



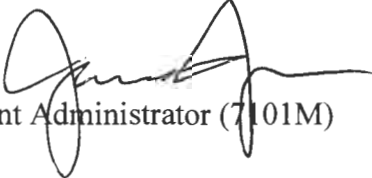
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY - 6 2013

OFFICE OF CHEMICAL SAFETY
AND POLLUTION PREVENTION

MEMORANDUM

SUBJECT: Nationwide Final Program Under the Federal Insecticide, Fungicide and Rodenticide Act Section 2(ee)(6) Regarding Use of Section 18 Emergency Exemption and Section 24(c) Special Local Need Products in Indian Country
-- **DECISION MEMORANDUM**

FROM: James J. Jones 
Acting Assistant Administrator (7101M)

THRU: OEX (1105A)

TO: Bob Perciasepe
Acting Administrator (1101A)

ISSUE

Should the U.S. Environmental Protection Agency make a statutory finding under FIFRA section 2(ee)(6) to allow registered pesticides to be used within Indian country for off-label uses that are available in the surrounding areas outside of Indian country under section 18 emergency exemptions or section 24(c) special local need registrations?

OVERVIEW

Background

FIFRA section 18 provides that the EPA may exempt any federal or state agency from any provision of FIFRA if the EPA determines emergency conditions exist requiring such exemption. Pursuant to this authority, the EPA has approved requests from states and federal agencies to allow the sale, distribution and use of an unregistered pesticide or a registered pesticide for an unregistered use for a limited time, no longer than one year for specific public health exemptions or three years for quarantine exemptions. FIFRA section 24(c) authorizes states to issue registrations for additional uses of pesticide products currently registered under section 3 to meet special local needs.

FIFRA is silent on whether the benefits of these provisions are available to tribes and farmers in Indian country¹; therefore, tribes and farmers in Indian country do not explicitly have access to the full range of options available for addressing an emergency situation or special local need. This situation may present equity, enforcement and environmental protection concerns in Indian country. This gap in our national

¹ Indian country is defined at 18 U.S.C. 1151 as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

protection could allow plant diseases or pest species to affect growers in Indian country and allow them to remain uncontrolled in areas proximal to major state agricultural centers.

The EPA has interpreted emergency exemptions requested by a state and special local need registrations issued by a state as not extending to Indian country located within such a state. As a result, off-label use in Indian country of a registered pesticide in a manner authorized in a state under section 18 or registered by a state under section 24(c) would be considered a violation of FIFRA's general prohibition against the use of "any registered pesticide in a manner inconsistent with its labeling" (FIFRA section 12(a)(2)(G), 7 U.S.C. 136j(a)(2)(G)). The Tribal Pesticide Program Council and certain Indian tribes have requested that the EPA consider issues relating to access to FIFRA section 18 emergency exemptions and section 24(c) special local need registrations in Indian country.

FIFRA Section 2(ee)(6)

FIFRA section 2(ee)(6), 7 U.S.C. 136(ee)(6), authorizes the Administrator to allow use of a registered pesticide that might otherwise be considered inconsistent with the pesticide's labeling if the Administrator determines that use of the pesticide is "consistent with the purposes of FIFRA." In essence, with a section 2(ee)(6) finding in place, a use of a registered pesticide that would otherwise be considered a violation of FIFRA would be lawful, provided the conditions of the section 2(ee)(6) finding are met. Such a finding would be limited to registered pesticides and would not authorize the use, sale or distribution of unregistered pesticides.

Pilot Program Results and Other Supporting Information

To address concerns that areas of Indian country within a state may experience the same pest infestation problem that leads a state to request a section 18 exemption or to issue a section 24(c) registration, the EPA implemented progressively broader pilot programs to make section 18 and section 24(c) products equally available in relevant areas of Indian country.

The Office of Pesticide Programs first implemented two small-scale pilot programs in 2006-2007 to provide for the lawful use of those pesticides in areas of Indian country that are within the geographic boundaries of state(s) or county(ies) to which the emergency exemption or special local need registration pertains. The first pilot program was intended to make section 18 and section 24(c) pesticides for the control of soybean rust available for use in Indian country nationwide. The second pilot program focused on the Yakama Nation and Washington State. It was intended to address more generally (*i.e.*, beyond just products designed to control soybean rust) the use within Yakama Indian country of products available outside of Yakama Indian country under section 18 or section 24(c).

Based on the success of those pilot programs, OPP then implemented a nationwide, three-year pilot program to provide for the lawful use of those pesticides in areas of Indian country that are within the geographic boundaries of state(s) or county(ies) to which the emergency exemption or special local need registration pertains. To implement each of these pilot programs, the Administrator made a statutory finding under FIFRA section 2(ee)(6) that "where a use of a registered pesticide product is authorized under section 18 or section 24(c), it would be consistent with the purposes of FIFRA to allow that same use within those areas of Indian country that are within the geographic boundaries of the state(s) or county(ies) to which the emergency exemption or special local need registration pertains."

