

Legal Aid of North Carolina, Inc.

Farmworker Unit

224 South Dawson Street – 27601 • P.O. Box 26626 • Raleigh, NC 27611
919.856-2180 • Toll-free 800.777.5869 • Fax 919.856.2187

Mary Lee Hall
Senior Managing Attorney

www.legalaidnc.org

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Administrator Gina McCarthy
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Agricultural Worker Protection Standard Revisions; Proposed Rule Docket ID # EPA-HQ-OPP-2011-0184

Dear Administrator McCarthy,

Thank you for the opportunity to comment on the proposed revisions to the Worker Protection Standard. The Farmworker Unit of Legal Aid of North Carolina is a statewide project that provides free, high-quality civil legal aid to migrant and seasonal farmworkers in North Carolina. As witnesses to the hard and dangerous work that farmworkers do in North Carolina, we are pleased that the EPA is proposing to strengthen some of the pesticide safety regulations. There are several areas in which we believe that improvements that would strengthen the rule's effectiveness in preventing unnecessary pesticide exposure for migrant and seasonal farmworkers in North Carolina and across the US.

We would like to highlight several key areas in which the proposed rules fall short:

- The proposed **Minimum Age** of 16 to work as a pesticide handler, or as an early re-entry worker, is inappropriate and unsupported by the scientific literature. We urge you most strongly to adopt a minimum age of 18.
- The proposal to eliminate **Central Posting** does not solve the need for better hazard communication. We recommend retaining central posting, particularly for greenhouse and nursery workers, as well as implementing more robust field posting to address gaps in Hazard Communications.
- Implement **Anti-Retaliation Provisions** that ensure workers' complaints are confidential.

Minimum Age

The proposed minimum age of 16 to work as a pesticide handler, or as an early re-entry worker [§§170.9(c), 170.13(c) and 170.303], is inappropriate and unsupported by the scientific literature. It is widely opposed by farmworkers, health care providers, and public health advocates. We strongly recommend a minimum age of 18.

Pesticide handlers and early re-entry workers are at high risk of pesticide exposure. Working with pesticides is not appropriate work for youth because:

- Teens' bodies are still developing. The brain and reproductive system in particular undergo significant development during the teen years.^{1,2} Many pesticides are highly toxic to the brain and to the reproductive system.³ Exposing immature, developing systems to pesticides can do long-term harm.
- Exposure to pesticides can increase the risk of chronic diseases such as cancer⁴ and Parkinson's Disease.⁵ The likelihood of developing such diseases later in life increases with additional years of exposure.
- Teens are capable of many jobs, but they are not yet mature enough to handle highly-hazardous chemicals like pesticides. Studies have shown that teens perceive themselves as less vulnerable to harm, and therefore do not follow the same safety precautions as adults -- even when they have received the same trainings.^{6,7}
- Pesticide poisoning surveillance data show that youth are more likely than adults to be injured by pesticides on the job.⁸
- In every other industry, 16 and 17 year-olds are not allowed to work with hazardous chemicals.⁹ There is no compelling reason to treat farmworker youth differently or afford them a lesser level of protection on the job.

¹ Lebel and Beaulieu. "Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood." *The Journal of Neuroscience*, July 27, 2011. 31(30):10937-10947

² Medline Plus, "Adolescent Development." US National Library of Medicine, National Institutes of Health. <http://www.nlm.nih.gov/medlineplus/ency/article/002003.htm> (accessed 3/17/2014)

³ Roberts and Reigart. "Chapter 21: Chronic Effects" in *Recognition and Management of Pesticide Poisonings*, Sixth Edition. 2013. US EPA Publication number 735K13001.

⁴ Bassil et al. "Cancer health effects of pesticides: Systematic review" *Canadian Family Physician*. October 2007 vol. 53 no. 10 1704-1711

⁵ Kamel et al. "Pesticide Exposure and Self-reported Parkinson's Disease in the Agricultural Health Study" *Am J Epidemiol* 2007;165:364-374

⁶ Salazar et al. 2004. "Hispanic Adolescent Farmworkers' perceptions associated with pesticide exposure." *West J Nurse Res*. 26(2):146-166.

