



## NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL

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December 18, 2018

Andrew Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Dear Acting Administrator Wheeler:

The National Environmental Justice Advisory Council (NEJAC) urges you to halt efforts to rescind portions of the Agricultural Worker Protection Standard and the Certification of Pesticide Applicators rule. NEJAC believes that the rules should be implemented as they are currently written to better protect farmworkers and rural, agricultural communities. We urge you to rigorously enforce these rules, as they provide the necessary protections to vulnerable farmworkers from exposure to toxic pesticides.

**A. Farmworkers and their families are a vulnerable group of people that need strong EPA rules to protect them from pesticide exposure.**

The EPA established the Worker Protection Standard and the Certification of Pesticide Applicators rule in part to protect non-English speaking farmworkers. According to the National Agricultural Workers Survey, more than half of U.S. farmworkers primarily speak Spanish,<sup>1</sup> but farmworkers across the country speak a variety of languages. Further, approximately 59% of farmworkers speak a little or no English; 38% cannot read English at all and another 23% can only read English a little.<sup>2</sup>

In addition to having limited English proficiency, many farmworkers also have concerns related to their immigration status. From 2013-2014, 73% of workers were

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<sup>1</sup> U.S. DEP'T. OF LAB., FINDINGS FROM THE NAT'L AGRIC. WORKERS SURV. 2013-2014 (2016), available at [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_12.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf). The preamble to the Worker Protection Standards summarizes the Findings from the National Agricultural Workers Survey as "Approximately 65% of the [farmworker] population speaks little of no English; 38% cannot read English at all and another 30% can only read English a little." 80 Fed. Reg. 67496, 67502.

<sup>2</sup> U.S. DEP'T. OF LAB., FINDINGS FROM THE NAT'L AGRIC. WORKERS SURV. 2013-2014 (2016).

foreign born, compared to 74% in 2010-2012.<sup>3</sup> The share of hired crop workers not legally authorized to work in the U.S. grew from 15% in 1989-1991 to almost 55% in 1999-2001, and has since fluctuated around 50%.<sup>4</sup> Undocumented workers are worried about speaking up with safety concerns or to learn their rights because they worry about retaliation<sup>5</sup> and that raising concerns will cost them their jobs.<sup>6</sup> Cultural barriers factor into farmworkers' vulnerability, as well, as many farmworkers are unaccustomed to standards, regulations, policies, procedures, and workplace culture in the U.S. Cultural norms in their communities may differ, and the workplace can be challenging, not just in terms of arduous working conditions, but in having to navigate within a different culture. Many farmworkers are also women, who frequently work throughout their pregnancies and have concerns about exposing their children to pesticides in utero. Further, most farmworkers live and send their children to school near the farms where they work. Farmworkers need safeguards to protect themselves and their families from pesticide exposure.

**B. These provisions are incredibly important and protect this vulnerable population.**

The purpose of the 2015 revisions to both the Worker Protection Standard and the Certification of Pesticide Applicators rule was to reduce occupational pesticide exposure and incidents of related illness among agricultural workers and pesticide handlers. Additionally, these revisions aim to protect bystanders and others from being exposed to agricultural pesticides. The Worker Protection Standard requires agricultural establishments to adopt workplace practices to reduce or eliminate exposure to pesticides and establish procedures for responding to exposure-related emergencies. These rules, in combination with other components of EPA's pesticide regulatory program, intend to prevent unreasonable adverse effects of pesticides among workers, handlers, and other persons who may be on or near agricultural establishments, including vulnerable groups, such as minority and low-income populations. The provisions regarding minimum age, designated representatives, and the application exclusion zone are essential to achieving this purpose.

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<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP'T. OF AGRIC., FARM LAB. (2018) <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#legalstatus>.

<sup>5</sup> See Michael Frank, *Can America's Farms Survive the Threat of Deportations?*, ROUTE FIFTY (Jun. 7, 2017) <https://www.routeifty.com/public-safety/2017/06/can-americas-farms-survive-threat-deportations/138471/> (explaining the fear farmworkers experience now that the U.S. Immigration and Customs Enforcement (ICE) have expanded their efforts to find undocumented workers).

<sup>6</sup> See Richard L. Gaw, *Twelve Arrested in ICE Raid at Mushroom Farm*, CHESTER COUNTY PRESS (May 3, 2017) <http://www.chestercounty.com/2017/05/03/141298/twelve-arrested-in-ice-raid-at-mushroom-farm> (explaining how ICE is increasingly targeting farms in Pennsylvania and the Northeast that employ undocumented workers).

The minimum age requirement, the designated representative, and the application exclusion zone are essential for protecting the health of vulnerable farmworkers. The minimum age requirement ensures that children will not be harmed by pesticide exposure because it guarantees that children will not handle or apply pesticides. The Worker Protection Standard's designated representative requirement protects farmworkers by allowing farmworkers to have someone help obtain information about the pesticides that they may have been exposed to in the workplace. The application exclusion zone prohibits pesticide applicators from exposing people, including workers and non-workers, within the immediate area surrounding the application equipment. These rules represent a first step in protecting farmworker children, helping farmworkers obtain important information about their exposure to pesticides, and protecting people who work and live near farms from pesticide exposure.

