

# Revising Certification Plans to Meet the Requirements of the 2017 Certification of Pesticide Applicators Final Rule

## Questions & Answers

August 2019

This document is intended for pesticide State Lead Agencies (SLAs), Tribes and Federal Agencies (“certifying authorities”) to answer their questions on the 2017 Certification of Pesticide Applicators regulation and the requirement to submit to EPA revised certification plans by March 4, 2020. This document was first released in February 2019 and amended in April 2019. The nine questions and answers added to this August 2019 amended version are highlighted in gray. They are: 4. Certification categories - 4G; 5. Exams - 5G and 5H; and State plans- requirements - 9N, 9O, 9P, 9Q, 9R, and 9S.

Questions and answers have been renumbered and reorganized to follow the order of the regulation:

1. General
2. Definitions 40 CFR 171.3
3. Effective date 40 CFR 171.5
4. Certification categories 40 CFR 171.101 (commercial applicator category definitions),  
40 CFR 171.103 (commercial applicator category competency standards),  
40 CFR 171.105 (private applicator category competency standards)
5. Exams 40 CFR 171.103(2)
6. Recertification by continuing education 40 CFR 171.107(b)(2)
7. Supervision of noncertified applicators 40 CFR 171.201
8. State plans – submission, review and approval
9. State plans – requirements 40 CFR 171.303
10. Indian country 40 CFR 171.307

Many questions pertain to more than one subject area. Therefore, an index of subjects is provided at the end of this document on pages 23 and 24.

### 1. General

**(1A) Q:** *What efforts are being made to provide SLAs and PSEP additional funding to implement the program, including funding for developing new exams and training materials (for all categories, not just the new application-specific categories)?*

A: At this point, EPA does not have additional funds to implement the program beyond what is provided in State and Tribal Assistance Grants (STAG) and cooperative agreements. EPA provides funds in support of C&T program implementation and plan revisions through FIFIRA program implementation STAG to all SLAs for C&T program implementation and two cooperative agreements. EPA funds a cooperative agreement with UC Davis in collaboration with Oregon State University (Pesticide Educational Resources Collaborative or PERC) primarily for materials development such as certification training and exam materials. EPA also funds a cooperative agreement with the Extension Foundation to distribute funds to Pesticide Safety Education Program (PSEP) for applicator education and training programs.

**(1B) Q:** *Applicator Competency Standards for non-English languages- The long-held position by most certifying authorities is that as long as FIFRA requires the EPA's approved pesticide labels be written in English, and because there are no EPA-approved versions of multi-lingual pesticide labels, certifying authorities must require applicators to comprehend a label written in English as part of their demonstration of competency (and not allow labels to be registered in any language other than English). The question is will EPA require certifying authorities to provide applicator training and certification in languages other than English? The new rule doesn't specifically say applicator training and certification MUST be provided ONLY in English, but it is written in such a manner that leads us to think we might be required to offer it in a language other than English if we, as the certifying authority, are asked to certify an applicator as competent to read and understand a pesticide label and that person cannot read or understand English labels.*

A: No, EPA is NOT requiring certifying authorities to provide applicator training and certification in languages other than English. Although the new rule doesn't specifically say applicator training and certification must be provided ONLY in English, the required competencies for applicator certification require that an applicator must be able to understand pesticide labeling and its associated warnings, terms, symbols, use restrictions, and other information commonly appearing on the label. The fact that the majority of all RUPs bear labels that are written in English only, not having translated RUP labels is a reasonable basis for requiring applicants to demonstrate English label competency for RUP certification.

**(1C) Q:** *State certification of federal employees: Does USDA APHIS' wildlife damage control program have an EPA-approved certification plan for wildlife damage control? If not, does this mean that any USDA applicators applying RUPs (i.e., M-44 or Compound 1080) for livestock pest control would have to be certified under state programs and state jurisdiction in an appropriate state category? Does the state have jurisdiction over a USDA employee that is certified under the state's plan? If a state chooses not to retain a category for M-44 or Compound 1080 for wildlife damage control, would this prevent USDA applicators from applying these products in the state?*

A: No, USDA APHIS' wildlife damage control program does NOT currently have an EPA-approved certification plan for certifying their own USDA program staff. This means that any USDA applicators applying M-44 or Compound 1080 for predator control, or any other RUPs for predator control or other livestock pest control, would have to be certified under state programs and state jurisdiction in an appropriate state category to permit such uses. The state does have jurisdiction over USDA applicators that are relying on state certification for conducting RUP applications in the state, but even APHIS-certified applicators would have to comply with state law. The USDA applicators are considered the same as any other certified applicator in the state and are subject to the same regulatory enforcement applicable to non-government applicators. If a state chooses not to certify applicators for M-44 or Compound 1080 for predator control, this would prevent USDA applicators, and any other applicators, from applying these products under a state certification. Federal agency employees certified for predator control under an EPA-approved federal agency plan could use M-44 or Compound 1080 if state law does not affirmatively prohibit their use.

## **2. Definitions - 40 CFR 171.3**

**(2A) Q:** *The new definition of "Use," as in "to use a pesticide" in the revised rule states that use includes, "Other pesticide-related activities, including, but not limited to, transporting or storing pesticide containers that have been opened, cleaning equipment, and disposing of excess pesticides, spray mix, equipment wash-waters, pesticide containers, and other pesticide-containing materials." Since a person must be certified to use an RUP,*

*does this new definition of use mean that truck drivers who are not using or applying an RUP, but merely transporting unopened pesticide containers (or containers that have been opened and resealed so they are not considered opened) will now need to be certified or under the supervision of a certified applicator to transport such containers?*

A: EPA has regulated restricted use pesticides (RUPs) since its founding in 1970 and has never interpreted its regulations as requiring waste haulers and disposal facilities to become certified applicators in order to dispose of RUPs. EPA did not intend to impose such a requirement through the 2017 revision of part 171, and nothing in the rulemaking record suggests any contemplation of such a dramatic change to the existing regulatory scheme.

The definition of “use” in 171.3 appropriately reflects the activities governed by the pesticide label and does not represent any significant change in the Agency’s position. See e.g., 40 Fed. Reg. 28047, 28272 (July 3, 1975) (former regulation defining “use” to include pre- and post-application activities, and expressly including storage and disposal). By including a definition of “use” in the 2017 revisions to part 171, EPA intended to make explicit the Agency’s long-standing position that certified applicators are responsible for complying with FIFRA and the label requirements for all pesticide handling and pesticide contact activities reasonably related to the use of RUPs, including post-application activities such as cleanup and disposal. EPA did not intend, and does not construe, the revised part 171 to require waste haulers and disposal facilities to become certified applicators in order to dispose of RUPs. In regard to unopened containers, nothing in the new 171.3 definition of “use” suggests that persons who transport or store unopened RUP containers need to be certified applicators or supervised by a certified applicator.

### **3. Effective Date – 40 CFR 171.5**

*(3A) Q: Exactly what is needed from the certifying authorities by March 4, 2020? Please provide some templates and/or examples.*

A: By March 4, 2020, certifying authorities wanting to keep their existing EPA-approved plans in effect (during the time EPA reviews their submission and makes its determination), must submit to EPA revised certification plans documenting that their certification programs meet the 2017 rule requirements. If the certifying authority is relying on pending legislative and/or regulatory changes for full compliance, it must provide a detailed description of the changes and a timeline for completing all needed revisions.

*(3B) Q: Do certifying authorities have until March 2020 to give EPA a proposed modification of their certification plan describing what changes they plan to make and the timeframe for the changes?*

A: Yes. In order to keep an existing certification plan in effect, the certifying authority has to submit a proposed modification of its certification plan to EPA by March 4, 2020.

