problem would be to change the definition of "labor contractor" to explicitly exclude CPHEs: "*Labor contractor* means a person, other than a commercial pesticide handler employer, who employs workers ~~and handlers~~ to perform tasks . . ." [The reference to handlers in the definition for "labor contractor" could then be eliminated, since any person employing handlers is a CPHE, and no longer a labor contractor.] For handlers, this change would have the practical effect of limiting the meaning of the word "employ" to just a direct employment relationship. As a result, each handler would only have a single handler employer (i.e. his or her direct employer). For workers who are not handlers, agricultural employers would still "employ" anyone engaged directly or through a labor contractor.

EPA Response. EPA agrees that the current definitions of labor contractor and commercial pesticide handler employer contain some problematic language that could result in potential confusion and/or conflict regarding agricultural employer and commercial pesticide handler employer duties under the rule. EPA has made the suggested changes to the final rule with minor modifications to address the fact that some labor contractors do bring handlers on to agricultural establishments. EPA believes the revised text below clarifies that CPHEs are responsible for the handlers they employ and agricultural employers would no longer be considered employers of CPHE handlers for the purposes of the WPS, without overlooking the fact that some handlers are hired by agricultural employers through labor contractors and not CPHEs.

Commercial pesticide handler employer means any person, other than an agricultural employer, who employs any handler to perform handler activities on an agricultural establishment. A labor contractor who does not provide pesticide application services or supervise the performance of handler activities, but merely employs laborers who perform handler activities at the direction of an agricultural or handler employer, is not a commercial pesticide handler employer.

245 *Employ* means to obtain, directly or through a labor contractor, the services of a person in
246 exchange for a salary or wages, including piece-rate wages, without regard to who may pay or who may
247 receive the salary or wages. It includes obtaining the services of a self-employed person, an independent
248 contractor, or a person compensated by a third party, except that it does not include an agricultural
249 employer obtaining the services of a handler through a commercial pesticide handler employer or a
250 commercial pesticide handling establishment.
251 *Labor contractor* means a person, other than a commercial pesticide handler employer, who
252 employs workers or handlers to perform tasks on an agricultural establishment for an agricultural
253 employer.
254
255 c. USDA. USDA is further concerned that EPA's definitions of "employ" and "agricultural
256 employer" are not consistent with common legal definitions of these terms. Common law, tax law, and
257 certain court decisions interpreting related statutes such as the Fair Labor Standards Act and the
258 Seasonal Agricultural Worker protection Act, *Aimable v. Long and Scott Farms*, 20 F.3d 434 (1994),
259 make a clear distinction between an employer/employee relationship and other, less direct working
260 arrangements, such as independent contractors. USDA encourages EPA to assign WPS responsibilities
261 in accordance with these more traditional and accepted definitions of "employer" and "to employ".
262
263 EPA Response. EPA disagrees. EPA acknowledges that its use of the term "employ" in the WPS
264 is more aligned with popular usage than with the common law and tax law uses of the term, but notes
265 that the definition of "agricultural employer" in the existing WPS has been used since 1992 without
266 significant conflict or confusion with similar terms. USDA's objection pertains to the existing WPS
267 definition of "agricultural employer" to the same degree as it does to the draft final rule's definitions of
268 "employ" and "agricultural employer," and EPA declines to change this fundamental and longstanding
269 WPS principle.
270
271 d. USDA. EPA included in the definition of "outdoor production" the phrase ". . . or in the case
272 of forest operations, a natural forest". Ignoring the question of what an "unnatural" forest would be,
273 USDA is unsure why this phrase is needed at all. As this is written one could say that any planted forest
274 is then not subject to WPS. There are other occurrences in the preamble (pages 202, 204, and perhaps
275 others).
276
277 EPA Response. EPA agrees that the inclusion of the term "natural forest" in the definition of
278 "outdoor production" creates confusion and is not needed. EPA has made the following change to the
279 definition of "outdoor production" to address USDA's comments:
280 *Outdoor production* means production of an agricultural plant in an outside area that is not
281 enclosed or covered in any way that would obstruct the natural air flow.
282
283 e. USDA. In addition, most golf courses have nursery greens located next to, or near, the golf
284 course. Posting agricultural exclusion zones, etc. could disrupt golfing activities. USDA requests
285 clarification of how nursery greens are considered. If they are covered by this rule, did EPA consider
286 the costs to golf courses which may have nurseries?

287
288 EPA Response. Golf courses that have operations considered nurseries on their establishment
289 (e.g., they are growing turf/greens in a nursery area for use in replacing turf on the playing areas of the
290 golf course, or they are growing ornamentals in a greenhouse for planting on the golf course) have
291 always been covered by the WPS, and compared to the existing WPS, the coverage of golf courses that
292 have nurseries on their establishment is not changed by the amendments in this final rule. EPA has
293 included an excerpt from the 1995 WPS guidance which clarifies this coverage below. Since there are
294 no posting requirements associated with application exclusion zones, EPA does not see this as an issue.
295 Additionally, EPA understands that most golf course pesticide applications are conducted when the
296 public is not using the course, and this should be similar with applications to a nursery operation on the
297 golf course. EPA expects this practice should minimize any potential impact to golf course operations
298 due to WPS requirements. EPA considered the cost to golf courses that operate nurseries; the costs
299 would be accounted for under the costs of the WPS revisions on nursery operations.
300
301 **14-24 Production of agricultural plants for other than direct sale**
302 **IGW Question:** What is the scope of the WPS with respect to establishments producing
303 agricultural plants for other than direct sale, i.e., in-house use?
304 **IGW Answer:** There is no exception for agricultural plants produced for other than
305 direct sale, i.e., in-house use. The WPS covers an agricultural establishment if (1) a WPS-labeled
306 agricultural pesticide is used on the establishment, (2) workers or handlers are employed by or on
307 the agricultural establishment, (3) the establishment is a farm, forest, nursery, or greenhouse, as
308 defined in the WPS, and (4) the establishment or the activity is not covered by one of the
309 exceptions specifically described in the rule, Section 170.102 (b).
310 For instance, the following operations are covered by the WPS: Production of hay or feed
311 grown for livestock on dairy farms, cattle ranches, or other livestock operations; sod farms,
312 greenhouses, or nurseries operated by golf courses; and greenhouses and nurseries operated by
313 theme parks, hotel chains, botanical gardens, and state and local governments. (Note: Pasture and
314 rangeland used for grazing are excluded.) (March 15, 1995)
315
316 f. USDA. Including "arranging for the application of the pesticide" in the definition of "use, as in
317 'to use a pesticide'" is superfluous and gives the impression of expanding the WPS – and the related
318 state enforcement actions – far beyond the actual agricultural establishment to reach off-site
319 administrators involved only in pre-application tasks. USDA recommends removing the reference to
320 "arranging for the application of the pesticide."
321
322 EPA Response. EPA also received several similar comments from states, growers, agricultural
323 associations and pesticide manufacturer associations objecting to the proposed definition of "use." Most
324 commenters objected to the definition of use because they did not support inclusion of "arranging for
325 application of the pesticide" as part of the definition of "use," and they said they believed that this
326 language would greatly expand the scope of the WPS and would be unreasonable and unnecessary. EPA
327 disagrees with comments that say the proposed definition for the term "use" could or will expand the
328 scope of the WPS because this language has been in §170.9(a) of the WPS since the rule first became

329 effective in 1992. Moreover, EPA has not been made aware of any instances where this definition of
330 "use" has resulted in an unreasonable or inappropriate outcome. EPA believes that "arranging for
331 application of the pesticide" is appropriately part of the definition of "use" for the purposes of the WPS
332 because in production agriculture, the individual who physically "uses" a pesticide almost always does
333 so at the direction of another person who has substantially greater control over the circumstances of the
334 use. Thus the WPS is designed so that when an agricultural or handler employer arranges for the
335 application of a pesticide by a handler employee, it triggers certain WPS duties that are properly the
336 responsibility of the agricultural or handler employer. For instance, once the agricultural employer
337 arranges for a pesticide application by a commercial pesticide handling establishment, the commercial
338 pesticide handler employer must provide the agricultural employer with certain information about the
339 intended application before the application takes place (so the employer will be able to fulfill WPS
340 notification requirements and protect workers during application, etc.). In such circumstances, it is
341 reasonable and appropriate that the handler employer should be held responsible for the pre-application
342 information exchange even though the application has not commenced and even though the handler
343 employer personally never physically applies the pesticide. Therefore, since EPA has not been made
344 aware of any instances where the existing interpretation of the term "use" has resulted in unreasonable
345 difficulties for growers, states or the agricultural industry, EPA has moved the definition for the term
346 "use" into the definitions section of the rule without any changes from the proposal.
347
348 8.1 "Administration of Conservation Programs" was not included in the proposed rule. This
349 NAICS code includes the administration of recreational areas and weather forecasting administration,
350 geologic survey program administration, preservation of natural resources, recreational areas, erosion
351 control, etc. USDA would like an expansion on the rationale for their inclusion into the worker
352 protection standard. Furthermore, the entirety of this NAICS code's government population, appears not
353 to be addressed in the Economic Analysis and, therefore, the impact on this sector may not have been
354 included.
355
356 EPA Response. EPA did not receive comments from the entities listed under this NAICS code,
357 and does not believe that the WPS applies to them. EPA has removed the reference from the preamble,
358 per USDA's request.
359
360 **9. §170.309(c) and §170.313(c) minimum age**
361 USDA. As in previous reviews, USDA opposes changing the minimum age for handlers and
362 early-entry workers proposed by EPA and defer this decision to the States. U.S. agricultural workers
363 operate under a variety of federal requirements, including those of the Environmental Protection Agency
364 and the U.S. Department of Labor. States also have minimum age requirements for users of pesticides.
365 The U.S. Department of Labor has already set federal minimum age limits for people who are 18 years
366 old or younger when working with pesticides. The current regulatory system allows for States to
367 increase age requirements and most states have already exercised this right based on their unique
368 circumstances. USDA believes the current federal-state system is working in this regard. The need for
369 added regulation is not apparent and should be weighed against state discretion and current state and
370 federal laws.

371 Please see the following as posted by the Department of Labor at
372 http://www.dol.gov/elaws/esa/flsa/docs/hazag.asp. (Italics added for emphasis.)

373 Prohibited Occupations for Agricultural Employees

374 The child labor rules that apply to agricultural employment depend on the age of the young
375 worker and the kind of job to be performed. The rules are the same for all youth, migrant
376 children as well as local resident children. In addition to restrictions on hours, the Secretary of
377 Labor has found that *certain jobs in agriculture are too hazardous for anyone under 16* to
378 perform.