These pilot programs were developed after long and careful consideration, in consultation with tribes, and with input from various stakeholders. For a summary of the consultation with tribes regarding the EPA's proposed final program, see the section on Stakeholder Involvement on page 4. The EPA

regional tribal pesticides coordinator was available to help tribes if they had any concerns during the course of the pilot program.

The nationwide pilot program expired on November 28, 2011. The finding allowed use of the identified products in areas of Indian country covered by the finding, effective from the date of the Administrator's signature on November 28, 2008. Enforcement of the use of these products in Indian country was done by the EPA regions, with the cooperation of tribes where the tribes have cooperative agreements with the EPA relating to enforcement. Feedback from tribes was generally positive of the pilot program and of the EPA's efforts to make section 18 and section 24(c) products available for use in Indian country.

The nationwide pilot program affected federally recognized tribes in states where additional uses of registered pesticides were authorized under section 18 or section 24(c) and in those states that applied for section 18 emergency exemptions or issued section 24(c) registrations. The finding did not allow the use of those pesticides that are classified as restricted-use products unless the applicator was certified to apply the pesticide in the jurisdiction where the pesticide was being applied; nor did it allow the use of unregistered pesticides.

SUMMARY OF THIS ACTION

The attached finding marks the final step in our efforts to make section 18 and section 24(c) products available in relevant areas of Indian country. It would provide for lawful use of registered section 18 and section 24(c) products in areas of Indian country that are within the geographic boundaries of the state(s) or county(ies) to which the emergency exemption or special local need registration pertains.

This final program would provide a consistent approach to making emergency exemption and special local need products available in relevant areas of Indian country. It would provide tribes and farmers in Indian country access to a wider range of options for addressing an emergency situation or special local need, closing a gap in our national protection that could allow plant diseases or pest species to affect growers in Indian country and allow them to remain uncontrolled in areas proximal to major state agricultural centers.

This final program would not impose any new requirements or revise any regulations, nor would it impose any additional rights or responsibilities on states. This program will not cause any adverse economic impacts or additional regulatory burden associated with the emergency exemption process or special local need registration process. Furthermore, this final program is not intended to override applicable tribal laws, codes, regulations or other mechanisms for restricting or prohibiting the use of pesticides. Consistent with FIFRA, tribes wishing to limit or prohibit the use of certain products may do so under their own laws, codes, regulations or other mechanisms, at their own discretion, and may enforce those tribal laws, codes, regulations or other mechanisms to the extent of their own authorities. The attached finding does not allow for the use of unregistered pesticides or for the use of restricted-use pesticides by non-certified applicators.

COMMUNICATION PLAN

The EPA developed an extensive communication plan to let tribes and states know about the finding, and to describe for tribes how they can determine what pesticides could be used on their lands based on this finding. The EPA is also encouraging states to establish procedures to inform tribes when they apply for a section 18, when section 18s are approved, and when a section 24(c) has been issued. Planned communication mechanisms include:

- The EPA's database for section 18 actions at <http://cfpub1.epa.gov/oppref/section18/search.cfm> ;;

- The EPA's Pesticide Product Information System for section 24(c) actions at <http://www.epa.gov/opp00001/PPISdata/>;
- State pesticide web sites that list section 18s and section 24(c)s available in those states; and
- E-mails or letters through the EPA's OPP to notify tribes of approved section 18s and section 24(c)s.

STAKEHOLDER INVOLVEMENT

Stakeholder input has been a critical component of the agency's development of this final program. Consistent with the federal government's trust responsibility to federally recognized Indian tribes, the EPA provided notice to all tribes of its development of this section 2(ee)(6) final program and provided opportunities for consultation on the program. The EPA also provided information to tribes through the TPPC, individual tribal representatives, and Regional Tribal Operations Committees. The EPA provided information to states through the State-FIFRA Issues Research and Evaluation Group.

Tribes are generally supportive of the final program and of the EPA's efforts to make section 18 and section 24(c) products available for use in Indian country. At the same time, tribes want to maintain control of pesticide use on their lands. These FIFRA section 18 and 24(c) products present an additional set of products and uses that tribes may now have to address under their own laws and over which non-tribal members may challenge tribal authority and jurisdiction. While potential jurisdictional issues relating to tribal authority to regulate non-tribal-member pesticide use under tribal law exist in the context of a section 3 registered product as well as with section 18 or 24(c) registrations, the difference with this final program is that states, but not tribes, have the opportunity to initiate the section 18 and section 24(c) uses in the first instance, either through a section 18 application or issuance of a registration under section 24(c). This may create the perception that states have some ability to decide pesticide use in Indian country. However, it is this finding by the EPA under FIFRA section 2(ee)(6), not state action, that makes these products available for use in Indian country.