### **4. Certification Categories – 40 CFR 171.101 (commercial applicator category definitions), 40 CFR 171.103 commercial applicator category competency standards), 40 CFR 171.105 (private applicator category competency standards)**

*(4A) Q: Public Health Pest Control Category - The revised rule seems to require persons certified under the “Public Health Pest Control Category” to be government employees or contractors working directly for a government agency responsible for public health pest control. Is that the case? What about states that have traditionally*

*certified private pest control operators for public health pest control? Will they still be able to certify those applicators? Will it require creation of a separate category?*

A: Yes, the revised rule limits the Public Health Pest Control Category to persons that are government employees or contractors using restricted use pesticides (RUPs) pursuant to a contract with a government agency responsible for public health pest control. (§ 171.101 Commercial applicator certification categories. (h) Public health pest control. This category applies to State, Tribal, Federal or other governmental employees and contractors who use or supervise the use of restricted use pesticides in government-sponsored public health programs for the management and control of pests having medical and public health importance.)

Certifying authorities that have traditionally certified non-government or non-government contractors for public health pest control will have to change their certification plan to limit the Public Health Pest Control Category to government employees or contractors working directly for a government agency responsible for public health pest control. A certifying authority may create an additional category or subcategory (e.g., under the “Industrial, institutional, and structural pest control” category) for private and/or commercial applicators engaged in control of public health pests outside of government-sponsored public health programs.

**(4B) Q:** *Fumigation Categories - Soil fumigation versus enclosed space soil fumigation: Would we need a soil fumigation category if the treatment would be to the soil within the enclosed space (e.g., a greenhouse)? Would soil fumigation in a greenhouse be covered by a certification covering enclosed space fumigation? [At this time, we are NOT proposing a soil fumigation category as it does not occur in the state (other than maybe to the soil in greenhouses, high tunnels, or other enclosed structures). I am not talking about the growing medium used in pots, but to the ground within that structure.]*

A: The 2017 final Certification Rule does not use the term “enclosed space”; instead it distinguishes between soil fumigation and fumigation of “anything other than soil.” So, applicators fumigating the soil/grounds of greenhouses or other structures would need to have the soil fumigant certification. Applicators fumigating the structure and enclosed space of greenhouses or other structures, and not making any directed effort to penetrate soil (i.e., to no greater degree than they seek to penetrate other elements of the structure) would need certification in the non-soil fumigation category. States would need to offer certification in a fumigant-specific category that covers soil fumigation to permit that use in the state. If the certifying authority chooses not to create a soil fumigant category in compliance with the revised rule, then all applicators in the jurisdiction of that certifying authority will be prohibited from being able to purchase or apply soil fumigant products. In that situation, the certifying authority would not have a category authorizing the use of soil fumigants, and dealers will not be able to sell or distribute RUP soil fumigant products unless the applicator presents proof of certification in a specific and appropriate soil fumigant category (or general fumigation category that covers all soil and non-soil uses and meets the required standards for both).

**(4C) Q:** *Fumigation Categories - The revised rule requires creation of new categories for soil and non-soil fumigation. Can these be combined into a single category? What are the requirements if we take that approach? Can the non-soil fumigation be broken into separate categories (e.g., structural, commodity and/or vertebrate pest control (using fumigants)) so that applicators do not need to be certified for the full range of non-soil fumigation uses?*

A: Yes, certifying authorities may combine soil and non-soil fumigation into a single category if the requisite competency standards address both methods of fumigation in the certification process.

Certifying authorities can choose whether to combine soil and non-soil fumigation into a single category or keep the two fumigation types as separate categories. Certifying authorities may also further subdivide or split either of the soil or non-soil fumigation categories into separate, more distinct fumigation categories (e.g., rodent burrow fumigation, structural fumigation, commodity fumigation, etc.). However, each of these categories or subcategories must be updated to address all the required competency standards in the rule for soil and non-soil fumigation, as applicable to the specialized category or subcategory.

**(4D) Q:** *Fumigation Categories - [We currently have a separate category for rodent control and plan to keep that. Within that category is where we do the training on the use of rodent fumigants (fumitoxin, phostoxin)]. What our question really is, is if we can keep the fumigation component for rodent control in the rodent training and category? That fumigation is specialized to that category only, and in our view, does not fit or is applicable to the federal fumigation category of soil, non-soil. It would be "non-soil", but to us non-soil will be structural, grain bin, rail car, other commodity fumigation, etc.]*

A: No, certifying authorities can no longer permit the use of fumigants through certification in one of the other "non-fumigant" categories. Certifying authorities may only certify persons to use fumigants that have been certified in a fumigation category appropriate for their type of fumigant use. Certifying authorities may create specialized fumigant categories for things such as rodent burrow fumigation or commodity fumigation; however, the specialized categories or subcategories must be updated to address all the required competency standards in the rule for soil and non-soil fumigation, as applicable to the specialized category or subcategory.

**(4E) Q:** *Limited Use Categories - Can we keep the limited use category (i.e. limited use vs. specific use)? [Our current category titled Specific Use is EPA's proposed Limited Use title. It's only a matter of titling, we can look to amend it while we are revising our regulations. Simple fix. We just would like feedback if we need to change the title.]*

A: Certifying authorities may retain current limited use categories or create new limited use categories. Certifying authorities do not have to adopt rule or policy changes to change the title of current "specific use" categories to "limited use categories". However, certifying authorities must ensure that any such specific use or limited use category included in the plan meets the requirements of the revised rule at 171.303(a)(4) applicable to limited use categories, and that the plan contains the necessary information to document compliance with the rule requirements.

**(4F) Q:** *Reiterate the category requirements for the aerial, fumigation and predator control categories (i.e., must applicators also be certified in the "use category" associated with the specialized application they are making? (e.g., if an aerial applicator is applying to crops must he also be certified in the Agricultural Plant category or is the aerial category certification sufficient?)) Do you anticipate any exceptions?*

A: In the final rule, soil fumigation, non-soil fumigation, aerial application, sodium cyanide predator control, and sodium fluoroacetate predator control are each a complete certification category and no additional category certification is required. If a commercial applicator is certified in any one of the 15 federal commercial applicator certification categories identified in §171.101 (including the categories soil fumigation, non-soil fumigation, aerial application, sodium cyanide predator control, and sodium fluoroacetate predator control), then he/she would be eligible to use RUPs in the category in which he/she has completed certification. A certifying authority may require certification in two or more categories, however.

**(4G) Q:** A state intends to limit nonsoil fumigation by private applicators to rodent burrow use only. EPA's nonsoil fumigant category pertains to all nonsoil fumigation types. Would EPA approve certification standards selected from § 171.105(e) that are most appropriate for rodent burrow fumigation?

A: The certification standards at § 171.105(e) for private applicator certification for RUP nonsoil fumigation are broadly written to pertain to all nonsoil fumigation uses. For private applicator certification in a rodent burrow fumigation category, the state should use the applicable standards from the general standards in § 171.105(a)(1) through (11) and the category standards at § 171.105(e) for general nonsoil fumigation to arrive at the standards that would be appropriate for rodent burrow fumigation. EPA would approve a fumigation category that had been narrowed to rodent burrow use only, if all the essential fumigation category standards that are applicable to all fumigation types are included in the certification standards for the rodent burrow fumigation, as well the necessary competency standards for the category-specific use of rodent burrow fumigation.

## 5. Exams – 40 CFR 171.103(a)(2)

**(5A) Q:** § 171.103(d) states in part, "Examinations... must be based on the standards of competency specified in paragraphs (d)(1) through (15) of this section." Likewise, § 171.105, Standards for certification of private applicators, states in paragraph (a), "Persons seeking certification as private applicators must demonstrate practical knowledge of the principles and practices of pest control...including all of the following" before listing the standards. It appears in both cases that the rule is defining general standards upon which exams should be based rather than listing specific items that must appear on an exam. However, § 171.103(c), Core standards for all categories of certified commercial applicators, states "Written examinations for all commercial applicators must address the following areas of competency..." and then lists topics. Our question is whether this section is defining the standards on which core exams are to be based or is it a listing the topics that must appear in items on a Core exam. Please clarify whether the language in the rule is meant to define standards on which certification exams are based or if it is meant to list specific topics that must appear in items on certification exams. Please clarify which interpretation is correct.