379 - *Once a young person turns 16 years old, he or she can do any job in agriculture.*
380 - A youth 14 or 15 years old can work in agriculture, on any farm, but only in non-
381 hazardous jobs.
382 - A youth 12 or 13 years of age can only work in agriculture on a farm if a parent has
383 given written permission or if a parent is working on the same farm as his or her child,
384 and only in non-hazardous jobs.
385 - If the youth is younger than 12, he or she can only work in agriculture on a farm if the
386 farm is not required to pay the Federal minimum wage. Under the FLSA, "small" farms
387 are exempt from the minimum wage requirements. "Small" farm means any farm that did
388 not use more than 500 "man-days" of agricultural labor in any calendar quarter (3-month
389 period) during the preceding calendar year. "Man-day" means any day during which an
390 employee works at least one hour. If the farm is "small," workers under 12 years of age
391 can only be employed with a parent's permission and only in non-hazardous jobs.

392 **Hazardous Occupations**

393 - The Secretary of Labor has found that the *following agricultural occupations are*
394 *hazardous for youths under 16 years of age. No youth under 16 years of age may be*
395 *employed at any time in any of these hazardous occupations in agriculture* (HO/A) unless
396 specifically exempt. Exemptions (*) will apply to HO/A #1 through #6 under limited
397 circumstances. (None of the exemptions apply to pesticides.)
    398 - HO/A #9 *Handling or applying agricultural chemicals if the chemicals are*
    399 *classified under the Federal Insecticide, Fungicide and Rodenticide Act as Toxicity*
    400 *Category I -- identified by the word "Danger" and/or "Poison" with skull and*
    401 *crossbones; or Toxicity Category II -- identified by the word "Warning" on the label.*
    402 (Handling includes cleaning or decontaminating equipment, disposing of or returning
    403 empty containers, or serving as a flagman for aircraft applying agricultural
    404 chemicals.)

405 USDA requests that EPA work with DOL to unify their regulations so that those working in agriculture
406 have clear guidance as to federal minimum age requirements for agricultural workers. The States have
407 regulations in place that are consistent with DOL – or more restrictive – based on the needs of individual
408 States.
409

410 EPA Response. EPA notes that a majority of the comments received encouraged the Agency to
411 implement a minimum age of 18 for handlers and early-entry workers.
412 EPA welcomes input from DOL to ensure no avoidable conflict between the WPS and FLSA.
413 However, the statutory criteria for regulating under FIFRA and the child labor provisions of FLSA are
414 different. While EPA will defer to DOL regarding the scope of its authority under FLSA, it does not
415 appear that DOL has the discretion to use the FLSA section 12 child labor provisions to protect children
416 16 or older working in agriculture. FIFRA does not contain such a limitation, and EPA believes that
417 pesticide handling in agriculture and entry to a treated area when a restricted-entry interval (REI) is in
418 effect ("early-entry workers") by persons under the age of 18 is inconsistent with the FIFRA statutory
419 standard.
420 Moreover, where DOL exercises its FLSA child labor authorities in regard to children employed
421 in agriculture, its focus is on protecting the child worker (see 29 USC 213(c)(4)). EPA's mandate under
422 FIFRA is significantly broader, requiring EPA to prevent unreasonable adverse effects of pesticides to
423 workers, other persons, and the environment, and these are put at risk when agricultural pesticides are
424 applied by persons with immature judgment and risk-taking behaviors. Inasmuch as FLSA and FIFRA
425 have different purposes and different scopes, it is not surprising that they should produce different
426 regulatory outcomes.
427 DOL's standard and the WPS differ in the types of pesticides covered. DOL's restrictions on
428 pesticide use in agricultural employment applies only to pesticides with high acute toxicity (toxicity
429 categories I and II). The WPS applies to all agricultural use pesticides, some of which may pose a
430 variety of other risks. Pesticides that are extremely toxic to other species, or that are powerful
431 carcinogens or mutagens, may nevertheless have low acute human toxicity, and therefore be classified in
432 toxicity categories III and IV. Such pesticides can pose significant risks to the handler, bystanders, and
433 the environment if not used properly.
434 To the extent that DOL's standard does protect children from agricultural pesticides, it only
435 protects children as pesticide applicators. DOL's standard does not cover early-entry workers at all,
436 though they face increased risks from entering an area treated with pesticides before the residue levels
437 have fallen to a level unlikely to cause unreasonable adverse effects.
438 In sum, EPA disagrees with USDA's request that EPA should defer to the states or the FLSA and
439 not establish any age-related restrictions on pesticide handling or early-entry activities. EPA has the
440 responsibility under FIFRA to regulate the use of pesticides to avoid unreasonable adverse effects, apart
441 from any requirements established by other federal or state laws.
442
443 **10. §170.311(b)(6)**
444 a. USDA: The new requirement to maintain application information and SDSs for 2 years is
445 onerous and without foreseeable benefit. Acute toxic effects would be the most likely triggering need to
446 get this information to a worker. EPA should have considered a longer application information posting
447 time (45 days, 60 days) rather than a 2-year record retention.
448
449 EPA Response. EPA believes that workers in agriculture and pesticide regulatory agencies
450 should have access to application and exposure information, and believes that two years is a reasonable
451 compromise between access and the burdens of record retention. Acute pesticide illnesses are the most

452 common triggering effects; however, chronic illnesses are potentially linked to pesticide exposure, and
453 workers and handlers may present such illnesses and should have access to the exposure or hazard
454 information. Under OSHA, records of exposure to hazardous chemicals are required to be retained for
455 30 years, and access to those must be provided to workers, even if they are no longer employed by the
456 employer. Once the record is created and filed, there is little cost to maintaining it. In addition,
457 employers may choose to keep the information at the central posting display for the required retention
458 period of two years from the date of application, providing that the information remains legible and all
459 other requirements are met.
460
461 b. USDA: USDA expresses concern over the increased burden placed on agricultural employers
462 due to a significant expansion and complexity of record-keeping requirements. As written, agricultural
463 employers will bear the sole responsibility in providing records and responses to workers, their
464 designated representatives, plus states and federal enforcement. Agricultural employers already must
465 keep records under OSHA, including The Migrant and Seasonal Agricultural Worker Protection Act
466 (MSPA), Field Sanitation Standards under the Occupational Safety and Health Act, and Agricultural
467 Employers under the Fair Labor Standards Act (FLSA). USDA is further concerned over agricultural
468 employers' liability resulting from small procedural mistakes stemming from the added recording-
469 keeping requirements under FIFRA.
470
471 EPA Response. EPA responded to comments from agricultural interests opposing the proposed
472 recordkeeping on the basis of burden by examining the purpose and need for the records. As a result,
473 EPA eliminated from the final rule the requirement for documenting oral notification to workers for
474 early-entry. The review found that collection of the application information and the SDS are necessary
475 for hazard communications. The remaining records were found to be necessary for employers to
476 demonstrate compliance with aspects of the regulation.
477 USDA expresses concern for employers' liability from small procedural mistakes. Small
478 procedural mistakes are typically addressed with a warning notice, rather than monetary penalties. After
479 implementation, there will be a period of compliance assistance. During this period, EPA and state
480 regulatory agencies will work with agricultural interests to ensure understanding of the rule
481 requirements and how to comply with them, thereby minimizing "small procedural mistakes."
482
483 c. USDA. Under OSHA, there are already considerations for "designated representatives" for
484 farm accidents, farm chemical hazards, wages, etc. which can be confusing if there is a separate
485 "designated representative" under FIFRA for pesticide hazard communication records. OSHA provides
486 a process for expiration, revocation of "designated representatives," and whether the designated
487 representative can be a union representative, worker group representative, etc. for records and in what
488 circumstances the designated representative can accompany an inspection. The WPS language does not
489 specify how many authorized representatives a worker may have. The time to process multiple
490 authorizations, confirm signatures and make changes will incur added costs to agricultural employers
491 and should be included in the Economic Analysis.
492

EPA Response. EPA believes the WPS final rule is clear regarding the identification and function of the designated representative. The representative must provide, in writing, the designation from the worker or handler. The information that the employer must provide is limited to the application records and the SDS that were displayed while the worker or handler was on the establishment. EPA's designated representative requirement is modeled on OSHA's rule at 29 CFR 1910.1020. EPA is aware that California and Texas regulations include employee representatives' access to information for farmworkers. Comments from the Texas Department of Agriculture encouraged EPA to require the designation in writing and to limit access to records to the timeframe of 2 years.

Under the final rule, while a worker may have multiple authorized representatives, EPA expects a single individual could be the designated representative under both sets of regulations, thereby minimizing confusion and burden for the employer. The final rule does not provide access to inspections for the designated representative.

The Economic Analysis has been updated to provide an estimate of the costs of processing requests on a per-request basis, and includes the cost of verifying the validity of the request. Please refer to comment #30 for details.

d. USDA. USDA believes the total costs for record-keeping should include the following: set-up costs to establish a recordkeeping system (if one has not already been established; costs to develop internal record forms; printing costs for paper records); computer software/system costs (for electronic records); storage costs; disposal costs of records with sensitive information; maintenance costs for records beyond the two-year minimum for longer-term employees. Did EPA consider all these in its cost estimates for record-keeping, especially for small businesses and government agencies?

EPA Response. As USDA noted previously in this comment (10.b.), agricultural employers must comply with recordkeeping under requirements from other federal agencies. Therefore, EPA believes that establishments will have recordkeeping systems in place as a result of complying with the cited requirements. EPA estimates the following costs: paper, time to collect information and signatures, and storage. The records required by EPA do not include information that would ordinarily be considered private or sensitive (note that the draft final rule does not require employers to record workers' birthdates), therefore, there is no need to dispose of those in any particular manner. Finally, as there is not a requirement to retain records beyond the two year timeframe regardless of a worker or handler's continued employment, such cost is not necessary to assess.

11. §170.311(b)(7)-(9)

a. USDA. Compared to the proposed rule's "authorized representative," EPA has now coined and defined the term "designated representative" and added additional language. Regardless of terms, EPA's definition of "designated representative" still raises serious concerns for USDA. We also remind EPA of the concerns expressed by key stakeholders that are detailed below in response to reading the proposed rule. USDA is concerned that EPA has not seriously considered their concerns. We also note that there was only one public comment in support of this concept during the proposed rule period which was far outnumbered by those written in opposition.