### **1. Minimum age requirements protect vulnerable young people from harmful pesticide exposure.**

Raising the minimum age to 18 for pesticide handlers and early entry workers protects adolescent farmworkers. Adolescent farmworkers are at risk of potential health effects from pesticide exposure because their bodies are still developing. Adolescent farmworkers are also put in jeopardy because their behavior is riskier than that of adults, which puts them and everyone nearby at risk. Youth under 21 years of age are not eligible to rent a car, for example, from most car rental companies, for the very reason that statistics indicate that younger drivers are more at risk for accidents due to lack of experience and a penchant for risk taking. For these reasons, thousands who commented on the proposed rules supported raising the age to 18 to protect teenagers from harm. The few commenters who supported a minimum age of 16 did not provide any research or data showing that 16 and 17-year old adolescents would not suffer adverse chronic effects from potential pesticide exposure from applying pesticides.

Reserving pesticide handlers' and applicators' jobs for adults is consistent with how the Fair Labor Standards Act already protects children. Provisions in the Fair Labor Standards Act prohibit anyone under the age of 18 from working in hazardous conditions. The Fair Labor Standards Act defines "oppressive child labor" as a condition of employment in which "any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation ... to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being."<sup>7</sup>

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<sup>7</sup> 29 U.S.C. § 203(1)(2)

- 2. The Designated Representative requirement ensures that there is someone who can effectively communicate with farmworkers and obtain information about the pesticides they were exposed to in the workplace.**

Many farmworkers do not speak English or have a limited understanding of the language. Therefore, workers and handlers may be reluctant to request information for themselves due to their inability to communicate effectively with, or fear of retaliation from their employer, or because they may not be able to understand the information without help. The Worker Protection Standard allows farmworkers to designate a representative to obtain pesticide application information on their behalf. Without this right, the Worker Protection Standard will fail to ensure that vulnerable farmworkers know what pesticides they were exposed to and understand the potential adverse health effects of those exposures. Furthermore, having detailed information about the name and class of pesticide can help farmworkers seek and obtain an accurate diagnosis and proper medical care after a pesticide-poisoning incident.

- 3. The Application Exclusion Zone is a first important step to protect farmworkers, their families, and their neighbors from pesticide exposure.**

An application exclusion zone is a 25-100-foot area immediately surrounding the application equipment during a pesticide application. If a pesticide applicator sees a non-trained and unprotected person within this zone, they must suspend the application and resume after the person leaves the area. The application exclusion zone provision establishes clear areas where pesticides can be sprayed in order to prevent others from harm. The rule recognizes that pesticide drift may affect neighboring farms. Recent cases in California and Florida have resulted in farmworkers suffering adverse health effects and even hospitalization from pesticide applications that have drifted from the farm where the application was occurring to a neighboring farm where workers were harvesting crops. These incidents not only led to illness and hardship to workers, but loss of production in the field, economic loss to the farms, lengthy investigations of the incidents, and fines for the farm that caused the incident. The application exclusion zone reduces the risk of these incidents from occurring.

**C. The EPA must protect and preserve the current rules.**

- 1. These rules were created after a robust process.**

The Worker Protection Standard and the Certification of Pesticide Applicators rule were the result of numerous stakeholder and working group meetings over months

and years. Stakeholders included farmworker organizations, health care providers, state regulators, educators and trainers, pesticide manufacturers, farmers, organizations representing agricultural commodity producers, and crop advisors.

The EPA received substantial feedback on the 2015 proposals to implement these protections, including over 2,400 written comments with over 393,000 signatures. Commenters included farmworker advocacy organizations, state pesticide regulatory agencies and organizations, public health organizations, public health agencies, growers and grower organizations, agricultural producer organizations, applicators and applicator organizations, pesticide manufacturers and organizations, Personal Protective Equipment manufacturers, farm bureaus, crop consultants and organizations, and others. The comments received covered a wide range of issues and took diverse positions. These issues ranged from protecting children from pesticide exposure because their developing bodies are susceptible to agriculture chemical exposure, to following the same guidelines that other agriculture-reliant states have implemented regarding a minimum age requirement of 18 for pesticide handlers.

The EPA engaged with these stakeholders formally through the National Assessment of the Pesticide Worker Safety Program, public meetings, federal advisory committee meetings, and a Small Business Advocacy Review Panel. The EPA also engaged stakeholders informally, meeting with farmworker organizations, with individuals and other stakeholder groups. For example, EPA Administrator Gina McCarthy met with farmworker women in California and found their concerns to be valid and their requests for stronger protections compelling.

Because the Worker Protection Standard and the Certification of Pesticide Applicators rule were developed and finalized through numerous stakeholder discussions and a formal administrative process designed to address real and urgent concerns and to withstand the whims of partisan politics, they must be preserved unless there is compelling new evidence that would warrant walking back the regulations as they now stand.