A: The rule defines competency standards on which certification exams (or non-examination alternatives) should be based and they are not meant as a list of specific topics that must appear in certification exams. This interpretation is consistent with the clearer wording in both § 171.103(d) and § 171.105(a), and the fact that § 171.103(c) is entitled "Core standards" rather than "Core exam items."

**(5B) Q:** When do certifying authorities need to ensure that certification exams meet the new exam standards?

A: The Certification rule contains no deadline for implementation of modified certification plans, such as updating certification exams. EPA will base each certifying authority's implementation period on the particular circumstances of that jurisdiction and the requests from the certifying authority but anticipates that most certifying authorities will be allowed two years from the date of EPA approval to fully implement their revised certification plans. Certifying authorities should include in their modified plans a proposed schedule to bring exams and other aspects of their certification program up to the required standards.

**(5C) Q:** Is there a requirement in the revised rule, or an expectation by EPA, that certifying authorities must submit copies of their certification exams to EPA for review along with revised certification plans? Is EPA going to review exams to determine whether exams adequately address competency standards? How will EPA determine whether state certification exams and the certification process meet the required standards?

A: No, there is no requirement or expectation that certifying authorities submit certification exams to EPA for review during or after the plan approval process. However, certifying authorities must provide along with revised plans satisfactory documentation that their certification and recertification standards meet or exceed those prescribed by the Agency under §§ 171.101 and 171.103. For exams, certifying authorities must describe the processes and procedures used to develop and administer, maintain integrity, and ensure they are updated as needed. The rule does not prescribe specific standards regarding exam development. If there is any reason to believe any processes or procedures are inadequate, EPA may request more documentation (including copies of exams) to ensure that certifying authorities' programs meet the required standards.

**(5D) Q:** *Examination Standards - Does the revised rule require states to establish minimum requirements for retaking exams? For repeat testers, what do we do if they fail? Take twice? If they fail a third time do they take additional training? [Our current process as outlined in regulation is allowing two attempts, then proof of training before allowing a 3rd attempt. We recently internally discussed what are the steps following the 3rd if they fail. I believe our revised regulations will further clarify this. So, our question is: What is EPA's feedback or suggestions?]*

A: No, the rule does not establish any minimum requirements for prospective applicators retaking exams after failing an initial and/or subsequent exam. Certifying authorities can and should establish minimum requirements for prospective applicators retaking exams if they believe such requirements are necessary or appropriate for ensuring the integrity of the certification process. Certifying authorities should identify in their certification plans measures such as these that contribute to assuring the competency of certified applicators. States should provide an explanation of why they have selected their requirements and how/why the requirements help ensure state standards meet or exceed EPA's required standards for certification.

**(5E) Q:** *Examination Standards - Does the revised rule require states to establish minimum specific cut scores for exams? [Is the minimum standard supposed to be 70% or 80% to pass? This varies between states, ours is currently 70%, other states require 80%, and there appears to be other variations such as 90% for state law specific exams. We do not plan to make changes now but will bring it up for discussion with the industries. We would like feedback if EPA wants continuity between states, or is this left up to the states to make that determination? I don't think this was ever discussed or considered in the revised federal regulations.]*

A: No, the rule does not establish minimum exam scores or "cut scores" for certifying authorities. Certifying authorities can establish minimum exam scores or cut scores that they believe are appropriate for exam(s) being administered based on their own criteria. However, certifying authorities should explain why they have arrived at certain exam scores or cut scores, especially for any situation that could appear not to be establishing the required level of competency to meet or exceed EPA's required standards for certification.

**(5F) Q:** *If applicators in our State take a core exam first, then a category exam, do we need to review the content (compared to federal competency standards) of all exams or core exams only? (Example: State's commercial applicators must have core license for 2 years before obtaining commercial applicator license.)*

A: Core competency exams must meet the standards of §171.103(c), and category competency exams must meet the standards of §171.103(d). Certifying authorities will need to incorporate the competency standards in their certification and recertification program requirements and can do so according to the timeline proposed to EPA with revised certification plans.

**(5G) Q:** Are examination standards required to be in regulation or can they be addressed via policy document? (This question is for both commercial and private applicators)

A: No, the examination standards (procedural exam requirements) are not required to be in state, tribe or territory statute or regulations. However, the certifying authority must submit exam “procedures” that meet or exceed EPA’s (§ 171.103(a)(2)) in their revised certification plans.

**(5H) Q:** Who is responsible for writing and certifying exam questions?

A: § 171.303(b)(6)(i) requires the Governor to designate the pesticide state lead agency (SLA) responsible for administering the EPA-approved certification plan. § 171.303(b)(6)(i) also provides that if the state certification plan makes more than one agency or organization is responsible for performing functions, the application for approval of the certification plan must identify all cooperating agencies and organizations involved and list the functions to be performed by each. The regulation does not specify who must write, review, or approve the use of examination questions. However, the SLA is ultimately responsible for the certification process, including how examinations are used to assess applicator competency. As the party responsible for ensuring that each person certified as a commercial or private applicator has the necessary competency to use restricted use pesticides in the state, it is incumbent on the SLA to ensure that the exam questions and examinations assess such competency.

## 6. Recertification – 40 CFR 171.107(b)(2)

**(6A) Q:** § 171.107(b)(2)(iii) says, “A certifying authority must ensure that any continuing education course or event, including an online or other distance education course or event, relied upon for applicator recertification includes a process to verify the applicator’s successful completion of the course or event.” What does EPA require a state have in place to verify a person’s participation in online training or online testing? Some certifying authorities put the burden on the sponsor of the online course provider.

A: EPA does not require any specific process or procedure to meet the requirements of § 171.107(b)(2) to verify the applicator’s successful completion of the course or event. The certifying authority bears the responsibility for deciding what process or procedures will adequately ensure the integrity of its certification process. If a certifying authority allows third party outside cooperators to provide recertification training, the certifying authority is responsible for ensuring the cooperator meets the requirements and conditions of the approved plan. EPA will work with the AAPCO C&T workgroup and the American Association of Pesticide Safety Educators (AAPSE) to identify existing examples of processes that state lead agencies, PSEPs or other trainers are using to verify applicator completion of online, remote access, or other training programs that could potentially be used as models.

**(6B) Q:** *Recertification Standards - Online recertification program verification: Does the revised rule require states to establish online verification requirements? Does the explicit method of verification of an online course need to be part of the regulations? Or would it be enough that there is a policy that before the certifying authority approves an online course, the third party must disclose their method of verification?*

A: There is no requirement in the Certification rule that procedures for online recertification need to be part of the certifying authorities’ laws or regulations. The Certification rule requires certifying authorities to describe how their recertification program meets or exceeds the recertification standards outlined in the rule. If certifying authorities allow online recertification courses, their plan should

describe how their process ensures the continued competency of applicators and the integrity of the certification and recertification process. Certifying authorities using third party vendors to conduct recertification must demonstrate in their plan that they have sufficient procedures, standards and requirements in place to hold such parties that are cooperating in the certification program accountable for carrying out their roles and responsibilities related to certification and/or recertification, and ensuring they meet or exceed the required standards. Certifying authorities can indicate in their plan that their policy and procedures will require third party providers of online training to disclose their method of verification, but the certifying authority should also describe or indicate what methods of verification are acceptable for online recertification for the online recertification to be recognized as adequate.

**(6C) Q:** *Recertification Standards – Does the revised rule require states to establish a minimum number of Continuing Education Units (CEU) required for recertification for the plan to be acceptable?*

A: No. The revised rule does not require states or certifying authorities to establish specific CEU requirements. The rule requires certifying authorities to describe how their recertification program meets or exceeds the recertification standards outlined in the rule, so the plan should explain how and why the certifying authority's proposed CEU (or other) requirements will meet the required standards.