535
536 Minor Crop Farmer Alliance (MCFA)
537 "The current proposed definition of "authorized representative" is overly broad and would be very
538 difficult to manage to ensure information that is worker specific is protected. The information necessary
539 to provide support for workers who seek treatment for potential health related impacts is already
540 provided in the current WPS regulations. The proposed definition is open-ended and subject to serious
541 abuse. The representative of a worker seeking information under the provision of the WPS should be
542 limited to family members or medical personnel with a legitimate need for information."
543
544 National Association of State Departments of Agriculture (NASDA)
545 "Authorized representative: We request EPA remove "Authorized representative" from the proposed
546 rule. We recognize at least one state has this provision included in its state regulations, and we
547 understand the inclusion has led to a range of complications and on-going litigation that does nothing to
548 forward the purpose of the WPS or facilitate a sound regulatory framework. If mandated in the Code of
549 Federal Regulations, the new provision will lead to numerous complications for both the state regulatory
550 agency and the regulated community in trying to comply with the proposed WPS rule, even if the
551 designation is required in writing, while protecting against liability in responding to fraudulent claims or
552 interests seeking to utilize this provision for non-WPS purposes. We oppose this proposal."
553
554 Association of American Pesticide Control Officials (AAPCO)
555 "Authorized employee representative - A person designated by the worker or handler, orally or in
556 writing, to request and obtain any information that the employer is required to provide upon request to
557 the worker or handler.
558
559 AAPCO does not support the definition as proposed. An authorized representative should be designated
560 in writing for a specific worker or handler and for a specific event or time period within the last 2 years
561 from the date of request (due to record retention requirements). The information required to be provided
562 to the authorized representative, and the purpose of the request or intended use of the information,
563 should be clearly specified as noted in the above comments."
564
565 EPA response. In response to the many comments concerning the identification of the designated
566 (authorized) representative, EPA has clarified the requirements for the designation: it must be in writing,
567 include the name and signature of the requesting employee, describe the specific information being
568 requested, the date of the designation, and directions for sending the information if so desired. These
569 requirements largely meet the AAPCO recommendation. In addition, the employer has 15 days to
570 provide the information. EPA believes requiring the identification of the designated representative in
571 writing addresses the concerns raised for the legitimacy of the designated representative and clarity of
572 the request, while continuing to allow access to important pesticide exposure information for workers
573 and handlers that they may be reluctant to request of their employer.
574 One public comment states that the emergency provisions of the current rule provide adequate
575 support for workers. However, under the rule, only employees seeking emergency assistance while on

576 the establishment are so protected. Additionally, employees should have access to the information if
577 they are concerned for their exposure but do not show symptoms.
578 USDA states that only a single public comment supports the authorized representative concept;
579 however, EPA has found several comments in support of the authorized representative, stating that the
580 requirement would enable a worker or handler access to important information for medical purposes.
581
582 b. USDA has the following additional comments on this section:
583 These requirements for providing application data to the worker or handler, treating medical
584 personnel, or a designated representative do not spell out the timeframe for which records can be
585 produced based on §170.311(b)(6) (two year application information retention requirement). Each of
586 subsections should include the phrase "within the last two years" to clarify that after two years there is
587 no expectation that such records would have been retained.
588 EPA should be clear on the differences between a "designated representative" and a person
589 acting under the direction of medical personnel. Who are those "persons"? While the two could be the
590 same person, it is possible that in an emergency situation, the requirements for requesting the
591 information as outlined may not be expedient.
592
593 EPA Response. EPA has clarified in those sections that the information is accessible for only
594 that period of time after it is collected and retained.
595 USDA has also expressed concern that it is not clear who may access the information as a person
596 acting under the direction of treating medical personnel. In consultation with USDA, EPA has revised
597 the language to clarify that treating medical personnel and persons working under their supervision are
598 to be given access to the information.
599
600 c. USDA. Allowing oral requests to the employer by workers and handlers for pesticide
601 application information and safety data sheets is not consistent with the EPA's new posting requirements
602 that prohibit oral notification to workers of pesticide applications due to difficulty in recalling oral
603 information, difficulty communicating orally if language barriers exist and the lack of verification of an
604 oral notification. For these same reasons, oral notification to employers should be replaced with written
605 notification. USDA encourages EPA to meet with stakeholders representing employers and farm
606 workers to best balance the oral versus written requests and the mechanism for collecting the written
607 statement to designate the representative.
608
609 EPA Response. USDA finds inconsistency between (1) the option for workers and handlers to
610 orally request hazard information from their employer and (2) the requirement for the employer to post
611 areas treated with a pesticide with an REI of greater than 48 hours. EPA does not agree that these
612 requirements need to be consistent with each other. While it would be more convenient for employers to
613 get a written request for the hazard communication information, in the interest of promoting access to
614 workers and handlers who may not be literate and could not provide a written request, allowing oral
615 requests facilitates the flow of information and outweighs the convenience for the employer. Posting a
616 treated area under an REI as a visual warning is intended to provide an ongoing reminder to workers not

617 to enter the area, because they may forget the oral notification given, or there may be confusion about
618 which field is treated.
619 Regarding USDA's comment about the mechanism for collecting the written request to designate
620 the representative, the written information can be hand delivered, mailed, provided to the employer as an
621 attachment to an e-mail, or any other way seen as appropriate. Oral identification of the designated
622 representative is not sufficient.
623
624 **12. §170.313**
625 USDA. This section creates responsibilities for commercial pesticide handler employers
626 (CPHEs) toward "each handler" or "any handler," without limiting the CPHE's responsibility to only the
627 handlers employed by the given CPHE. This may lead to difficulties and unintended consequences when
628 multiple CPHEs are operating on the same agricultural establishment, or when an agricultural employer
629 chooses to employ some handlers directly while contracting for additional handlers through a CPHE.
630 Regarding subsection (b), how is a CPHE supposed to ensure that handlers employed by a
631 different CPHE or handlers employed directly by the agricultural employer receive the protections
632 required by the WPS?
633 Regarding subsection (c), how is a CPHE supposed to ensure that handlers employed by a
634 different CPHE or handlers employed directly by the agricultural employer are at least 18 years old?
635 The same line of questioning also applies to subsections (d), (e), (f), (g), (h), and (k). A CPHE
636 will not likely be able to follow these requirements with regards to handlers that are not employed by
637 him or her and thus are not within his or her supervisory control. USDA recommends clarifying that for
638 purposes of §170.313, the term "handler" is limited to handlers employed by the CPHE (i.e. the CPHE's
639 "own" handlers).
640 In addition, if EPA makes the changes to the definition of "labor contractor" in §170.305
641 suggested above, EPA should remove references to labor contractors in this section. This is because any
642 contractor who employs handlers will no longer be both a "labor contractor" and a CPHE, but only a
643 CPHE instead.
644
645 EPA Response. EPA does not believe that a CPHE has responsibilities for handlers other than its
646 own handler employees because the required employer-employee relationship that triggers WPS
647 responsibilities does not exist for handlers that are not employed by the CPHE. However, in the interest
648 of providing greater clarity in the, EPA has clarified in the rule in 170.313 that the commercial pesticide
649 handler employer duties are only applicable for handlers they directly employ. The revised reg text is
650 included below:
651
652 **§170.313 Commercial pesticide handler employer duties.**
653 "Commercial pesticide handler employers must:
654 (a) Ensure that any pesticide is used in a manner consistent with the pesticide product
655 labeling, including the requirements of this part, when applied on an agricultural establishment by a
656 handler employed by the commercial pesticide handling establishment.
657 (b) Ensure each handler employed by the commercial pesticide handling establishment
658 and subject to this part receives the protections required by this part.

(c) Ensure that any handler employed by the commercial pesticide handling establishment is at least 18 years old.

(d) Provide to each person, including labor contractors, who supervises any handlers employed by the commercial pesticide handling establishment, information and directions sufficient to ensure that each handler receives the protections required by this part. Such information and directions must specify the tasks for which the supervisor is responsible in order to comply with the provisions of this part.

(e) Require each person, including labor contractors, who supervises any handlers employed by the commercial pesticide handling establishment, to provide sufficient information and directions to each handler to ensure that the handler can comply with the provisions of this part.

(f) Ensure that before any handler employed by the commercial pesticide handling establishment uses any equipment for mixing, loading, transferring, or applying pesticides, the handler is instructed in the safe operation of such equipment.

(g) Ensure that, before each day of use, equipment used by their employees for mixing, loading, transferring, or applying pesticides is inspected for leaks, obstructions, and worn or damaged parts, and any damaged equipment is repaired or is replaced.

(h) Ensure that whenever a handler who is employed by the commercial pesticide handling establishment will be on an agricultural establishment, the handler is provided information about, or is aware of, the specific location and description of any treated areas where a restricted-entry interval is in effect, and the restrictions on entering those areas.

(i) Provide the agricultural employer all of the following information before the application of any pesticide on an agricultural establishment:

(1) Specific location(s) and description of the area(s) to be treated.

(2) The date(s) and start and estimated end times of application.

(3) Product name, EPA registration number, and active ingredient(s).

(4) The labeling-specified restricted-entry interval applicable for the application.

(5) Whether posting, oral notification or both are required under §170.409.

(6) Any restrictions or use directions on the pesticide product labeling that must be followed for protection of workers, handlers, or other persons during or after application.

(j) If there are any changes to the information provided in §170.313(i)(1), §170.313(i)(4), §170.313(i)(5), §170.313(i)(6) or if the start time for the application will be earlier than originally forecasted or scheduled, ensure that the agricultural employer is provided updated information prior to the application. If there are any changes to any other information provided pursuant to §170.313(i), the commercial pesticide handler employer must provide updated information to the agricultural employer within two hours after completing the application. Changes to the estimated application end time of less than one hour need not be reported to the agricultural employer.