⁷ Steinberg, 2005. "Cognitive and affective development in adolescents." *Trends in Cognitive Sciences*, February 2005 vol. 9 no. 2 69-74.

⁸ Calvert et al, 2003. "Acute pesticide poisoning among agricultural workers in the United States 1998-2005." *Am J Ind Med* 51(12):883-898.

⁹ "Youth & Labor: Hazardous Jobs" United States Department of Labor. <http://www.dol.gov/dol/topic/youthlabor/hazardousjobs.htm> (accessed 3/17/2014)

EPA proposed a minimum age of 16, based on the higher cost of increasing the minimum age to 18. For a cost differential of only *ten dollars* per year for an average farm, EPA has proposed to promulgate a standard that would put over 89,000 16- and 17-year-old farmworker teens at elevated risk of pesticide exposure, affording them a lesser level of protection from chemical hazards than they would receive at any other job.

There is simply no viable reason to afford farmworker children a lesser degree of protection, as the US Department of Labor does through its Hazardous Orders. FIFRA allows EPA to regulate child labor in agriculture more broadly than DOL can under the FLSA, and thus EPA can reach different results about when children ages 16 to 18 can do agricultural work involving the handling of pesticides. For DOL to regulate child labor, it must make a finding of particular hazard or detriment to health [29 U.S.C. § 203(l)]; whereas EPA can regulate the use of pesticides to avoid “unreasonable risk,” broadly understood [7 U.S.C. § 136(bb)]. Because allowing children ages 16 and 17 to work as pesticide handlers would pose “unreasonable risks,” EPA is mandated by FIFRA to prohibit this practice as part of the Worker Protection Standard. The FLSA does not preempt more protective standards in other federal laws. Regulations adopted by DOL under the authority of the FLSA provide that “Nothing in this subpart shall authorize non-compliance with any Federal or State law, regulation, or municipal ordinance establishing a higher standard. If more than one standard within this subpart applies to a single activity the higher standard shall be applicable” [29 C.F.R. § 570.50].

Since the founding of EPA’s Office of Children’s Health Protection in 1997, EPA has repeatedly restated its commitment to protect children as “fundamental to EPA’s core mission.”¹⁰ Advancing a rule that explicitly allows adolescents to work with high-risk materials is at odds with that mission, and out of step with protections for youth working in every other industry nationwide.

Hazard Communications

EPA has proposed doing away with the current requirement for a central posting location for pesticide application information, while requiring that employers make the SDS and labeling for pesticide applications available to workers or their representatives upon request [§170.11(b)]. We support EPA’s clarification that this information must be made available to workers’ representatives (whether medical providers, attorneys, union representatives, etc). Particularly in the case of workers injured by pesticides, it is critical for workers’ representatives to be able to obtain accurate, timely information about the pesticides to which workers may have been exposed. However, specific information about the pesticides applied and the hazards they pose must be made available to workers

¹⁰ US EPA Office of Children’s Health Protection website.
<http://yosemite.epa.gov/ochp/ochpweb.nsf/content/homepage.htm> (accessed 4/25/2014)

universally, in advance of pesticide applications. Anything less is a step backward in Hazard Communications.

The proposal to maintain pesticide use records for 2 years is a significant improvement over the current 30-day requirement. North Carolina adopted a 2-year record retention requirement in 2009 in the wake of the Ag-Mart case [02 NCAC § 9L .1402]. However, we urge the Agency to go further in adopting a 5-year interval, which would coincide with the statute of limitations for civil violations (28 U.S.C. § 2462). The cost difference for growers in maintaining records for five years vs. two years would be negligible.

However, the proposal omits any record-keeping of worker re-entry into treated areas. In the 2006 Ag-Mart case in North Carolina, one of the major points at issue was whether workers were sent into fields before the re-entry interval (REI) had expired. EPA should require that employers record the date, time and field location of worker re-entry into treated areas, and should require that those records be maintained for five years (coinciding with the statute of limitations for civil violations). The act of recording worker re-entry into recently-treated fields could also serve as a deterrent that makes employers more aware of REIs and less likely to endanger workers' health by sending them into recently-treated areas too soon.