## **7. Supervision of Noncertified Applicators - 40 CFR 171.201**

**(7A) Q:** *Noncertified Applicator Standards - Currently, in one of our states, “apprentices” (noncertified applicators with initial training requirements, yet less than “technicians”), need to be 16 years old. Would it be ok if they wrote into their regulations that apprentices cannot use RUP’s until they turn 18? Or will they need to change the minimum age to 18? [It is expected some states may face resistance in changing or adding minimum age requirements through legislation.]*

A: The requirements of 40 CFR part 171 pertain to the use of RUPs only. So long as a certification plan complies with the minimum age requirements in the revised rule in regard to persons using RUPs, the existence or absence of age requirements for persons using non-RUPs is irrelevant to EPA's approval decision. (Repeated under #6 Noncertified Applicator Competency and Supervision)

**(7B) Q:** *Could certifying authorities have a certification plan that permits annual safety training online for noncertified handlers?*

A. Yes, online training (interactive or prerecorded) could be used to satisfy the training requirement for noncertified applicators if all conditions of the § 171.201(d) training requirements are met.

**(7C) Q:** *Are “apprentices” and “technicians” considered “noncertified applicators”? If the state chooses to require apprentices or technicians to take courses and have on the job training, are they also required to have annual training as well under the revised plan? If the state plan requires apprentices to take and pass a core exam every third year, would that be sufficient to meet the 171 standards for noncertified applicator competency? Will EPA approve certifying authorities’ requirements for noncertified applicators on a case by case basis?*

A: Part 171 does not define or specifically address “apprentices” or “technicians”, and those terms might have different meanings in different states or jurisdictions. Any person who is not certified for a certain use category and is using a restricted use pesticide (RUP) under the supervision of a certified applicator is considered a “noncertified applicator”. It is possible that state (or other jurisdiction) requirements for “apprentices” and “technicians” would fulfill some or all of part 171 requirements for

certified applicators or for noncertified applicators who may use RUPs under the direct supervision of a certified applicator, but that is a question that would be addressed case-by- case in the development and review of a certification plan.

**(7D) Q:** *May a certifying authority propose in its certification plan that noncertified applicators qualify to apply RUPs under the supervision of a certified applicator by obtaining CEUs in lieu of annual training? If so, how would that be tracked and recorded?*

A: Yes, in principle. It is possible to develop continuing education programs that would meet or exceed the standards in § 171.201(d), or alternatively, that would meet or exceed the training requirements for WPS agricultural handlers under 40 CFR 170.501. The certifying authority must ensure that the process chosen to qualify noncertified applicators to apply RUPs has adequate tracking mechanisms and verification procedures to ensure the intended protections are provided.

**(7E) Q:** *§171.201(b)(1)(ii) states that supervisors of non-certified applicators must be certified in the category applicable to the supervised application. However, §171.201(d)(2)(i) seems to allow the possibility that a certified applicator can train a non-certified applicator who will apply pesticides outside of the trainer's certification category (e.g., a person certified only in structural pest control can train---but not supervise---a non-certified applicator who will be making turf applications). Is this correct?*

A. Yes, a person certified in one category can provide training to a noncertified applicator for any category of use. The qualifications required for noncertified applicators in 171.201(c) are general, and not category-specific. All pesticide applicators demonstrate through the certification process an understanding of the same core concepts required in noncertified applicator training. Therefore, all certified applicators, regardless of category, should be competent to provide general RUP safety training. On the other hand, an applicator must be certified in a category pertaining to the restricted use pesticide use to supervise a noncertified applicator.

**(7F) Q:** *May a certifying authority require noncertified applicators be "licensed" in lieu of annual training? (e.g., if a State requires a Core license)? Do "licensed" noncertified applicators have to take annual training?*

A: Yes, in principle. Section 171.201(c) requires that a noncertified applicator meet at least one of the following qualifications:

The noncertified applicator has been trained in accordance with 171.201(d) within the last 12 months.

A. The noncertified applicator has met the training requirements for WPS agricultural handlers under 40 CFR 170.501 within the last 12 months.

B. The noncertified applicator has met training standards that meet or exceed the standards in § 171.201(d).

C. The noncertified applicator is currently a certified applicator but is not certified to perform the type of application being conducted or is not certified in the jurisdiction where the use will take place.

Per § 171.201(c)(3), a certifying authority could require "licensing" of noncertified applicators in lieu of annual training if it demonstrates that such a program meets or exceeds the standards in § 171.201(d). For example, the certifying authority could require noncertified applicators to pass the commercial core exam (but not a commercial category exam for applicator certification) every three years. For a licensing program that significantly exceeds the standards in § 171.201(d), EPA might approve a less frequent (e.g., 2 years or more) renewal period. However, if a program does not exceed but meets the standards in § 171.201(d), it should be an annual program.

**(7G) Q:** *Is the certifying authority required to establish a limit to the number of noncertified applicators that can be under the direct supervision of a certified applicator?*

A: No. EPA did not establish a maximum number of non-certified applicators that may use RUPs while under the supervision of a single certified applicator. (See page 995 of the preamble to the final rule for a full discussion on the decision.)

**(7H) Q:** *Do certifying authorities have to require that both commercial and private certified applicators keep records of noncertified applicator training?*

A: No. FIFRA section 11(d) prohibits EPA from requiring private applicators to keep records. Therefore, Part 171 does not require any private applicator recordkeeping. However, § 171.201(e) requires commercial applicators to keep records of noncertified applicator training.

**(7I) Q:** *Supervision of Noncertified Applicators - The rule at 171.201(b)(3)(v) requires the certified applicator to ensure that a means to immediately communicate with the certified applicator is available to each noncertified applicator using restricted use pesticides under his or her direct supervision. Please clarify what EPA means by "immediate communication" between a non-certified applicator and a certified applicator. Does this mean the supervising certified applicator must be on site and close enough for direct voice communication or is immediate communication via cell phone from remote distances acceptable?*

A: No, the requirement in the rule at 171.201(b)(3)(v) requiring the certified applicator to ensure that a means to immediately communicate with the certified applicator is available to each noncertified applicator using restricted use pesticides under his or her direct supervision does NOT mean that the supervising certified applicator must be on site and close enough for direct voice communication. This requirement means that the certified applicator must ensure that each noncertified applicator applying an RUP under their direct supervision has a means to immediately communicate with the certified applicator (i.e., in a matter of seconds if needed) via phone, cell phone, two-way radio, or other mechanism that enables immediate communication. While in-person immediate voice communication would meet the requirements of the rule, it is not necessary to meet the requirements.

**(7J) Q:** *Noncertified Applicator Standards - In our state, technicians are required to have a prescribed amount of training, as well as taking the core and category examinations, prior to them getting their technician license. However, they do not currently need to keep up with recertification credits. To satisfy the yearly training for non-certified applicators, would it be acceptable to issue three-year licenses, in which they must take a specific amount of core credits each of the 3 years?*

A: Yes, in principle it would be permissible for the certifying authority to issue three-year "licenses" for the noncertified applicator technicians that would require those noncertified persons to take a specific amount of core credits each of the 3 years as the mechanism for ensuring noncertified applicator requirements meet or exceed the standards in § 171.201(d). EPA sees no insurmountable obstacle to the development of continuing education programs that would meet or exceed the standards in § 171.201(d), or alternatively, that would meet or exceed the training requirements for WPS agricultural handlers under 40 CFR 170.501. It would be up to the State to ensure that whatever process the State chooses to qualify noncertified applicators to apply RUPs includes adequate tracking mechanisms and verification procedures to ensure the intended protections are provided, and that the plan contains adequate documentation and explanation of how the state ensures that (e.g., having a process for terminating the license if continuing education requirements aren't met).

**(7K) Q:** *Certifying authorities recommend development of a video that is suitable and content relevant to train non-certified, non-agricultural pesticide applicators. Will EPA provide such a video resource?*

A: EPA is aware of the need for this resource and will consider options for developing it. One such option is the Pesticide Educational Resources Collaborative (PERC) which relies on its advisory board to choose projects for development. PERC has a video project for training noncertified, non-agricultural pesticide applicators on the list of projects to consider developing in 2019.