(k) Provide emergency assistance in accordance with this paragraph. If there is reason to believe that a handler has experienced a potential pesticide exposure during his or her employment by the commercial pesticide handling establishment or shows symptoms similar to those associated with acute exposure to pesticides during or within 72 hours after his or her employment by the commercial pesticide handling establishment, and needs emergency medical treatment, the commercial pesticide

700 handler employer must do all of the following promptly after learning of the possible poisoning or
701 injury:
702 (1) Make available to that person transportation from the commercial pesticide handling
703 establishment, or any agricultural establishment on which that handler may be working on behalf of the
704 commercial pesticide handling establishment, to an operating medical care facility capable of providing
705 emergency medical treatment to a person exposed to pesticides.
706 (2) Provide all of the following information to the treating medical personnel:
707 (i) Copies of the applicable safety data sheet(s) and the product name(s), EPA registration
708 number(s) and active ingredient(s) for each pesticide product to which the person may have been
709 exposed.
710 (ii) The circumstances of application or use of the pesticide.
711 (iii) The circumstances that could have resulted in exposure to the pesticide.
712 (l) Ensure that persons directly employed by the commercial pesticide handling
713 establishment do not clean, repair, or adjust pesticide application equipment, unless trained as a handler
714 under §170.501. Before allowing any person not directly employed by the commercial pesticide
715 handling establishment to clean, repair, or adjust equipment that has been used to mix, load, transfer, or
716 apply pesticides, the commercial pesticide handler employer must provide all of the following
717 information to such persons:
718 (1) Notice that the pesticide application equipment may be contaminated with pesticides.
719 (2) The potentially harmful effects of exposure to pesticides.
720 (3) Procedures for handling pesticide application equipment and for limiting exposure to
721 pesticide residues.
722 (4) Personal hygiene practices and decontamination procedures for preventing pesticide
723 exposures and removing pesticide residues.
724 (m) Provide any records or other information required by this part for inspection and
725 copying upon request by an employee of EPA or any duly authorized representative of a Federal, State
726 or Tribal government agency responsible for pesticide enforcement."
727
728 Please note that EPA has not removed the references to labor contractors in this section. This is
729 because the rule must still address the possibility that a CPHE could hire handler labor through a labor
730 contractor and the CPHE must be responsible for providing handler protections to individuals hired
731 through a contractor. The final rule has been revised so that a CPHE is no longer considered a labor
732 contractor under the WPS, and therefore the CPHE handlers will not be considered employees of the
733 agricultural establishment when hired through the CPHE, but it recognizes that a CPHE may use labor
734 contractors.
735

736 **13. §170.315 Whistleblower**

737 General comment: Because agricultural employers must already comply with OSHA regulations
738 on health and safety, USDA seeks a broad inter-agency discussion on whistleblower rights of
739 workers. OSHA already investigates whistleblower complaints under seven environmental statutes, and
740 established procedures are already in place for OSHA investigations. Is there a way to take advantage of
741 existing OSHA investigative standards, regulatory processes and whistleblower investigative procedures

742 for farm accidents, labor, chemical hazards, dust, wages, migrant housing, sanitation, drinking water,
743 etc.? This would also take advantage of existing state whistleblower laws and regulations. Both growers
744 and workers would benefit as there will be one federal body to place whistleblower complaints and an
745 existing regulatory process and infrastructure. One can therefore expect farm workers, agricultural
746 employers and labor contractors to experience reduced regulatory confusion.
747
748 EPA Response. EPA is interested in meeting with OSHA regarding their whistleblower
749 procedures and standards. The final WPS has adopted language consistent with OSHA's approach to
750 providing whistleblower protections, and it makes sense to have similar processes for investigations.
751 However, as it is not clear that OSHA can adequately enforce the WPS whistleblower provisions, EPA
752 is not prepared to cede that responsibility to OSHA. Although OSHA jurisdiction covers most areas of
753 agriculture, they do not cover pesticide use or establishments with fewer than 11 workers, i.e., the
754 majority of the farms subject to the WPS.
755
756 **14. §170.401(a) and §170.501(a) Annual Training**
757 USDA. After reviewing the public comments and conferring with state Departments of
758 Agriculture, USDA finds that annual training for workers and handlers will place an excessive burden
759 on states and growers, without any evidence of increased protections for workers. USDA recommends
760 that training should be required at most every two years.
761 Moreover, USDA urges that EPA confer with their state regulatory partners regarding the
762 feasibility of annual training with respect to the ability of state and extension service personnel at local
763 universities to enforce or provide training on an annual basis. USDA has noted letters of concern dated
764 August 15, 2014, in the docket from the Association of American Pest Control Officials (AAPCO) and
765 the National Association of State Departments of Agriculture (NASDA). Federalism and resource
766 issues were raised by NASDA. Also, per the Louisiana AgCenter August 18, 2014, Docket Letter to
767 EPA, "In Louisiana, we already retrain workers and handlers every three years. This is a dramatic
768 change requiring annual training rather than every five years. This would increase the cost of the
769 program and limit opportunities to attend training sessions. What is the funding source to support this
770 increase in the frequency of training events?"
771 Finally, the Forest Service's experience with mandatory annual training is that such training
772 becomes robotic and less useful over time. USDA is concerned that an annual training requirement will
773 add costs without any appreciable benefit or increase in safety. Annual training for handlers is required
774 in California, but probably not too many other places.
775
776 EPA Response. EPA is sensitive to the concerns of agricultural employers regarding the
777 potential burden of annual training. Many comments linked the concern for burden with EPA's proposal
778 to eliminate one segment of trainers, certified applicators, from qualifying as trainers of workers. Based
779 on the comments in support of allowing certified applicators to train workers, EPA reassessed the ability
780 of certified applicators to provide worker training and has retained certified applicators as trainers in the
781 final rule. EPA believes that, with the addition of certified applicators as trainers, there are adequate
782 resources to provide worker safety training. Please refer to the USDA comment 18 from this document:
783

784 "USDA is very supportive of expanding the class of persons qualified to train workers and
785 handlers compared to the proposed rule, and is especially in favor of allowing certified
786 applicators to train workers (170.401) and handlers (170.501). This is particularly important to
787 provide adequate numbers of trainers without severely straining cooperative extension trainer
788 resources required to meet the annual training requirement in the draft final rule. USDA also
789 supports that EPA retained the ability to use as trainers those who are so identified at the state
790 level as qualified trainers. That allows the Forest Service in California to utilize registered
791 professional foresters as trainers; something that was fought for in the past in state regulations."
792
793 Safety training is well recognized as an important factor to reduce workplace incidents. Despite
794 the absence of studies on this subject, it is reasonable to attribute to the 1992 WPS the significant
795 reduction in agricultural pesticide exposure incidents dating from the implementation of rule. Although
796 EPA cannot attribute the reduction in incidents to particular provisions in the WPS, we think the rule has
797 contributed significantly to this reduction, and EPA expects the number of incidents to be further
798 reduced upon implementation of the amendments contained in this rule.
799
800 **15. §170.401(c)(1) [comment cross-referenced from EA]**
801 USDA. Due to the added training topics and other requirements, USDA does not believe that the
802 estimated 45 minutes of training include ample time to thoroughly cover added topics and take
803 questions. To allow for at least 5 minutes per training topic (11 for workers and 13 for handlers) and at
804 least 15 minutes for questions the estimated training time should be adjusted to 1.5 hours. This is still a
805 conservative estimate and does not take into account the added time required when a translator is used.
806
807 EPA Response. Many of the topics listed for training content are self-explanatory and do not
808 require substantial elaboration. Current EPA training videos take about 30 minutes per session,
809 including questions. While questions and answers from workers can be unpredictable in quantity and
810 length, based on past experience EPA estimates that the training with added content will not take longer
811 (on average) than 45 minutes.
812 EPA recognizes there are many different languages in the workforce. The EA considers only
813 new burdens that would result from the amendments to the existing WPS. Sections 170.130(c) and
814 170.230(c) of the existing WPS include the same requirement that training be conducted "in a manner
815 workers can understand."
816
817 **16. §170.401(c)(3)**
818 USDA. EPA states that after the effective date, "training programs required under this section
819 must include, at a minimum, all of the topics listed in §170.401(c)(i)-(xvi) . . ." This is followed by a list
820 of 23 points numbered from (i) to (xxiii). If only the first 16, up to (xvi), should be included in future
821 training, there is no reason to include the remaining 7 points in the rule. Alternatively, if all 23 points
822 should be included in future training, then the language should be corrected to include "all of the topics
823 listed in §170.401(c)(i)-(xxiii) . . ."
824 Most of the points listed in §170.401(c)(3), including (ii)-(xv) and (xix)-(xxii), sound like topics
825 for training, as they should. However, there are a few points, notably (i), (xvi)-(xviii), and (xxiii), that

826 sound like restated or new requirements placed on agricultural employers. Unlike the other points, these
827 five points include "agricultural employer" as the subject together with commanding verbs such as "are
828 required," "must not," "must," and "are prohibited." This could easily lead to confusion if these points
829 are misinterpreted as binding requirements, rather than training topics.
830 In addition to being generally misleading, two of these five points include statements that are
831 incorrect. First, (i) states that agricultural employers are required to "*provide* pesticide safety training,"
832 (emphasis added) when in fact agricultural employers are merely required to "*ensure* that each worker
833 has been trained" (§170.401(a), emphasis added), meaning that workers can be trained by a third party.
834 Second, (xvi) states that agricultural employers are required to "provide workers information about the
835 location of safety data sheets," when in fact agricultural employers must display the safety data sheets
836 "at a place on the agricultural establishment where workers and handlers are likely to pass by or
837 congregate" and must allow workers "access to the location of the information" (§170.311(b)), but there
838 is no express requirement to provide workers information about this location.
839 USDA recommends that at a minimum, the language in (i) and (xvi) be corrected to properly
840 reflect the requirements placed on agricultural employers in the WPS. EPA should also consider
841 rewording all of the five points in question – (i), (xvi)-(xviii), and (xxiii) – to make it clear that these are
842 merely topics for training, and not new requirements.
843
844 EPA Response. EPA appreciates the correction, and has included all the points in the citation at
845 170.401(c)(3). EPA will revise the language at §170.401(c)(3)(i), (xvi)-(xviii), and (xxiii) to clarify
846 their intent as training points.
847 Regarding §170.401(c)(3)(i), USDA's comment is correct; the employer is required only to
848 ensure that the worker or handler has been trained. Therefore, EPA has adjusted the language to reflect
849 that distinction. However, the comment stating that there is not a requirement for employers to inform
850 workers and handlers of the location of the safety data sheets that reflects the training point at
851 170.401(c)(3)(xvi) is incorrect; please refer to 170.403(a) and 170.503(b)(1) that instruct the employer
852 to inform their employees of the location(s) of the safety data sheets.
853
854 **17. §170.401(c)(3)(i)**
855 USDA. Add the phrase "in writing" after "designate" to make it clear to workers that such
856 designation must be in writing.
857
858 EPA Response. This change has been made. The rule text at §170.401(c)(3)(i) has been revised
859 as follows:
860 (i) Agricultural employers are required to provide workers with information and protections
861 designed to reduce work-related pesticide exposures and illnesses… A worker may designate in writing
862 a representative to request access to pesticide application and hazard information.
863
864 **18. §170.401(c)(4) and §170.501(c)(4) certified applicators**
865 USDA. USDA is very supportive of expanding the class of persons qualified to train workers and
866 handlers compared to the proposed rule, and is especially in favor of allowing certified applicators to
867 train workers (170.401) and handlers (170.501). This is particularly important to provide adequate