Entry Restrictions Associated with Pesticide Applications

In 2013, Legal Aid of North Carolina assisted a worker in the tobacco harvest to file a complaint alleging various violations of the Worker Protection Standard. The complaint alleged that the grower caused the spraying of a plant growth regulator for the control of tobacco suckers named Flupro while they were working topping tobacco. The workers working in the field were so close in proximity to the application of the Flupro on the recently-topped tobacco plants that they were forced to move out of the path of the tractor applying the pesticide to pass them in an adjacent row in the field. Flupro has a 24 hour REI.¹¹¹² Despite the fact that the application of the chemical was in complete disregard of the workers' safety and may have caused serious injury, the state WPS enforcement agency determined that the application of the pesticide in this manner was not a technical violation of the WPS.

It was determined that the definition of "treated area"¹³ under the current standard only pertains to the area where the pesticide is directed and does not include adjacent areas. The treated area does not include a buffer zone of even the adjacent row of a row crop. The "entry restricted area" which does protect workers from having to work within a buffer

¹¹ Label for Flupro, http://www.agrian.com/pdfs/Flupro_003051910_Label4.pdf (last visited August 18, 2014).

¹² Restricted-entry interval means the time after the end of a pesticide application during which entry into the treated area is restricted. 40 CFR 170.3

¹³ Treated area means any area to which a pesticide is being directed or has been directed. 40 CFR 170.3

zone area around where the pesticide is applied is *only* applicable to nurseries and greenhouses¹⁴ and not on farms or in forests.¹⁵ The requirement for employers to ensure that no one is contacted by a pesticide during application¹⁶ does not sufficiently address this dangerous practice as it shifts the burden onto the sprayed worker to demonstrate evidence of overt contact with the chemical.

The current entry restrictions applicable to employers of workers on farms and forests do not adequately protect workers from easily preventable, but harmful pesticide exposure. The notion that pesticide droplets remain strictly limited to the specific areas a field where they are directed ignores weather conditions conducive to drift and the significant possibility of user error, and defies the basic laws of physics. Legal Aid of North Carolina applauds the agency's proposal to broaden the restricted worker entry during application to the treated area plus 100 feet and 25 feet around the treated area, depending on the application method, as a means to decrease the number of worker injuries and illnesses due to drift and off-target application [§170.105]. However, we question whether the size of the buffer zones as proposed will be sufficient to adequately protect worker from the potential hazard.

Notification to Workers and Handlers

EPA is proposing requiring employers to post warning signs regarding the application of a pesticide that has an REI greater than 48 hours (for outdoor production), or 4 hours (for enclosed space production) [§§170.109(a)(1)(i) and 170.109(a)(1)(ii)]. We believe that this change could reduce occupational pesticide illnesses. However, the 48-hour limit seems excessive, since as EPA notes in its proposal, people have difficulty remembering what they have been told orally. We recommend requiring both posting signs AND oral warnings for all pesticide applications, or at a minimum for those pesticides with an REI of 12 hours or more. The most effective way to convey important information is through multiple routes, ie oral and written.

Training

We strongly support the proposal to require annual training of workers and handlers [§§170.101(a) and 170.201(a)]. This is the current practice in California, and anecdotally many growers in North Carolina report using annual training as well. Annual training will decrease the likelihood that workers fail to receive critical pesticide safety training on the job. We also support the record-keeping and verification proposals

¹⁴ 40 CFR 170.110 (b).

¹⁵ 40 CFR 170.110 (a).

¹⁶ 40 CFR 170.210.

[§§170.101(d) and 170.201(d)] to help employers and workers track compliance with the training requirement.

However, the training grace period of two days [§170.309], while an improvement over the current rule, still puts workers at serious risk when they begin at a new workplace. We recommend eliminating the grace period and requiring that pesticide safety training take place before any worker is put at risk of exposure on the job. There is currently no grace period in California, and in most other industries OSHA requires that employers provide safety training *before* employees begin work with potentially hazardous materials, as EPA notes in the proposal package [29 CFR 1910.1200(h)]. There is no compelling reason that the standard should be different for farmworkers.