**(7L) Q:** *The rule assigns supervising certified applicators responsibility for equipment maintenance and operation. What type of documentation is required? Is this supposed to be another component of recordkeeping?*

A: The supervising certified applicator must ensure before each day's use that the equipment is in proper operating condition and can be used safely. There is no associated recordkeeping requirement in EPA's regulation. (See § 171.201(b)(3)(iv)).

**(7M) Q:** *Who is responsible for keeping records on the training of non-certified applicators?*

A: Sections § 171.201(e)(3) and § 171.303(b)(7)(vi) require that records of the training of non-certified applicators be accessible at the supervising commercial applicator's principal place of business for two years from the date the noncertified applicator used the restricted use pesticide. This recordkeeping requirement is not applicable to private applicators because EPA cannot require recordkeeping for private applicators. (See FIFRA section 11(d)).

**(7N) Q:** *Will certifying authorities be required to track and report in CPARD the number of noncertified applicators that are trained annually?*

A: No. The rule does not require certifying authorities to track or report on the number of noncertified applicators trained annually.

**(7O) Q:** *The rule at § 171.201(b)(3)(i) requires the certified applicator to ensure that the noncertified applicator has access to the applicable product labeling at all times during the pesticide application. Does EPA define what "access to the applicable product labeling" means? Does it have to be a paper copy or can it be on an electronic device, such as a tablet?*

A: No, EPA does not require access to a paper copy of product labeling. The certified applicator must ensure that the noncertified applicator has a means to access the labeling at the use site at all times during use of an RUP, especially in case of an emergency. EPA believes that this could be achieved through non-paper media.

**(7P) Q:** *Noncertified Applicators - The rule at 171.201(b)(3)(i) requires the certified applicator to ensure that each noncertified applicator applying an RUP under their direct supervision has "access to the applicable product labeling at all times during its use." Please clarify what EPA means by "access to the applicable product labeling at all times during its use." Does this mean that the noncertified applicator must have the entire product labeling in their possession at all times during use, or does it mean only that they just have a means to access the labeling (e.g., via phone, internet or return to the office, etc.)?*

A: No, the requirement in the rule at 171.201(b)(3)(i) requiring the certified applicator to ensure that each noncertified applicator applying an RUP under their direct supervision has "access to the

applicable product labeling at all times during its use” does NOT mean that the noncertified applicator must have the entire product labeling in their possession at all times during use. This requirement means that the certified applicator must ensure that each noncertified applicator applying an RUP under their direct supervision has a means to access the labeling at all times during use of an RUP while at a use site (e.g., via immediate voice communication, phone, internet, returning to the service vehicle).

## **8. State Plans – Submission, Review and Approval – 40 CFR 171.303**

**(8A) Q:** *What date can certifying authorities start submitting revised plans to EPA? Can a certifying authority submit a revised plan earlier than March 4, 2020?*

A: Certifying authorities may submit revised plans any time between now and March 4, 2020.

**(8B) Q:** *Will EPA Regions have to complete their reviews of revised plans and make a determination by March 4, 2022 too?*

A: All certifying authorities must have a revised EPA-approved plan by March 4, 2022 to continue administering pesticide applicator certification programs. Therefore, EPA expects to have all plans reviewed and a determination made by that date.

**(8C) Q:** *Will Certification Plan and Reporting Database (CPARD) be used to submit revised certification plans and annual reports?*

A: Certifying authorities should continue to use CPARD to submit annual certification accomplishment reports. However, because CPARD is not set up to enable editing or facilitate communications between multiple parties, EPA intends to use email and transmission of documents for review of revised certification plans. EPA intends to release an updated version of CPARD by late 2020 to house annual reports for 2021 and beyond. Previous records will always be accessible.

**(8D) Q:** *Who will sign and send the final letters of EPA approval of revised certification plans?*

A: EPA regions will send approval letters to each state lead agency. The letters will be signed by EPA regional administrators with concurrence from the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention (OCSPP) (See FIFRA Delegation 5-2, Appendix 1)

**(8E) Q:** *Will EPA review and approve partial submissions of certification plans and/or regulatory changes?*

A: No. EPA will not approve partial plans or interim submissions. However, EPA anticipates an iterative and interactive process whereby EPA will provide feedback to certifying authorities on sections of proposed plans. An EPA Certification Plan Workgroup is preparing for this process and will ensure consistency on answers and decisions. In the meantime, EPA regions are available to work with certifying authorities on revisions to certification plans.

**(8F) Q:** *Can EPA make “contingent approvals” on certification plans so the existing approved plan remains in effect until all changes are made and the revised plan is approved?*

A: Part 171 does not provide for “contingent approval.” However, EPA’s approval of a revised certification plan may allow some or all provisions of an existing approved plan to remain in effect until

the state completes the measures specified in the approval letter and revised plan. See § 171.308(b).

**(8G) Q:** *How many years can an existing approved plan, or parts of that plan, be allowed to remain in effect while a state completes measures to bring their plan into compliance with the rule and terms of the approval letter?*

A: Part 171 does not specify a limit. Per § 171.309(a)(4), EPA will approve a schedule for implementation of a revised certification plan, however schedules must be consistent with EPA's determination that new requirements of § 171.309(a) are necessary to prevent unreasonable adverse effects. In the preamble to the final rule, EPA stated that it would take most certifying authorities two years from the date of EPA approval to fully implement their revised certification plans. It is possible that circumstances would require longer than 2 years for certain aspects of the plan, and EPA will make such decisions based on each case.

**(8H) Q:** *Will EPA withhold approval of a revised certification plan until the state has made all the changes EPA requested? Does the state notify EPA when changes are complete before EPA can issue a final approval? What is the effective date of an approved revised plan?*

A: EPA's approval of a revised plan precedes implementation of the plan. EPA expects that before submitting a revised plan on March 4, 2020, the state and EPA will reach preliminary agreements on the plan changes and the associated schedule and timeframes for their completion that are likely to allow for EPA approval. The plan changes and schedule specified in EPA's final approval document must be implemented consistent with EPA's approval document for the plan approval to remain in effect. The regulation does not expressly require a state to notify EPA when it completes the implementation; however, failure to meet an implementation milestone could be a "substantial modification" for which § 171.309(a)(2) requires notification within 90 days. In addition, EPA could also include more specific reporting requirements among the conditions of approval.

**(8I) Q:** *Describe how EPA will make its "equivalency determinations" for situations where the certifying authority's statutory or regulatory requirements for certain standards or regulatory authorities are not exactly like those contained in the Part 171 rule (i.e., how will EPA make the determination whether the plan's requirements will meet or exceed EPA's requirements?).*

A: EPA Regions will coordinate with the relevant experts from the appropriate offices [Office of Pesticide Programs (OPP), Office of Enforcement and Compliance Assurance (OECA), and the Office of General Counsel (OGC)] to review and compare the statutory and regulatory authorities and citations for each certification plan submission. The state attorney general or legal counsel opinion and other supporting documentation submitted with the plan will also be reviewed. EPA intends to work with certifying authorities where there are differences. EPA will then decide whether the expected protections of the state will meet or exceed those required by the EPA's revised Part 171 rule. The state has the right to challenge a decision, as § 171.309(a) provides that "the Agency shall give the certifying authority submitting a certification plan notice and opportunity for an informal hearing before rejecting the plan, however, EPA hopes that early consultation and collaboration will produce approvable certification plans.

**(8J) Q:** *Are plans approved only upon publication of a Federal Register Notice (FRN)? Will EPA publish a FRN as each state certification plan is approved, or wait and publish one for multiple plan approvals?*

A: EPA will issue a letter of approval for each approved certification plan. Each plan will be reviewed and approved on its own timeline based on the date of submission. EPA is required to publish a FRN

only for public comment on proposed certification plans administered by EPA.

**(8K) Q:** *If certifying authorities submit draft documents containing interim plan revisions or information about plans for proposed regulatory changes to EPA via email, could the information be released under Freedom of Information Act (FOIA)?*

A: EPA cannot guarantee that documents for certification plans will be exempt from release in response to a FOIA request.