868 numbers of trainers without severely straining cooperative extension trainer resources required to meet
869 the annual training requirement in the draft final rule. USDA also supports that EPA retained the ability
870 to use as trainers those who are so identified at the state level as qualified trainers. That allows the Forest
871 Service in California to utilize registered professional foresters as trainers; something that was fought for
872 in the past in state regulations.
873
874 EPA Response. None required.
875
876 **19. §170.401(d) National Data Base for trained workers and handlers**
877 USDA. USDA reminds EPA of the comments submitted by key stakeholder groups that have
878 responsibilities for recordkeeping:
879
880 a. Association of American Pest [sic] Control Officials (AAPCO)
881 AAPCO supports recordkeeping of employee training. We recommend that the date of birth be
882 removed as a requirement from the record, as this will complicate use of the record, since the birth date
883 can be considered confidential information. The employer must verify age by other means (license,
884 immigration documentation, etc.) for personnel purposes that are maintained separately. We recommend
885 that the Agency provide a template for recordkeeping that can be provided as a convenience for
886 employers, but not make use of the template a requirement. The records should be kept by the
887 agricultural employer.
888
889 EPA Response. EPA was convinced by concerns raised by states regarding the confidentiality
890 issues with personally identifiable information, and has removed the requirement for a record of the
891 birthdate in the training record.
892 EPA plans to develop an optional form that employers may use to collect training records.
893
894 USDA.
895 b. Association of American Pest [sic] Control Officials (AAPCO)
896 AAPCO has serious concerns about the requirement in §170.101(d)(2). The possibility for use of
897 fraudulent records is real, and verification of the training record could require significant resources by
898 state lead agency personnel, or may be impossible if the record is provided by an out of state trainer.
899 AAPCO recommends that EPA develop a national data base that can be used by certified trainers to
900 enter information, coupled with a national card with a scannable bar code. State lead agencies can access
901 the data base to verify the training record. State lead agencies should not be expected to rely on the
902 employee-provided record to verify training.
903
904 National Association of State Departments of Agriculture (NASDA)
905 We encourage EPA to consult with NASDA, SFIREG, AAPCO, and the regulated community to
906 discuss and review the benefits and drawbacks of developing a central repository for basic training
907 information submitted to and retained by EPA.
908

909 EPA Response. Please refer to the notice of proposed rulemaking Unit VII B, 79 FR 15444,
910 page 15463, for a discussion of the advantages and disadvantages of a centralized database for training
911 records. EPA declined to propose requirements that would centralize the recorded information because it
912 would burden employers to enter the data, and the requirement for on-site records for inspection
913 purposes would remain. EPA continues to believe that the costs of such a scheme would outweigh its
914 expected benefits. Although there are potential uses for a centralized database of trained workers and
915 handlers, EPA believes that it would require significant resources committed to ensure data quality.
916 Giving workers and handlers a copy of their training records on their request should provide workers
917 and handlers a simple way to demonstrate prior training to a new employer.
918
919 **20. §170.405(a)**
920 USDA.USDA is concerned how helicopter or fixed wing applications can possibly meet this
921 standard without de facto buffers. A pilot would otherwise have to be constantly scanning a distance of
922 100 feet from the aircraft in all directions looking for some errant person; which is a huge safety issue in
923 itself. This essentially means that a 100 foot buffer remains with aerial applications.
924
925 EPA Response. The provision in §170.405(a) establishes a requirement on the agricultural
926 employer, not the applicator (handler). Specifically, an agricultural employer must not allow or direct a
927 worker or other person to remain in the treated area or application exclusion zone within the boundaries
928 of the establishment until application is complete. This is a relatively small extension of the current
929 requirement in §170.110(a) for agricultural employers to keep workers and others out of a treated area
930 during application on farms and forests. The final rule will cover a slightly larger area from which the
931 agricultural employer must exclude workers and other persons but only while the application equipment
932 is treating that specific section of the treated area. For the example of an aerial application, there would
933 be an additional 100 foot area along the side of the treated area from which people must be excluded, but
934 only while the helicopter or airplane is treating that edge of the field. Once the aircraft has left the edge
935 of the field, workers and other persons must be excluded of only the treated area, as is currently
936 required.
937 As explained in Unit IX.B.2, EPA notes that the application exclusion zone is not a "buffer," a
938 term that typically is used to describe an area that cannot be sprayed. The application exclusion zone is
939 simply an area around active application equipment that moves with the application equipment as the
940 application progresses. Under the final rule, a pesticide can be applied in an application exclusion zone,
941 and the requirement for agricultural employers is to keep workers and other people out of this zone
942 (which is a specified distance from the application equipment, not the edge of the treated area) during
943 the pesticide application.
944 For additional information, see the response to question 26.
945
946 **21. §170.409(b)(3)(ii) – forestry signs**
947 USDA. The requirement to post outdoor production areas at all normal access points, or roads, or
948 trails, or if no access points, at corners of the units can be problematic in forestry. Is a skid trail or a
949 landing considered a road or access point? What if no roads or trails access the unit? Posting the corners

950 makes no sense in such a case, as those would be essentially invisible anyway. EPA may want to
951 reconsider posting requirements related to forestry regulations.
952
953 EPA Response. The requirement in the final rule is that "the signs must be visible from all
954 reasonably expected points of worker entry to the treated area, including at least each access road, each
955 border with any worker housing area within 100 feet of the treated area and each footpath and other
956 walking route that enters the treated area." EPA does not believe the application of this proposal to
957 forestry operations is unique or substantially from its application to large fields or orchards that may not
958 have definitive points of entry. In the situation described above, the draft final rule would require the
959 employer to consider whether the "skid trail" or landing is a reasonably expected point of worker entry;
960 if so, then it must be posted. Where there are no reasonably expected points of worker entry, the draft
961 final rule provides that "signs must be posted in the corners of the treated area or in any other location
962 affording maximum visibility." If as USDA suggests, the geography of a particular treated area makes
963 posting the corners irrelevant, then the employer should post the locations providing maximum visibility
964 for workers entering the treated area.
965 EPA intends that the final rule should apply to these situations in the same manner as described
966 in the existing WPS IGW guidance that addresses this topic (a copy of the WPS IGW guidance
967 applicable to this issue is included below). It is worth noting that EPA intends to revisit all the existing
968 WPS IGW guidance Q&As and will retain those that are still applicable, and will revise any guidance
969 that is still necessary but needs to be updated to reflect changes in the final rule. EPA would be glad to
970 work with USDA to revise the existing WPS IGW guidance related to posting such types of
971 fields/forests to make sure it adequately addresses forestry concerns.
972
973 **13-10 Posting areas with unlimited entry points**
974 Question: If a treated area has unlimited entry points, how often should treated-area warning
975 signs be posted to be "visible from all usual points of entry?" Every 100 feet?
976
977 Answer: The rule requires that signs be visible at all usual points of worker entry, including at
978 least each access road, each border with any labor camp adjacent to the treated area, and each
979 footpath and other walking route that enters the treated area. If there are many usual points of
980 entry, then signs must be visible from all usual points of entry. When there are no usual points of
981 worker entry, signs must be posted in the corners of the treated area or a location affording
982 maximum visibility. In areas where there are unlimited points of entry, the agricultural employer
983 must determine the usual points of entry and make signs visible from those points of entry.
984 (March 7, 1995)
985
986 **22. §170.411(b) Decon water – 1 gallon/worker**
987 USDA. Requiring a gallon of water at the beginning of the work shift for every worker entering a treated
988 unit for a period lasting 30 days after the REI could be problematic in forestry applications. If the water

989 is always located in the worker's vehicle, it is probably not a major issue, although carrying extra
990 canteens in the vehicle will be a change in procedures.
991
992 EPA Response. Since the WPS requirement for the quantity of decontamination water for
993 workers in the final rule is merely a codification of an existing WPS IGW policy that clarified what a
994 "sufficient" amount of water per worker was, EPA does not believe this change should represent a
995 significant burden compared to the existing rule. Since this is water that only has to be available at the
996 area where decontamination supplies are provided, or at the nearest point of vehicular access, the
997 provision will not result in workers having to carry any water on their persons. It will only necessitate
998 that the required amount of water per worker be available at the area where decontamination supplies are
999 provided, or at the nearest point of vehicular access. Additionally, EPA believes the current exceptions
1000 in the rule for the location of decontamination supplies provide adequate flexibility to agriculture and
1001 forestry to accommodate the range of situations.
1002
1003 **23. §170.411(d) and §170.509(c) – define nearest place of vehicular access**
1004 USDA. The term "nearest place of vehicular access," which is where decontamination supplies
1005 must be stored when workers or handlers are working in remote areas, is not defined in the WPS. This
1006 location depends on whether one considers just regular automobiles that travel on paved or well-
1007 maintained unpaved roads; or also tractors and all-terrain vehicles that can travel where regular
1008 automobiles cannot; or even helicopters, drones, and other aircraft. Is there a general standard for what
1009 "nearest place of vehicular access" means, or does it depend on which vehicles the agricultural employer
1010 or handler employer happens to have available at the time? USDA recommends the EPA include a
1011 definition of "nearest place of vehicular access" in §170.305.
1012
1013 EPA Response. EPA does not believe it is necessary to define the phrase "nearest place of
1014 vehicular access" because the term is sufficiently clear in its meaning without further explanation.
1015 USDA is correct that the nearest place of vehicular access would be dependent on the type of vehicle in
1016 use for the situation, and because it is not practical to describe all situations, EPA believes it is
1017 appropriate to use a general term that can be easily interpreted. In the 20 years of WPS implementation
1018 and taking questions from regulators and the regulated community, EPA is not aware of any serious
1019 disagreement related to the meaning of the phrase "nearest place of vehicular access", and feels that
1020 trying to define the term may reduce the existing flexibility in the rule afforded by the current approach.
1021
1022 **24. Subpart F, §170.501-170.509 Conflict between "handler employer" and CPHE employer"**
1023 USDA. Subpart F assigns a host of responsibilities regarding handlers to the "handler employer."
1024 As noted in the comments on §170.305, the definition of "handler employer" is currently so broad, that
1025 at any given moment there could be two or more "handler employers" responsible for the same handler
1026 (i.e. the agricultural employer and one or more commercial pesticide handler employers).
1027 This dual responsibility is very problematic. Is each requirement in Subpart F supposed to be
1028 carried out in duplicate? This would mean that both the agricultural employer and the commercial
1029 pesticide handler employer would have to independently check the handler's training status (and keep
1030 the corresponding records), age, and knowledge of relevant information; both would have to ensure that