We strongly support the proposal that qualified trainers should provide WPS training to workers. However, the standard should be the same for pesticide handlers. [§§170.101(c)(4) and 170.201(c)(4)]. We question the agency's logic in deciding that for trainers of handlers, simple Certified Applicator status is adequate to provide an effective training, when that status is not adequate for trainers of workers – especially because handlers are arguably at higher risk of exposure. All trainings – whether for workers or handlers – should be provided by someone who has proven competency in adult education techniques, in the language of the trainees, and cultural competence to convey the information effectively to the target audience. A high-quality nationwide train-the-trainer program can ensure these competencies.

It is absolutely critical that workers be well-trained in pesticide safety. However, it is at least as important to ensure that the employer understand clearly the hazards of the pesticides being used and her/his obligations to protect workers. The WPS places a lop-sided emphasis on training and information provision to workers, who have no control over the circumstances in which pesticides are used. The employer is the one responsible for compliance with the rule, and in control of whether the conditions for compliance exist, such as adequate PPE, decontamination supplies, etc. The rule needs a specific mandate for Employers and labor contractors/crew leaders to receive regular training on pesticide hazards and their obligations under the WPS. A pro-active approach to training employers and crew leaders could help improve compliance rates, ease the transition to the changes in the WPS, create safer work conditions, and place the emphasis on compliance where it belongs – with the employer.

Prevention of Take-Home Exposure

Training workers in preventing take-home exposure is key for better protecting the health and safety of workers' children and other family members [§§170.101(c)(2) through (3)]. However, workers will be severely challenged to actually carry out prevention of take-home exposure, since employers do not have to provide a place for workers to change and store clean clothes, wash clothes or take a shower before leaving the workplace. EPA must do more to ensure that workers can actually act carry out the precautions and behavior changes in which they are trained.

For example, EPA did not choose to propose that employers provide a place to shower before leaving work. How can workers be reasonably expected to shower before returning home if no shower is provided? On the east coast, many migrant workers are housed in barracks or trailers provided by their employers. The current migrant housing standard in North Carolina requires employers to provide only 1 working shower head per 10 workers, meaning that after work many workers are forced to wait in long lines to remove pesticide residues. The North Carolina migrant housing standard does not require washing machines, or a ride to the local laundromat – only one “laundry tub” per 30 people for washing work clothes [NCGS §95-222:229]. Workers cannot be reasonably expected to wash work clothes regularly and separately from other laundry under such conditions. We recommend that EPA require employers to provide such facilities at the worksite that would enable compliance with safety training:

- Showers with separate stalls or privacy screens;
- A changing area with lockers to store clean clothes; and
- Washing machines designated for work clothes, or regular access to a nearby laundromat or other similarly-equipped facility.

Training workers on these safety topics is futile without the facilities to actually comply.

Anti-Retaliation Provisions

The EPA should strengthen the anti-retaliation provisions of the WPS. Farmworkers are afraid to report pesticide violations because they fear resulting loss of their jobs or other retaliation. In North Carolina, workers are frequently interviewed by inspectors in the presence of their employer, or a crewleader or supervisor acts as an interpreter. Workers have little incentive to speak up when they know that their present job or ability to return to a certain employer in the future is at stake. Workers delay seeking medical care after pesticide exposure for the same reasons.

The EPA should adopt the same provisions to prevent retaliation that are provided by OSHA for employees who wish to report an unsafe condition or practice without fear of disclosure. EPA should establish basic procedures that would protect workers against retaliation, including a requirement that complaints can be confidential, and can be filed by an authorized representative, and other protections applicable to workers in other industries.

Poor State Enforcement

State agency enforcement of the WPS remains lackluster with no future plans to address issues fundamental to EPA compliance goals such as steps to make the agency more accessible to workers including those with limited proficiency in the English language. For example, inspections are often announced in advance reducing the likelihood of unspoiled evidence and accurate testimony. There is greater weight and attention given to employer

testimony. In a recent review of past inspection files, we noted there was little record of what the worker interviewees had been asked. In one case file, there is no evidence that workers were asked more than one question. The investigator relates the interpreter's summary account of what the worker reported, instead of the more accurate method of having the interpreter simultaneously interpret the investigator's interview questions and the worker subject's answers. Ideally, fully bilingual investigators, not just interpreters, should be collecting and documenting testimony in cases of alleged violations of the WPS. Workers are interviewed in front of interested parties, including in one case in which the state enforcement agency investigators appear to have interviewed workers in front of the head of the state growers' associations – his employer - and the primary worker liaison on his staff.