**(8L) Q:** *Certification Plan and Reporting Database – Our state intends to eliminate several categories that are completely inactive (no manuals, no tests and no applicators) when our plan is revised and submitted to EPA. Should we go ahead and delete those categories in CPARD, or should we keep those categories in CPARD until such time that our plan is submitted and approved?*

A: States should keep listing those categories in CPARD until such time that EPA has approved a revised plan that requests deletion of those current state categories since. This ensures CPARD is an accurate reflection of your current EPA-approved state plan and certification program. States should just indicate that there are 0 applicators for that category in their CPARD annual reporting. When the revised state plan requesting deletion of those categories is submitted and approved, then it will be appropriate to reflect those changes in CPARD.

## **9. State Plans – Requirements - 40 CFR 171.303(b)**

**(9A) Q:** *The rule requires a written statement by the governor of the state designating a state agency responsible for administering the state certification plan. If the copy of the governor's "designation letter" contained in the current EPA-approved plan is still valid (i.e., the state agency designated in the letter is still the lead agency of record), can the State submit the same letter to meet the requirements of the rule?*

A: Yes. If an existing governor's designation letter is still valid and is consistent with the revised certification plan, submitting a copy of that existing letter is acceptable.

**(9B) Q:** *The rule requires a written opinion from the state attorney general (AG) or legal counsel affirming that the lead agency and other cooperating agencies have the legal authority necessary to carry out the certification plan. If there are changes to state pesticide laws or regulations must the state lead agency submit a new written opinion, or can it use the current one on file?*

A: Certifying authorities must submit to EPA a new written AG or legal counsel opinion if the legal authority that supported the existing EPA-approved plan changes, or if the revised plan requires different legal authorities than the existing EPA-approved plan. NOTE: The new written opinion could reference an earlier opinion regarding authorities that are unchanged.

**(9C) Q:** *What should the opinion from the state attorney general (AG) or the legal counsel look like? Are examples available?*

A: Certifying authorities may use their own format as there is no EPA-required form or format for written opinions. EPA can provide examples upon request of written opinions submitted with EPA-approved plans. EPA will work with Association of American Pesticide Control Officials (AAPCO) to identify a model(s).

**(9D) Q:** *In a state with more than one applicator certification program (such as a state with a structural pest control program separate from the rest of the applicator certification program), is each agency responsible for part of a program required to submit a revised plan or does the lead agency submit one combined plan? Similarly, must such certifying authorities submit one letter from the attorney general and governor for each separate certification program or one letter for all certification programs?*

A: In accordance with FIFRA Section 11(a)(2)(A), the Governor must designate one state agency as responsible for developing, modifying, maintaining and administering the certification plan throughout the state. Since EPA expects each state to submit a single, comprehensive certification plan, it is appropriate that the certification plan also contain one letter from the governor and a single written opinion of the state attorney general or legal counsel for the state agency. The rule at § 171.303(b)(6) requires that the lead agency serve as the central point of contact on all issues related to the plan, coordinate activities and ensure consistent plan administration with all other agencies and organizations involved and submit one annual report.

**(9E) Q:** *The rule says that if more than one agency or organization will be responsible for program functions, the certification plan must identify all such agencies and organizations, list their associated functions, and describe how all functions will be coordinated by the lead agency to ensure consistency on administering the certification plan. Is there a strategy or model work plan outlining how the lead agency, Pesticide Safety Education Programs (PSEPs) and/or other cooperating agencies should support each other?*

A: EPA can work with the AAPCO to identify existing examples for use. However, it is up to each state lead agency to determine how to coordinate program functions and involve other agencies or cooperators, define their roles and ensure consistent administration (e.g., through a memorandum of agreement with the PSEP).

**(9F) Q:** *Several new categories are required by the rule for specific applications/uses (e.g., soil and non-soil fumigation, aerial, predator control). If a state chooses not to implement a certification category could it accept applicator certifications in that category from other certifying authorities? If so, would this allowance have to be described in the state plan?*

A: A state certification plan must include standards for a category to rely on another state's certification in that category. Section 171.303(a)(9)(ii) provides that where a state certifies applicators by relying on certifications issued by another State, it must examine the standards of competency used by the other state to determine whether the standards for a category are comparable to its own standards. Certifying authorities choosing to rely on another state certification to certify applicators must provide in the certification plan certain information about the conditions for such reliance (see § 171.303(a)(9)). A state that foresees little need for a category may establish a limited use category, as authorized by § 171.303(a)(4). This provision reduces some of the burden associated with certifying small numbers of applicators for one use or product.

**(9G) Q:** *Are there certain certification plan requirements in § 170.303 that can only be met with state statutory or regulatory requirements?*

A: Yes. Certifying authorities must provide a specific legal or regulatory citation demonstrating they have legal authority to satisfy each requirement in § 170.303(b)(7)(i)-(vii) and wherever the rule requires a citation, such as for certification standards.

**(9H) Q:** *Do all certification plan elements required by § 171.303 have to be established in state laws and*

*regulations, or are there elements that can be met with a written state policy that documents compliance? (Example: Can private applicator competency standards be established by policy?)*

A: No. EPA does not require all elements of a certification plan to be established through state laws and regulations. However, some elements must be established through state laws and regulations where explicitly required in the rule. For example, private applicator competency standards cannot be established by policy because the rule requires the state to provide, "A list and detailed description of all of the standards for certification of private applicators adopted by the state and a citation to the specific state laws and/or regulations demonstrating that the state has adopted such standards."

**(9I) Q:** *The revised regulations at § 171.303(b)(7) require that certifying authorities now have legal authority to criminally convict pesticide applicators for a violation of their laws or regulations. Is there a guidance document on what criminal authority should look like and how to add it?*

A: No, EPA cannot provide guidance but can provide examples of criminal provisions from FIFRA or other state statutes. There is no set process for establishing criminal authority or for making any legislative or regulatory changes because it will vary according to the constitution, policies and procedures of the certifying authority. EPA will work with the Association of American Pesticide Control Officials (AAPCO) to identify appropriate models of criminal authority and examples of processes certifying authorities have used to add it.

(Also see

**(9J) Q:** *Legal provisions or policy - Does the revised rule require states to have legal provisions in their laws and regulations to meet the requirement for competency standards of private applicators? Or can states implement their revised private applicator competency standards through program policy?*

A: EPA does not require that all elements of a certification plan be established through State laws and regulations. However, some elements must be established through State laws and regulations where explicitly required in the rule. For example, private applicator competency standards cannot be established by policy because the rule requires the State to provide, "A list and detailed description of all of the standards for certification of private applicators adopted by the State and a citation to the specific State laws and/or regulations demonstrating that the State has adopted such standards."

**(9K) Q:** *Must a state have regulatory text identical to EPA's Part 171 for competency standards of the same or similar categories? What about situations where EPA does not have a comparable category or competency standard?*

A: The rule provides that certifying authorities may adopt their own standards and categories. For certifying authorities, § 171.303(b)(2) says: "The application for Agency approval of a state certification plan must contain satisfactory documentation that the state standards for the certification of commercial applicators meet or exceed those standards prescribed by the Agency under §§ 171.101 and 171.103. Such documentation must include one of the following: (i) A statement that the state has adopted the same standards for certification of commercial applicators prescribed by the Agency under §§ 171.101 and 171.103 and a citation of the specific state laws and/or regulations demonstrating that the state has adopted such standards; [or] (ii) A statement that the state has adopted its own standards that meet or exceed the standards for certification of commercial applicators prescribed by the Agency under §§ 171.101 and 171.103. If the state selects this option, the application for Agency approval of a state certification plan must include all of the following..."

The rule goes on to specify the information the state must submit for EPA to determine if its standards meet or exceed EPA's required standards. When the state standards do not use text identical to the federal regulation, EPA may approve plans provided the "equivalency determination" is made that the state plan will provide essentially equivalent protections as the federal rule or standards (i.e., the state plan will result in protections that meet or exceed those provided by the EPA rule).