1031 handlers using highly toxic pesticides or fumigants within enclosed spaces are monitored regularly; and
1032 both would have to provide PPE and decontamination supplies to the handler. This approach would be
1033 ridiculously wasteful. At the same time, it is questionable whether splitting responsibility between the
1034 agricultural employer and the commercial pesticide handler employer would lead to better results, since
1035 the two parties would have to coordinate extensively to determine who will cover each requirement.
1036 USDA recommends that EPA address this problem by making the changes to the definition of
1037 "labor contractor" in §170.305 suggested above, which would have the practical effect of changing the
1038 definition of "handler employer" to mean only the handler's *direct* employer, whether that is an
1039 agricultural employer or a commercial pesticide handler employer.
1040
1041 EPA Response. EPA believes it has made the revisions to the rule text necessary to address
1042 USDA's concerns in this area. Please see EPA's responses to comments 8b and 12.
1043
1044 **25. §170.501(c)(3)(xiv) training for handlers – error in reg text**
1045 USDA. This section requires that the training for handlers include the following point: "Handler
1046 employers must post treated areas as required by this rule." However, under §170.309(h) and §170.409,
1047 it is the agricultural employer – not the handler employer – who is required to display information and
1048 signs related to pesticide applications and worker entry restrictions. USDA recommends that EPA
1049 resolve this discrepancy.
1050
1051 EPA response. EPA corrected the text of the final rule to refer to the agricultural employer.
1052
1053 **26. §170.505(b) –AEZ – handler suspend application if person in zone, even when outside the**
1054 **property**
1055 USDA. This section requires that handlers suspend pesticide application when individuals are
1056 present in the application exclusion zone. Unlike in §170.405(a)(2), there is no exception if the
1057 individuals are outside the boundaries of the agricultural establishment, for example on a neighboring
1058 property or on a public right-of-way. USDA recommends that the language in §170.505(b) should be
1059 adjusted to match §170.405(a)(2): ". . . the handler performing the application must immediately
1060 suspend a pesticide application if any worker or other person [other than another handler] is in the
1061 application exclusion zone described in §170.405(a)(1) that is within the boundaries of the establishment
1062 . . ." The agricultural employer has no control over individuals outside of the agricultural establishment,
1063 and this should be recognized by not requiring automatic suspension of application in situations where
1064 individuals beyond the boundaries of the establishment might peripherally encroach on an application
1065 exclusion zone. It should be noted that §170.505(a) already requires the handler to "ensure that no
1066 pesticide is applied so as to contact, directly or through drift, any worker or other person [other than
1067 another handler]." This renders superfluous the additional restriction in §170.505(b) requiring
1068 suspension when the application exclusion zone is encroached outside the establishment.
1069
1070 EPA Response. EPA disagrees that the application exclusion zone should be limited to the
1071 boundaries of the agricultural establishment for the requirement in §170.505(b) for a handler to suspend
1072 application if a worker or other person is in the application exclusion zone.

1073 EPA agrees with USDA that labels and §170.210(a) already require handlers to apply in a way
1074 so pesticides do not contact a worker or another person. However, these provisions appear inadequate
1075 because drift from pesticide applications continues to cause human exposure incidents. EPA also agrees
1076 that an agricultural employer has no control over individuals outside the establishment, which is why the
1077 requirement for agricultural employers in §170.405(a) is limited to the boundaries of the agricultural
1078 establishment. However, the handler who is applying the pesticide does have the ability to temporarily
1079 suspend an application and restart it after the worker or person leaves the area. Handlers who are
1080 applying should already be doing this so they do not contact a worker or other person during application.
1081 As stated by the National Agricultural Aviation Association in their comments on the proposed rule, "It
1082 is standard operating procedure for aerial applicators to temporarily avoid making passes adjacent to
1083 such [rural] roads if workers happen to be passing by in vehicles or on foot."
1084

1085 **27. §170.507 [comment cross-referenced from EA] Respirator Requirement costs and update**
1086 **terminology**

1087 USDA. The discussion of costs associated with respirator fit tests could be clarified by providing
1088 additional information on the types of pesticides that are assumed to require respirators, the frequency
1089 those pesticides are applied (every year or less frequently), and the number of farms likely to apply those
1090 pesticides.
1091 Consistent use of terminology: USDA commends the change of terminology from dust/mist
1092 filtering respirator to filtering facepiece respirator. Use of the OSHA terminology prevents confusion
1093 and contributes to more cohesive standards across agencies. USDA suggests the addition of this term to
1094 §170.205 to reflect the definition provided by OSHA in 29 CFR 1910.134 (b) (quoted below) for further
1095 clarity.
1096 "*Filtering facepiece respirator* means a negative pressure particulate respirator with a filter as an
1097 integral part of the facepiece or with the entire facepiece composed of the filtering medium."
1098

1099 EPA Response. EPA disagrees that a detailed discussion of the respirator cost analysis is needed
1100 in the Federal Register. Those details are included in the economic analysis.
1101 EPA appreciates USDA's comments on changing terminology from dust/mist respirators to
1102 filtering facepiece respirators. The final WPS rule only uses the term filtering facepiece respirator in the
1103 preamble; it does not appear in the reg text itself. Therefore, EPA has added OSHA's definition of
1104 filtering facepiece respirator to Unit XV.A.3 of the preamble as follows: "…Many farmworker
1105 advocacy organizations and some PPE manufacturers asserted that EPA should also apply the proposed
1106 standards for fit testing, training, and medical monitoring to users of filtering facepiece respirators in
1107 addition to the other respirator types (e.g., tight fitting elastomeric facepieces). Commenters suggested
1108 that filtering facepiece respirators are widely used and covered by OSHA's respirator requirements, and
1109 that their exclusion would result in inadequate protection for many pesticide handlers. OSHA defines a
1110 filtering facepiece as "a negative pressure particulate respirator with a filter as an integral part of the
1111 facepiece or with the entire facepiece composed of the filtering medium" in 29 CFR 1910.134(b)."
1112

1113 **28. §170.509(b) and (d) decon water in forestry**

1114 a. USDA. Requiring 3 gallons of water per handler at the beginning of the work shift will be
1115 problematic, especially if added to the eye wash requirement of 6 gallons of water for mixer/loaders
1116 using pesticides requiring protective eyewear. When using backpack applicators, each handler is at some
1117 point a mixer/loader (loading from a batch tank into the backpack, most commonly). A crew of 8
1118 applicators could then potentially need 72 gallons of water to be carried each day. This seems excessive.
1119 It is clear that each handler requires 3 gallons of water at the start of the shift for decontamination, but in
1120 such a circumstance as described, would a crew of 8 each need 6 gallons for eye flushing, or would one
1121 quantity of 6 gallons meet the requirement? This could be clarified.
1122
1123 EPA Response. Section 170.509(d) requires an emergency eye wash system at the
1124 mixing/loading site immediately available to the handler when a handler is mixing or loading a product
1125 whose labeling requires protective eyewear for handlers. Only one emergency eye wash system (that
1126 meets the WPS requirements) is required at a mixing/loading site regardless of how many handlers are
1127 mixing or loading at that site. EPA has revised Unit XII.C.3 of the preamble as follows to clarify this:
1128 "…The final rule allows employers to provide either at least 6 gallons of water in containers suitable for
1129 providing a gentle eye flush for about 15 minutes, or a system capable of delivering gently running
1130 water at a rate of 0.4 gallons per minute for at least 15 minutes to satisfy the requirement. One
1131 emergency eye wash system is required at a mixing/loading site when a handler is mixing or loading a
1132 product whose labeling requires protective eyewear to handlers, regardless of how many handlers are
1133 mixing or loading at that site." The final rule retains the existing requirement for water to be of "a
1134 quality and temperature that will not cause illness or injury."
1135
1136 b. USDA. May this water be drafted from local natural surface waters (woodland stream)? May
1137 the requirement be met by pre-positioning 6 gallons at the nearest place of vehicular access outside any
1138 treated area or area subject to a restricted-entry interval? Clarification invited.
1139
1140 EPA Response. The water in an emergency eye wash system can be drawn from local natural
1141 surface waters if the handler employer has determined the water meets the standard of being "of a
1142 quality and temperature that will not cause illness or injury when it contacts the skin or eyes or if it is
1143 swallowed" as required in §170.509(b)(1). An emergency eye wash system at the nearest place of
1144 vehicular access would not satisfy the requirement of §170.509(d)(1) unless it is "at the mixing/loading
1145 site immediately available to the handler."
1146
1147 **29. §170.601(a)(1)(xii) – mistake in numbering in reg text**

1148 USDA. This point references §170.605(a) through (c) and (e) through (k). However, the rule as
1149 currently written does not include a §170.605(k), only (a) through (j). EPA likely meant to write
1150 §170.605(a) through (c) and (e) through (j).
1151
1152 EPA Response. This change has been made to the rule text.
1153
1154 **USDA Comments on EPA Worker Protection Standard Economic Analysis**

1155
1156 **30. §170.311 Display Requirements for Pesticide Application and Hazard Information**
1157 a. USDA. The economic analysis does not account for provision of safety data sheet and
1158 information about the application to the worker or a designated representative within 15 days of request
1159 for such material. In addition, there is no cost assumed for mailing this material to the designated
1160 representative. There is no estimate of the expected number of requests for this information by workers
1161 or their representatives. These costs should be included.
1162
1163 EPA Response. These costs have now been included in the EA (Section 3.3.2) and Appendix B
1164 (Section 2, Tables B.2.a-2 and B.2.a-5). EPA calculates that the cost of responding to a request from a
1165 current employee to be about $3.50 and the cost of responding to a request from a former employee to
1166 be about $14, including mailing costs. It does not seem likely that costs would vary substantially
1167 whether the request comes directly from an employee or from a designated representative.
1168
1169 The number of requests is subject to a great deal of uncertainty; however, California and Texas
1170 have similar provisions and have not suggested that the issue arises frequently. For purposes of the EA,
1171 EPA has assumed that current employees may request hazard information once for every 20 applications
1172 made while one in 100 former employees may make a request.
1173
1174 b. USDA. The economic analysis assumes all farms have double-sided copies when it estimates
1175 3.3 pages are required to store the Safety Data Sheet, reported to be 6.7 pages on average (Table B.2.b.1
1176 Cost per Final Rule, WPS Farms, Information on Pesticide Applications, p. 17, Appendix B).
1177
1178 EPA Response. That is correct.
1179
1180 c. USDA. The period over which these records must be made available to the worker is unclear.
1181 The cost of retaining these records over time should be included and as well as the period over which
1182 they must be retained.
1183
1184 EPA Response. Records must be retained for two years (170.311(b)(6)). Retention costs are the
1185 cost of the folder used to store the documents, and are included in the EA.
1186
1187 **31. §170.401 Training Requirements for Workers**
1188 a. USDA. Due to the added training topics and other requirements, USDA does not believe that
1189 the estimated 45 minutes of training include ample time to thoroughly cover added topics and take
1190 questions. To allow for at least 5 minutes per training topic (11 for workers and 13 for handlers) and at
1191 least 15 minutes for questions the estimated training time should be adjusted to 1.5 hours. This is still a
1192 conservative estimate and does not take into account the added time required when a translator is used.
1193
1194 EPA Response. EPA's experience with the training material, as well as information provided in
1195 comments, suggest that current training sessions are about 30 minutes in length. One respondent to a
1196 questionnaire by the National Council of Agricultural Employers indicated that in the past year they

spent about 2,100 hours training 4,400 workers, or slightly less than 30 minutes per worker. See EPA's response to Comment 15, above.

b. USDA. The Economic Analysis does not take into consideration the cost of a translator for training. Though a translator is not required by the regulation, it does suggest the use of a translator in order to ensure that training is carried out "in a manner workers understand" (citation). These costs could be incorporated by estimating a reasonable probability of the number of trainings that will require a translator. Since EPA plans to develop training materials in several languages, the probability of requiring a translator could be estimated based on which languages and dialects would not be covered by those materials.