## **2. There is no new information justifying a rollback.**

The current Administration has failed to present any new information that justifies rolling back the Worker Protection Standard or the Certification of Pesticide Applicators rule. No new studies or reports have been published that would change the exhaustive information, public comments, agency review, and debate that took place before the rules were finalized.

EPA's formal notice that it is considering undoing these new rules protecting farmworkers mentions the Pesticide Program Dialogue Committee meetings as

justification to reconsider the rules. However, those discussions do not provide support for ending these key farmworker protections. The Pesticide Program Dialogue Committee met on May 4, 2017 to discuss President Trump's Executive Order 13777 establishing a task force to evaluate existing regulations and make recommendations about potential regulatory repeal, replacements or modifications. The Pesticide Program Dialogue Committee attendees then expressed their thoughts, comments, and concerns about what pesticide regulations should be repealed, replaced, or modified. Numerous representatives from various organizations expressed concerns about eliminating provisions that protect these vulnerable farmworkers because they believed that these provisions protect workers, especially children, from the harmful effects of pesticide exposure. The organizations represented include the Migrant Clinicians Network, the Center for Biological Diversity, Farmworker Justice, Oregon Law Center, and Beyond Pesticides.

The Pesticide Program Dialogue Committee met again on November 2, 2017 to discuss provisions in the Worker Protection Standard and Certification of Pesticide Applicator rule that are the subject of the proposed rule change. Committee members representing diverse organizations agreed that the minimum age requirement for handling pesticides should be 18. The committee members also agreed on the importance of the designated representative requirement. One committee member representing a state pesticide regulatory organization volunteered to gather information about state laws that provide farmworkers a right to a designated representative and how those states have implemented this requirement. The committee also came to a consensus regarding the importance of the Application Exclusion Zone. Some committee members suggested forming a working group to address issues and concerns raised about its implementation.

During this public meeting, no members of the Pesticide Program Dialogue Committee proposed rolling back requirements in the Worker Protection Standard or the Certification of Pesticide Applicators rule. To the contrary, committee members representing diverse stakeholders strongly advocated for keeping the rules in place, and only proposed minor changes to help clarify or improve the rules changes. Even more important are the extensive public comments made from a wide variety of stakeholders; significant scientific studies included in the docket, and Environmental Protection Agency review and analysis over many years. This rulemaking process included over 15 years of outreach, meetings, and engagement with affected sectors and revealed overwhelming support for the provisions of the regulation. To overturn these three provisions, after such extensive and exhaustive work by the Agency, not only puts farmworkers and agricultural communities at greater risk, but undermines the Agency's own efforts. There is no reasonable justification for a roll back.

**3. Supreme Court precedent, recently confirmed by the Keystone XL decision, makes clear that the Administration may not rollback policy decisions without “good reasons” for the new policy.**

The United States Supreme Court established a four-part test to determine whether a policy change is legal under the Administrative Procedures Act: “(1) the agency displays ‘awareness that it is changing position;’ (2) the agency shows that ‘the new policy is permissible under the statute;’ (3) the agency ‘believes’ the new policy is better; and (4) the agency provides ‘good reasons’ for the new policy.” *Indigenous People’s Network v. U.S. Dept. of State*, 2018 WL 5840768 \*12 (D. Mont. Nov. 8, 2018) citing *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009).

The recent decision invalidating the U.S. Department of State’s 2017 reversal of its 2015 decision not to approve the Keystone XL pipeline reaffirms Supreme Court precedent that “even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.” *Indigenous People’s Network v. U.S. Dept. of State*, 2018 WL 5840768, (D. Mont. Nov. 8, 2018)(citing *Org. Vill. of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015), quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Keystone XL decision reinforced the Supreme Court’s holding that an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *Fox*, 556 U.S. at 537.

As with the Keystone XL decision, the EPA cannot “ignore inconvenient facts” about pesticide harms to farmworkers and farmworker adolescents, nor can it reverse the Worker Protection Standards and Certification of Pesticide Applicators rule “without a reasoned explanation.” Because there is no “reasoned explanation” to roll back these critical protections, we strongly urge EPA not to move forward with this proposal that is both illegal and harmful to vulnerable farmworkers.

## CONCLUSION

For these reasons, the NEJAC strongly urges you to fully enforce the standards laid out in the current versions of the Worker Protection Standard and the Certification of Pesticide Applicators rule. These measures exist to protect vulnerable farmworkers and people living in rural, agricultural communities who need protection from the federal government in order to work safely. It is the duty of the Agency to ensure their health and safety. Farmworkers are essential to agricultural work, and without

them the entire industry would fail. Therefore, it is necessary to guarantee that they are protected with the utmost care in order to ensure that the industry thrives with healthy workers.

Sincerely,

National Environmental Justice Advisory Council

A handwritten signature in black ink, appearing to read "Richard Moore". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard Moore  
Chair

cc: NEJAC Members  
Henry Darwin, Acting Deputy Administrator  
Brittany Bolen, Associate Administrator for the Office of Policy  
Matthew Tejada, Director for the Office of Environmental Justice  
Karen L. Martin, Designated Federal Officer and NEJAC Program Manager