In addition, § 171.303(a)(2) describes how certifying authorities may adapt the certification categories listed in § 171.101:

- (i) A State certification plan may omit any unneeded certification categories.
- (ii) A State certification plan may designate subcategories within the categories described in §§ 171.101 and 171.105(b) through (f) as it deems necessary.
- (iii) A State certification plan may include additional certification categories not covered by the existing Federal categories described in §§ 171.101 and 171.105(b)-(f).
- (iv) A State certification plan may combine the categories described in § 171.101(m) through (n) into a single general fumigation category for commercial applicators.
- (v) A State certification plan may combine the categories described in § 171.105(d) through (e) into a single general fumigation category for private applicators.

**(9L) Q:** *Must applicators with existing certifications meet new certification and recertification standards under the revised plan (i.e., will they be allowed to be "grandfathered in" when program requirements change)?*

A: Existing certifications cannot be "grandfathered in" in a permanent sense, but EPA expects that many revised certification plans will provide for a brief transition period where some or all certifications issued under the former plan remain in effect. After a revised plan takes effect, all applicators certified under the former plan must be newly certified or recertified in accordance with the requirements of the revised certification plan. Certifying authorities will decide whether applicators certified under the former plan have to meet the new certification requirements immediately or upon expiration of their certification, and whether those applicators will require a new certification (either the same procedure as for a first-time applicant or a streamlined procedure that accounts for the certification under the previous plan) or a recertification (and in that case, whether as a regular recertification or a one-time enhanced recertification). A certifying authority could adopt a non-examination recertification process for applicators certified under the former plan if the process ensures applicators will meet the new certification standards. The state must explain in the revised certification plan how such a process would meet the rule's requirements.

**(9M) Q:** *EPA HQ has stated they want to know about significant incidents like the recent reports of dicamba and methyl bromide drift, etc. Is there already a place in CPARD to report this? Has EPA issued guidance on reporting expectations? Is this the kind of information EPA is seeking for "Program Reporting and Accountability: A summary of enforcement activities related to the use of RUP's."?*

A: Yes, the regulation at § 171.303(c) requires that certifying authorities submit as part of the annual report a summary of enforcement activities related to the use of RUPs during the last 12 month reporting period. Certifying authorities submit summaries, not specific incidents, through the Certification Plan and Reporting Database (CPARD) under "Enforcement Feedback". EPA has issued guidance on how to report on this element in "Instructions and Tips for Certifying Authorities on Completing the Annual C&T Reporting in CPARD", issued in 2010 and revised in December 2014. Please note that this reporting requirement is not new to the revised federal regulation.

**(9N) Q:** What are EPA's expectations regarding the requirements of § 171.303(b)(6)(v) which requires the State certification plan to include a document outlining the State's proposed approach and anticipated timeframe or schedule for implementing the State certification plan after EPA approves the plan?

A: The State plan must include a section or document on the approach and expected timeframe for implementing the revised and EPA-approved State plan and its new requirements. The regulation at § 171.303(b)(6)(v) requires "A document outlining the State's proposed approach and anticipated timeframe for implementing the State certification plan after EPA approves the State certification plan." This "implementation schedule" requirement is included in EPA's State Certification Plan Outline as "SECTION 13. IMPLEMENTATION TIMEFRAME. [§ 171.303(b)(6)(v)]." The EPA suggests the implementation document include at a minimum:

- How and when (month or quarter and year) the state will phase in new/revised requirements and end former requirements.
- How and when (month or quarter and year) the state will carry forward or end valid certifications under the former EPA-approved plan and anticipated month (or quarter) and year.
- List and explanation of requirements pending regulatory or law changes, the proposed regulatory text, and the anticipated month (or quarter) and year of proposal, final and implementation.

**(9O) Q:** What number(s) does a dealer record when selling a RUP if there is more than one registration number for a product? For example, a state could have registered a product under one or more FIFRA sections with an associated registration number for each (e.g., Section 24(c) special local need, a Section 18 emergency exemption, or a Section 3 conditional registration). How would the dealer know what number to record? What if a registration decision is made after the product has been purchased? How is this enforced?

A: Section § 171.303(b)(vii)(C) requires that the dealer must record the EPA section 3 registration number of any RUP product distributed or sold, including any applicable emergency exemption or State special local need registration (SLN) number. The dealer must record the emergency exemption or SLN registration number only where that information is necessary to establish that the authorized pesticide use corresponds to the applicator's certification category. This situation would only occur where an emergency exemption or SLN registration allows use in an additional certification category not specified on the label and the certified applicator is certified in that additional category, but not in any category identified on the section 3 label.

Example (1): A product is registered for use on ornamentals. The purchaser of the product shows the dealer proof of certification in a category pertaining to ornamentals. The dealer records the purchaser's information and the EPA registration number of the product. The dealer cannot sell the product to a person with a certification in agricultural use only.

Example (2): A product is registered for use on ornamentals and also has a state SLN registration for an agricultural use. The purchaser of the product shows the dealer proof of certification in an agricultural pest control category. The dealer records the original EPA registration number and the state SLN registration number of the product. The dealer either looks up, or the purchaser brings a copy, of the state SLN registered label (usually accessible on the state website). Without the state SLN registration for agricultural uses and the appropriate registration number, the dealer could not sell the product to a person who has a certification only in an agricultural pest control category.

**(9P) Q:** A state would like to create/allow legacy licenses for certain subcategories that are outside the federal categories (i.e. microbial, wood preservation, sewer line root control). The state would no longer issue licenses for these subcategories after EPA approves the revised plan but would allow use by applicators certified under the former plan who continue to meet recertification requirements (i.e. CE hours, renewal application, and payment). Below is draft regulatory text to allow applicators to operate under preexisting, valid certifications for three subcategories. Is this text acceptable, or does EPA need more information?

Draft regulatory text:

Section 6530.1 Wood Preservation, Sewer Line Root Control, and Microbial Pest Control Subcategories.

An individual holding a valid license or certificate in one of the following subcategories obtained prior to April 1, 2022 may perform pest control activities described below, provided the individual continues to meet the renewal requirements detailed in section 6511 for the respective subcategory.

(a) Subcategory Z - Wood Preservation

Perform pest control for wood damage and wood preservation, not including the use of fumigants.

(b) Subcategory Y - Sewer Line Root Control

(1) Perform pest control for roots in sewer lines.

(2) Fumigant use is limited to metam sodium products labeled for use to control roots in sewer lines.

(c) Subcategory X - Microbial Pest Control

(1) Perform microbial pest control, including:

(A) Wine barrel and cork sanitization;

(B) Potable water system, industrial cooling tower, and evaporative condenser disinfection.

(2) Fumigant use is limited to sulfur dioxide products labeled for sanitization of wine barrels and corks.

A: Provided that the state satisfactorily demonstrates how the recertification renewal requirements meet or exceed the requirements of § 171.303(b)(4), as well as how they ensure the recertification renewal requirements meet the specific category competency standards for certification under that category, EPA agrees that the state's plan to allow applicators to operate under preexisting, valid certifications for three subcategories would be acceptable as a plan and schedule for implementation based on the information provided.

**(9Q) Q:** *The federal regulation at § 171.303(b)(7)(vi) requires that the state plan include the citation to the specific state laws and regulations that requires commercial applicators to record and keep routine operational records for at least two years. In one state, the employer is required to keep application records, not the certified applicator. Will it be acceptable to EPA to require that the employer keep records and not the certified applicator?*

*The recordkeeping requirements for commercial applicators outlined in § 171.303(b)(7)(vi) is fulfilled through the state's pesticide use record requirements, which holds the operator of the property producing an agricultural commodity, and an agricultural pest control business applying pesticides to such property, or any person who uses a RUP, or any person engaged for hire in the business of pest control, or any person who uses a pesticide for industrial post-harvest commodity treatment; or any person who uses a pesticide for any outdoor institution or outdoor industrial use to maintain records that include the same information outlined in 40 CFR part 171.303(b)(7)(vi).*

A: Yes, the state requirement for agricultural pest control businesses to keep the application records meets the federal requirement for the commercial applicator in agricultural pest control to keep application records. In this case, the agricultural pest control businesses must keep application records for two years and make them available to State officials upon request.