In 2010, LANC assisted two H2A workers in the tobacco harvest to file a complaint alleging various violations of the Worker Protection Standard. The complaint alleged, among other things, that workers had been exposed to toxic levels of pesticides in the field in which they were working possibly due to a violation of a Restricted Entry Interval. In early August 2010, workers had been sent into a field to harvest tobacco, and, over the course of the morning, at least of the 22 crew members fell ill and could not continue working. They exhibited symptoms an acute pesticide exposure.¹⁷ Those that could not return to work immediately were forced to sign the employer's voluntary quit forms and were sent home to Mexico at their own expense and without medical attention. Several sick workers asked the crew foreman to transport them to the nearest medical facility and their requests were either flatly denied or they were told that he would transport them for a fee. At no time did the employer himself make arrangements or ensure that the ill workers were to be evaluated by a medical professional.

A recent review of the state enforcement agency investigative file for this complaint underscores the need to strengthen state enforcement of the rule. The agency investigator, as is the agency's practice, made an appointment with the complaint's employer to conduct their inspection the following week. Where Spanish speaking workers were read a list of pre-prepared questions by the interpreter with no follow up questions, the investigative file contains a long narrative by the English speaking employer as he was permitted to expound on each answer. Where workers testified that they fell ill or witnessed others fall ill, they were not asked any basic clarifying questions such as who and when, or asked for a description of symptoms that they witnessed or experienced. When a worker noted to the interviewer that everyone was afraid to tell the truth, there is no evidence that a follow up question was asked why he believed that. The agency failed to recognize the willful inaction on the part of the employer to provide transportation to an appropriate medical facility and failed to apply basic notions of agency law and impute the actions of the employer's designated worker liaison, the crew foreman, to the employer. Representatives

¹⁷ Their symptoms included: including nausea, headaches, dizziness, stomach pain, muscle cramping, difficulty breathing, and extreme perspiration. One worker complainant described a sensation of "spicy chiles" running throughout his body.

from the state enforcement agency have been willing to continue to meet with Legal Aid of NC and other worker advocates and representative regarding deficiencies identified in past investigations and current practices. We hope that the EPA will provide greater and more effective guidance, training, and critique to state enforcement agencies to achieve compliance goals more efficiently.

Worker's Authorized Representative

In the above-mentioned case, after Legal Aid of NC was in contact with two ill workers in Mexico, we made attempts to obtain a list of chemicals that their employer applied to the fields in which they worked during a discrete period of time pursuant to 170.160(b). When the employer failed to provide this information for weeks and the ill workers required additional medical evaluation and treatment, we contacted the state enforcement agency to assist with the enforcement of this rule. The agency adopted a narrow interpretation of the employer's obligation to disclose to only apply when an injured worker himself requests application information and not when that information is requested by an attorney on behalf of an injured worker client. We support the agency's proposal to extend the employer's requirement to preserve and make available certain records to the worker's authorized representative.

Field-tested Training

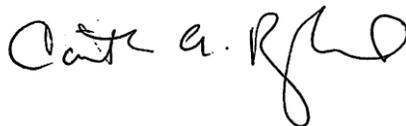
As EPA moves forward with this new rule and begins to consider implementation and training, we hope that you will reach out to us for assistance. Developing *and* field-testing strong new training and compliance materials will be key to this rule's success in both preventing hazardous pesticide exposure for workers and their families, and minimizing the challenges of compliance for growers.

Thank you for proposing needed changes to the Worker Protection Standard. We congratulate EPA for taking this major step forward, and look forward to working with you to ensure pesticide safety in the workplace. Many changes you propose are necessary to reduce the risk of immediate and long-term illness to farmworkers and their families. We urge you to include the strongest possible protections in the final regulations and to implement them as soon as possible.

Sincerely,



Caroline C. Smiley
Legal Aid of North Carolina



Caitlin A. Ryland
Legal Aid of North Carolina