EPA Response. The EA considers only new burdens that would result from the amendments to the existing WPS. Sections 170.130(c) and 170.230(c) of the existing WPS include the same requirement that training be conducted "in a manner workers can understand".

c. USDA. Small farms bear a disproportionately larger cost for the new training requirements than large farms. The economic analysis Appendix B states that worker training costs will result in an increase of 85% over baseline costs for small-small WPS farms, and increase by 75% for medium-small WPS farms and large-small WPS farms with less than 10 employees, 48% for large-small farms with 10 or more employees, and 42% for large WPS farms. It would be clearer if costs were summarized for each of these farm size categories for each of the rule provisions throughout the economic analysis.

EPA Response. USDA appears to have misunderstood the information in Appendix B. The percentage changes reported do not refer to increases in overall costs, only the change in the number of trainings needed. For example, the Appendix states that "Small-small farms (revenue/year less than $10,000) are assumed to hold an average of 1.2 training sessions per year, an increase of 85% over the baseline." That is, the number of training sessions increases from an average of 0.65 sessions to 1.2 sessions, an absolute increase of 0.55 sessions. EPA assumes a large farm (revenue ≥ $750,000) with more than 10 workers will increase the average number of training sessions from 4.5 sessions to 6.4, an absolute increase of 1.9 sessions.

EPA has provided a summary of costs by farm size throughout the analysis and provided an analysis of overall impacts to small farms, defined by the Small Business Administration as entities with revenue less than $750,000. Because this definition implies that 95% of all U.S. farms, and almost 80% of farms affected by the WPS, are small, EPA also provides a more detailed analysis to examine the impacts across the distribution of small farms.

d. USDA. The cost per farm of training workers or handlers appears to assume that only 1 training record per training needs to be retained by the farm (Table B.1.b.3. Cost under Final Rule, cost per WPS farm by size, Worker Training). For both large and small WPS farms, the economic analysis assumes retention of only one copy per training event. If a worker requests a copy, USDA assumes that only the worker's information will be provided and not the records of other workers who also attended the training. If EPA assumes the employer will provide records for all workers attending training (for

1239 example on the same sign-in sheet) when one worker requests their training record, the impact of this
1240 provision on privacy requirements should be included in the analysis. If privacy constraints prevent
1241 sharing records of other workers, the cost of record retention at the farm level should reflect the cost of
1242 providing individual records.
1243
1244 EPA Response. EPA's goal is to make the process of confirming training as easy as possible.
1245 The record of the training can be as simple as a paper with the following information:
1246 (i) The trained worker's printed name and signature.
1247 (ii) The date of the training.
1248 (iii) Information identifying which EPA-approved training materials were used.
1249 (iv) The trainer's name and documentation showing that the trainer met the requirements
1250 of §170.401(c)(4) at the time of training.
1251 (v) The agricultural employer's name.
1252 As the draft final rule does not require the collection of any personally identifiable information,
1253 no personally identifiable information would be included in the record. For a worker to confirm to a
1254 subsequent employer that he or she has recently completed the pesticide safety training, a copy of the
1255 training record would have the information needed for the subsequent employer's records.
1256
1257 e. USDA. As part of their preliminary research, EPA conducted a Small Business
1258 Administration Review Panel (SBAR Panel or Panel). In almost every written comment they received,
1259 small business owners urged them to keep a grace period for employee training. Since EPA conducted
1260 a SBAR Panel, USDA would like to see an acknowledgment that these issues were taken into
1261 consideration. Though most of the commenters did not see many real cost added with removing (or
1262 decreasing) the grace period, they did indicate that workers would have to be hired sooner and thus
1263 paid for days where the employer received no work. If the time lost from work is considered in the
1264 benefits section regarding healthcare, then time lost from work due to training and paperwork must be
1265 considered in the costs.
1266
1267 EPA Response. EPA thinks the elimination of the grace period is not likely to lead employers
1268 to hire workers and pay them for no work. Rather, EPA anticipates that employers may have to
1269 provide additional training sessions (see response 31.c.). The opportunity cost of time for the worker
1270 to attend a safety training is included in the estimated cost of the revisions.
1271
1272 f. USDA. The elimination of the grace period and the requirement that all workers be trained
1273 "in manner workers understand" creates the potential for discrimination on the basis of language and
1274 literacy. Economic analysis should discuss the probability that workers who speak the language used
1275 by the employer or by on-site trainers will be used more frequently when training is required by
1276 temporary or seasonal workers immediately prior to performing a field or handler task. If a farm must
1277 train workers immediately before any allowable exposure to pesticides, the most easily trained
1278 workers will be more likely to be used in job situations where exposure could occur, at least initially.
1279
1280

EPA Response: EPA notes that the requirement for training to be provided in a manner that the worker can understand is not new. EPA has not received comment regarding discriminatory practices related to language as a result of the WPS.

32. §170.507 Personal Protective Equipment

a. USDA. *Consistent use of terminology*: USDA commends the change of terminology from dust/mist filtering respirator to filtering facepiece respirator. Use of the OSHA terminology prevents confusion and contributes to more cohesive standards across agencies. USDA suggests the addition of this term to §170.205 to reflect the definition provided by OSHA in 29 CFR 1910.134 (b) (quoted below) for further clarity.

> ***"Filtering facepiece respirator*** means a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium."

Costs and benefits: In the cost estimate for the addition of filtering facepiece respirators the Agency assumes that all employers will use the suggested online medical evaluation (introduced in lines 3388-3394 of the rule preamble) from the outset. While the use of online medical evaluations would be the most cost-effective option for employers, assuming that employers will be able to use this method of evaluation in the first years of implementation does not seem likely. This is especially true for rural areas where broadband access is not available on every farm operation. Though online medical evaluations will likely be used by some employers, the estimated probability seems high for the first year. The probability of using an off-site medical evaluation is much more likely in the first year with a decreasing probability within the first five years as employers learn more about their available options.

EPA Response. EPA does not agree with USDA's reasoning. Employers are unlikely to forego cost-effective options, even initially. EPA plans significant outreach and is confident that private interests, including crop advisors and pesticide dealers, will engage in similar programs. According to the 2012 Census of Agriculture almost 70% of U.S. farms have internet access and most have high-quality service, including broadband or DSL. Less than 10% of farms rely on dial-up connections.

b. USDA. Additionally, the time estimate for an off-site medical evaluation (Table 3.3-34) should use the same estimate as the follow-up medical exam ($72.12). The analysis must also take into consideration the lost wages and travel time associated with visiting a medical professional considering that most farm operations are located in rural areas where access to a licensed medical professional may increase time and travel. The time should at least reflect the time allotted to the evaluation, but should also include at least 30 minutes of travel time. Please see table below for an example of suggested edits.

Table 3.3-34. Costs under Final Rule, Large WPS Farm, Respirator Fit Test.

Action/Material (j)	**wage/price** w_j	**unit time/quantity** $H_{r,i,j}/M_{r,i,j}$	**annual frequency Prob(i|j)**	**cost**
Time for medical evaluation	$20.04/hr	1.5 hour	0.535	$ 16.08
Off-site evaluation	$72.17	1	0.535	$ 38.61
On-line evaluation	$27.00	1	0.134	$ 3.62

Time for follow-up exam [1]	$20.04/hr	2 hour	0.134	$ 5.36
Follow-up medical exam [1]	$72.17	1	0.134	$ 9.66
Time for fit test, with travel	$20.04/hr	1.5 hour	0.535	$ 16.09
Fit test and training	$50.00	1	0.535	$26.76
Employer management	$33.44/hr	1 hour	0.535	$17.90
Collect/Store documentation	$33.44/hr	4 min	0.535	$ 1.19
$cost_{r,i,a}^{P}$				**$ 135.27**

1318 Source: EPA estimation. See text for data sources. Numbers may not sum due to rounding.
1319 1 EPA assumes approximately 25 percent of handlers taking the medical evaluation will be referred for a
1320 more complete medical examination.

1321 EPA Response. EPA does not agree with USDA's reasoning that employers will select a more
1322 costly response to the regulatory burden. Further, if they choose to skip the screening evaluation for a
1323 complete medical evaluation e.g., because of a previously scheduled physical examination, there
1324 would be no need for an on-line (screening) evaluation or subsequent follow-up evaluation.
1325
1326 c. USDA. In the Economic Analysis for the rule, EPA explains that it derives costs for
1327 respirator fit tests from the assumption that each farm will only have one handler that will need to be
1328 fit tested and that only 40 percent of farms will likely use pesticides that require respirators.
1329 "Accounting for the fact that not all farms will use pesticides every year, EPA estimates about 40
1330 percent of large farms and large-small farms will use a product requiring a respirator. A farm is
1331 unlikely to need more than one handler when using these products, so for ease we calculate costs at
1332 the farm level. Further, some handlers will undergo fit testing because the requirement has been
1333 incorporated onto some product labels, for example, various soil fumigants." (Economic Analysis
1334 §3.3.6)
1335
1336 With the addition of filtering facepiece respirators, USDA does not believe this estimate is
1337 accurate. First, though only one handler may be involved in pesticide use at a time, this does not imply
1338 that there is only one handler on the farm that will need to be fit tested. The number of handlers per
1339 farm that need fit tests should be estimated based on small versus large WPS farms.
1340 Second, the assumption that only 40 percent of farms will use pesticides that require respirators
1341 seems low considering the addition of filtering facepiece respirators (which are required for a much
1342 larger number of pesticides than chemical cartridge respirators (NIOSH 23-C)). USDA urges EPA to
1343 gather further data on the number of pesticide labels that require respirators (including filtering
1344 facepiece respirators) and use that data to re-estimate the cost of respirator fit tests.
1345
1346 EPA Response. EPA notes that USDA is quoting the baseline estimation of cost, where about
1347 40% of the larger farms ultimately use a product requiring a respirator and the employer provides the
1348 handler with instruction on fit and use. Under the final rule, EPA assumes that over half of the larger
1349 farms will arrange for a handler to be tested.
1350
1351 d. USDA. The discussion of costs associated with respirator fit tests could be clarified by
1352 providing additional information on the types of pesticides that are assumed to require respirators, the
1353 frequency those pesticides are applied (every year or less frequently), and the number of farms likely