**(9R) Q:** My state's Governor designated one agency as the state lead agency (SLA) in a 1974 letter to EPA. Since then, the state attorney general designated a different agency to administer the certification plan. Will the 1974 letter and the AG letter fulfill the requirement for § 171.303(b)(6)? Or do we need a new Governor letter to designate the SLA?

A: The regulation at § 171.303(b)(6)(i) requires a letter from the Governor designating the lead agency. EPA may, at its discretion, accept Governor's designation letters previously issued in support of the existing plan where there is appropriate evidence that the designation is still valid. However, unless the state attorney general was formally delegated the authority to designate the SLA at the time the letter was issued, EPA is not prepared to accept a letter from the state attorney general changing the designation to a different lead agency in lieu of a contemporary Governor's designation letter. The state must submit with its proposed modification of its certification plan a letter from the Governor designating a lead agency responsible for administering the modified plan.

**(9S) Q:** What are the civil and criminal penalty authority requirements for states?

A: Under the revised rule (see [40CFR 171.303](#)), states are required to cite in their certification plans specific laws and regulations demonstrating they have legal authority to assess both civil and criminal penalties against private applicators and commercial applicators. Specifically, states must have:

1. Provisions for and list the acts that constitute grounds for denying, suspending and revoking certifications of applicators. At a minimum, such grounds must include:
  - a. pesticide misuse;
  - b. falsification of records required of the applicator;
  - c. a criminal conviction under section 14(b) of the Federal Insecticide, Fungicide and Rodenticide Act;
  - d. a final order imposing civil penalty under section 14(a) of FIFRA; and
  - e. conclusion of state enforcement acts for violations of state laws or regulations relevant to the state certification plan.
2. Provisions for reviewing and, where appropriate, suspending or revoking an applicator's certification based on the grounds listed.
3. Provisions to assess criminal and civil penalties for violations of state laws or regulations relevant to the state certification plan.

In the revised certification and training rule, where the terms "private applicators" or "commercial applicators" are used, EPA means only those applicators; where the terms "certified applicators" or "applicators" are used, EPA means both commercial applicators and private applicators.

## 10. Indian Country - 40 CFR 171.307

**(10A) Q:** Do Tribes have to comply with the March 4, 2020 date for applicator certification programs in Indian country?

A: Yes. Tribes with a EPA-approved certification plan must comply with the same March 4, 2020 date for submission of a revised plan if they wish to continue to administer an applicator certification program. EPA intends to modify by March 4, 2020 the existing national EPA plan for Indian country for tribes to certify applicators through the EPA-administered plan. EPA will conduct a consultation with tribes on the revised EPA Plan for Indian country and anticipates it to occur in fiscal year 2019.

**(10B) Q:** *EPA is developing a federal plan for tribes applying pesticides in Indian country. When is that expected to be completed and could it be considered a template and/or example for the States?*

A: EPA is developing a revised national certification plan for areas of Indian country not covered by any other EPA-approved certification plan that will be ready by March 4, 2020. The EPA Plan for Indian country is significantly different from state certification plans regarding legal authorities and enforcement.

**(10C) Q:** *Tribal Plans/Agreements - If a tribe enters into an agreement with the EPA Region to establish a certification program, and that Tribal-Regional agreement relies on a particular state's certification for the underlying demonstration of competency for the applicator to be certified for RUP use in Indian country, does a state then have the authority to conduct pesticide inspections in the covered area of Indian country if the RUPs are being applied by applicators that have been certified in Indian country based on using the state's certification?*

A: No, a Tribe's reliance on a state certification as their basis for certification of applicators in the Tribe's Indian country (defined in our rule the same as at 18 U.S.C. 1151) does not provide the state with jurisdiction for pesticide enforcement or conducting inspections in Indian country. (Repeated under #7 General Rule Provisions and Program Implementation)

**(10D) Q:** *EPA Plan for Indian country – Some states issue “certificates” to “registered technicians,” but those certificates do not confer “certified applicator” status to the technician since they still require supervision by a certified applicator. Can EPA issue a federal certificate under the EPA's Plan for Indian Country to an applicator whose underlying state certificate is restricted such that the person require supervision by a certified applicator?*

A: No. Under the EPA Plan for Indian country, EPA Regions will only issue a federal certificate to a fully certified applicator that holds a valid state-issued private or commercial applicator certification that certifies that person to be able to purchase, apply and supervise the use of RUPs. Registered technicians and other persons that must operate under the direct supervision of a certified applicator are not considered certified applicators under FIFRA and Part 171 and could not be certified under the EPA Plan for Indian country based on a registered technician certificate. However, depending on the state's technician criteria, EPA anticipates that the forthcoming revised Indian Country Plan could allow Regions to rely on appropriate state technician credentials to satisfy the non-certified applicator qualification requirements of the 171.201(c).

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## Appendix 1



# Delegation of Authority

1200 TN 462  
04/06/1998

### FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (FIFRA)

#### 5-2. Certification of Pesticide Applicators

1. **AUTHORITY.** To perform EPA functions and responsibilities relative to certification of Pesticide Applicators as set forth in Section 11 of FIFRA, and to issue corresponding Federal Register Notices.
2. **TO WHOM DELEGATED.** The authorities pertaining to:
  - a. Certification of Pesticide Applicators, the approval, disapproval and withdrawal of approval for Certification and Training Plans, and the issuance of corresponding Federal Register Notices are delegated to:
    - 1) Regional Administrators for State Plans; and
    - 2) the Assistant Administrator for Chemical Safety and Pollution Prevention for Federal Agency Plans.
  - b. Prescribing Federal standards for the certification and training of Pesticide Applicators as set forth in FIFRA Section 11(a)(1) is delegated to the Assistant Administrator for Chemical Safety and Pollution Prevention.
3. **LIMITATIONS.**
  - a. With regard to State Plans, the Regional Administrators will:
    - 1) forward, upon receipt, copies of all State Plans to the Assistant Administrator for Chemical Safety and Pollution Prevention or his/her designee for review and concurrence;
    - 2) forward to the Assistant Administrator for Chemical Safety and Pollution Prevention or his/her designee for review and concurrence, any Federal Register notice pertaining to an intended or final action regarding any State Plan prior to signing any such notice; and
    - 3) forward to the Assistant Administrator for Chemical Safety and Pollution Prevention or his/her designee for review and concurrence, any notice or order withdrawing approval of a State Plan under FIFRA Section 11(b) prior to signing any such notice or order. .
  - b. With regard to Federal Plans, the Assistant Administrator for Chemical Safety and Pollution Prevention will:
    - 1) notify the Administrator or his/her designee five days prior to signing a Federal Register notice pertaining to intended or final action regarding any Federal Agency Plan; and

- 2) notify the Administrator or his/her designee five days prior to signing any notice or order withdrawing approval of any Federal Agency Plan.

**4. REDELEGATION AUTHORITY.**

- a. The authorities delegated to the Assistant Administrator for Chemical Safety and Pollution Prevention for the approval of a Federal Plan and the issuance of corresponding Federal Register Notices may be redelegated to the Division Director level or equivalent and these authorities may not be redelegated further. If the authority is redelegated, all officials in the management chain of the redelegatee retain the authority to exercise the delegated duties.
- b. The authorities delegated to the Regional Administrators may not be redelegated.
- c. With regard to Federal Plans, the Assistant Administrator for Chemical Safety and Pollution Prevention may:  
determine that the National Program Office or an appropriate Regional office shall administer an approved federal plan consistent with the directives of the Assistant Administrator. If the authority is redelegated, the Assistant Administrator for Chemical Safety and Pollution Prevention and all officials in the management chain of the redelegatee retain the authority to exercise the delegated duties.

**5. ADDITIONAL REFERENCES. None.**