1354 to apply those pesticides. The economic analysis could be strengthened by providing a more detailed
1355 explanation for the assumption that under the baseline and final rule, 60% of crop-producing farms use
1356 pesticides requiring respirators with an annual use at 40% of these farms. In Appendix A, 76% of
1357 crop-producing WPS farms are estimated to use pesticides. It is unclear whether the 60% estimate
1358 requiring respirators includes pesticides requiring only the filtering facepiece respirators as well as
1359 pesticides requiring other types of respirators. The baseline calculation for the cost of fit tests at WPS
1360 farms assumes 40.4% of these farms will have a handler undergo a fit test with 3% of these baseline fit
1361 tests consistent with OSHA requirements. The final rule calculations assume 53.5% of large and
1362 13.4% of large-small WPS farms have handlers undergoing fit tests. EPA should present the baseline
1363 percentage of WPS farms where handlers undergo fit tests in terms of large and large-small WPS
1364 farms to allow direct comparison between the two scenarios.
1365
1366 <u>EPA Response</u>. EPA does not think further discussion is warranted. As noted in the EA,
1367 "Pesticides bearing label requirements for respirators are not common, but there are a few commonly
1368 used pesticides with the requirement." The requirement is product-specific and may apply to the
1369 mixer/loader and/or to the applicator. In the end, EPA assumes that 75% of large and large-small
1370 primarily crop farms (farms with annual revenue of $750,000 or more and farms with annual revenue
1371 between $100,000 and $750,000, respectively) will account for virtually all respirator use subject to
1372 the WPS. According to data from the 2012 Census of Agriculture, farms primarily producing crops
1373 (NAICS 111) in these size ranges account for about 67% of all crop acreage in the U.S., but about
1374 80% of all herbicide and insecticide treated acreage and over 90% of all acres treated with fungicides
1375 or plant growth regulators.
1376
1377 <u>e. USDA.</u> The family farms fit test calculation needs further clarification. The economic
1378 analysis references Appendix A for the number of family farms by category (large, large-small, etc.).
1379 Appendix A does not discuss family farms explicitly – by back-calculating from the existing tables
1380 you could derive the number of family farms but this adds some uncertainty and the values do not
1381 match those reported in the economic analysis (18,949 large family farm and 141,753 large-small
1382 family farms). Further explanation or support is needed for the assumption that 40% of family farms
1383 producing crops use a pesticide requiring a respirator.
1384
1385 <u>EPA Response</u>. EPA acknowledges that Appendix A does not contain information on so-called
1386 family farms, *i.e.*, those farms that do not report hired labor. However, EPA has provided the exact
1387 numbers used within the analysis.
1388
1389 <u>f. USDA.</u> The values used in the baseline analysis for respirator fit tests at WPS farms are not
1390 consistent between the main economic analysis and its explanatory appendix B (See Table 3.3.32.
1391 Baseline Costs, per Large and Large-Small WPS Farm, Respirator Fit, Economic Analysis versus
1392 Table B-6.a.3. Baseline Cost, per WPS Farm, Respirator Fit, Appendix B). Likewise, the values
1393 reported in Appendix B for the number of large (79,434) and small-large (141,753) WPS farms do not
1394 appear in Appendix A where the reader is referred for further information. Since the population of
1395 WPS farms affected by the rule is assumed to only include crop-producing farms, it is assumed that

1396 these values represent crop-producing farms hiring labor (shown in Table A.1.10 of Appendix A).
1397 Further explanation would strengthen the economic analysis.
1398
1399 EPA Response. EPA acknowledges that Appendix B was in error and revised the tables and
1400 explanations.
1401
1402 g. USDA. In the cost estimate (p 90, Economic Analysis) for the addition of filtering facepiece
1403 respirators the Agency assumes that all employers will use the suggested online medical evaluation
1404 (introduced in lines 3388-3394 of the rule preamble) from the outset. While the use of online medical
1405 evaluations would be the most cost-effective option for employers, assuming that employers will be
1406 able to use this method of evaluation in the first years of implementation does not seem likely. This is
1407 especially true for rural areas where broadband access is not available on every farm operation.
1408 Though online medical evaluations will likely be used by some employers, the estimated probability
1409 seems high for the first year. On-line medical evaluations are currently offered only in Spanish and
1410 English. Workers speaking other languages will need off-site medical evaluations. The probability of
1411 using an off-site medical evaluation is much more likely in the first year with a decreasing probability
1412 within the first five years as employers learn more about their available options.
1413
1414 EPA Response. EPA does not agree with USDA's reasoning. Employers are unlikely to forego
1415 cost-effective options, even initially. EPA plans significant outreach and is confident that private
1416 interests, including crop advisors and pesticide dealers, will engage in similar programs. According to
1417 the 2012 Census of Agriculture almost 70% of U.S. farms have internet access and most have high-
1418 quality service, including broadband or DSL. Less than 10% of farms rely on dial-up connections. EPA
1419 does not see language as a significant barrier for employers and handlers.
1420
1421 h. USDA. The cost of the off-site medical evaluation used in the economic analysis is based on
1422 a single provider – Affordable Safety Training, offered in English and Spanish. A quick review of on-
1423 line medical evaluations for fit testing shows a range of products from the $25 for McHaney and
1424 Associates to $27 for Affordable Safety Training to $28 for a 3M on-line medical evaluation. These
1425 products are only offered in English and Spanish. If these medical evaluation materials need to be
1426 provided in other languages, there is no cost considered for this in the economic analysis. The
1427 Affordable Safety Training web site offers a fit test kit for $140 using Bitrex and $139.95 using
1428 saccharin. The economic analysis cites the cost for a fit test as ranging between $80 and $140 for an
1429 employer administered test.
1430
1431 EPA Response. EPA agrees that there are multiple options of similar price. Fit test kits come in
1432 a range of prices with smoke tests typically costing less than other options. EPA does not see language
1433 as a significant barrier for employers and handlers.
1434
1435 i. USDA. The economic analysis does not include costs accounting for circumstances
1436 requiring the same person to repeat the fit test for a different class of respirator which may involve
1437 additional measurements. The medical evaluation questionnaire required by OSHA lists two separate

1438 categories of respirators. A worker/handler would need an additional fit test and evaluation if required
1439 to use another class of respirator. The analysis also does not consider agricultural establishments
1440 where the same person is not the handler for all pesticides or for the entire year. Seasonal workers
1441 may not remain at an establishment for the entire period where pesticides requiring respirators may be
1442 applied.
1443
1444 EPA Response. EPA does not think the cost of a medical screen would be significantly
1445 increased if the handler seeks testing for different classes of respirators. Multiple respirators could be
1446 tested at an off-farm site or tested using the same test kit.
1447
1448 **33. §170.601 Exemptions – family farms**
1449 a. USDA. *Family farm exemption is too narrow*: The exemption for family farms applies to any
1450 agricultural establishment that is wholly owned by an individual, or where **all** of the owners of the
1451 establishment are members of the same immediate family. This definition is narrower than the
1452 definition used by ERS in the Agricultural Resource Management Survey (ARMS). The ERS definition
1453 is more flexible and requires only that the majority of the business is owned by the operator and
1454 individuals related to the operator by blood, marriage, or adoption, including relatives that do not live in
1455 the operator's household. Using this definition, ERS finds around 97% of all farms are family farms
1456 based on data from ARMS.
1457 Findings from the 2013 ARMS survey indicate that 97.6 farm are family farms, using the ERS
1458 definition. Family farms are organized as individually owned, partnerships, corporations and other types
1459 of legal status (trust, estate, cooperative). The largest category of ownership in family farms is
1460 individual ownership (91.5%). Partnerships account for 4.4 %, corporations for 3.3 % and other types of
1461 legal status for 0.8 %. Family farms that are not individually owned account for 173,434 farms.
1462 It is unclear how many of the farms considered family farms in the economic analysis would
1463 meet the definition required in the agricultural establishment exemption. The EPA should estimate how
1464 many of the crop producing family farms would be not be eligible for the exemption and thus should be
1465 counted in population of farms that must comply with the WPS standard. If ownership type is
1466 distributed similarly between crop producing family farms and all family farms, as many as 8% of crop
1467 producing farms may not be eligible for the exemption.
1468
1469 EPA Response. To determine the number of farms that would be impacted by revisions to the
1470 WPS, EPA considered all farms hiring labor as reported in the 2012 Census of Agriculture. Since farms
1471 may describe in their Census report as hired labor persons who would qualify for the WPS immediate
1472 family exemption, EPA has probably overestimated of the number of farms and workers/handlers
1473 affected by the WPS.
1474
1475 b. USDA. *The definition of immediate family is too narrow.* In regard to establishing a minimum
1476 age for handlers and workers performing early-entry tasks, the final rule requires that handlers and
1477 workers performing early-entry tasks be at least 18 years old, rather than the proposed minimum age of
1478 16 years old. This minimum age does not apply to an adolescent working on an establishment owned by
1479 an immediate family member. (EPA WPS FR page. 7). EPA has finalized the definition of "immediate

1480 family" as limited to the owner's spouse, parents, stepparents, foster parents, father-in-law, mother-in-
1481 law, children, stepchildren, foster children, sons-in-law, daughters-in-law, grandparents, grandchildren,
1482 brothers, sisters, brothers-in-law, and sisters-in-law (EPA WPS FR page 169).
1483 The EPA should reconsider the definition of immediate family. The proposed definition would
1484 not allow the exemption to youth who would work for a more distant family member such as an uncle.
1485 This definition would also not allow the exemption to youth whose parents are farm operators, but not
1486 owners. The Department of Labor (DOL) has exemptions for youth in the child labor requirements in
1487 agricultural occupations under the Fair Labor Standards Act. The Act states: "A child of any age may be
1488 employed by his or her parent or person standing in place of the parent at any time in any occupation on
1489 a farm owned or operated by that parent or person standing in place of that parent"
1490 (http://www.dol.gov/whd/regs/compliance/childlabor102.pdf). EPA should revise their definition of
1491 immediate family, or the exemption itself to be more consistent with rules enforced by DOL.
1492
1493 EPA Response. Under the owner and immediate family exemption in the existing WPS,
1494 establishments that qualify must be either wholly owned by the individual, or all owners of the
1495 establishment must be members of the same immediate family. While EPA is proposing to expand the
1496 types of familial relationships that would be considered "immediate family" under the WPS, EPA did
1497 not consider and does not plan to further expand the exemption to allow farms that are majority owned
1498 by family members to qualify. EPA did not propose such a change to the requirement and has not
1499 received comments from the public indicating that the current requirement for the establishment to be
1500 wholly owned by an individual or persons who are all members of the same immediate family is too
1501 restrictive.
1502