All 566 federally recognized tribes were sent notification letters inviting each tribe to two national consultation calls. Six tribes total participated on the two calls, and one tribe provided written comments on this proposed final program. Following is a summary of issues raised regarding implementation of the program and the EPA's response:

- **Limitations on tribes under FIFRA section 18 and section 24(c)** – Tribes expressed broad dissatisfaction with their inability to apply for emergency exemption and special local need pesticides on their own; the imposition of, and implications of allowing, pesticide use actions originating with states in Indian country; and the lack of a requirement for states to consult with tribes regarding emergency exemptions and special local needs.

Response: Under FIFRA, only states or federal agencies may explicitly apply for a section 18 emergency exemption, and only states may explicitly issue a section 24(c) special local need registration. Such actions initiated by states would not be applicable in Indian country. It is the federal action under this administrative finding, based on the EPA's assessment of the risks those pesticides might pose, that would allow the use of these pesticides in Indian country. Consistent with FIFRA, tribes may further restrict or prohibit the use of pesticides made available under this administrative finding under their own tribal laws or other tribal mechanisms, and in accordance with FIFRA. This finding advises pesticide applicators in Indian country to comply with any relevant tribal use restrictions, and applicators should obtain information about such requirements from the pertinent tribe.

The EPA encourages states and tribes to cooperate on developing section 18 emergency exemption and section 24(c) special local need registrations. When that is not feasible, tribes can request another federal agency, such as the U.S. Department of Agriculture, to apply for a section 18 emergency exemption on their behalf.

Government-to-government consultation with tribes in connection with federal actions that may affect tribes is a federal responsibility. This finding would not impose any additional consultation or other responsibilities on states.

- **Retaining tribal authority over pesticide use**

Opt-out provision: Several tribes commented that this finding should include an opt-out provision that would allow them to prohibit the use of section 18s or section 24(c)s on their lands.

The TPPC and other tribes presented no recommendations or preferences on whether an opt-out provision should be permanent, time-limited, periodically revisited, chemical-by-chemical, or for all emergency exemption and special-local-need pesticides.

Three tribes did opt out of the pilot program, as was permitted by the pilot: The Hopi Tribe, the Picuris Pueblo and the Pueblo of San Felipe. After the national tribal consultations were held, the EPA contacted the three tribes, none of which had participated in the consultations. The Hopi Tribe's environmental director stated in phone conversations with Region 9 and with OPP that the tribe wants an opt-out provision in the final program. Phone calls and e-mails from OPP to both Pueblos were not returned.

Response: The EPA provided an opt-out provision in the administrative finding that piloted this program because we did not believe participation in a pilot program should be mandatory. The EPA considered and rejected including an opt-out provision in this final finding. This is consistent with the EPA's general approach of ensuring comprehensive coverage, and not providing opt-out provisions for other FIFRA actions. Not only would an opt-out provision potentially set a precedent for other FIFRA actions, it would prevent the EPA from making the same tools available to applicators in any areas of Indian country not included in the program that are available outside of Indian country. Also, an opt-out provision may increase the cost of implementing this program for tribes, the EPA and pesticide applicators; and would create communication hurdles for tribes, the EPA and pesticide applicators to maintain and obtain accurate information on what tribes are in and out, and for what chemical.

Notwithstanding this finding under section 2(ee)(6), tribes would retain the authority to control pesticide use on their lands under tribal law. Consistent with FIFRA, any tribe wishing to restrict or prohibit the use of pesticides may continue to do so under their own tribal codes, laws, regulations or other applicable mechanisms. As with the pilot program, applicators under this final program should check with the relevant tribe before application of section 18 emergency exemption and section 24(c) special local need pesticides covered by this program, and comply with any applicable tribal use restrictions.

Notification: Two tribes said applicators should be required to notify tribes before pesticide applications. One tribe said that absent an opt-out provision in the final program, notification should be required through a label statement requiring applicators to check with tribes to verify

relevant laws. That would help ensure compliance with relevant tribal laws and aid enforcement efforts.

Response: The EPA considered and rejected including a tribal notification provision in this finding. The EPA believes this requirement would be unduly burdensome for applicators. The EPA also believes that not all tribes want a notification system, and those that do may not desire the same type of notification. Tribes desiring such a system may do so under their own tribal laws, codes, regulations or other applicable mechanisms.

As with the pilot program, this finding explicitly informs applicators that they should check with the relevant tribe before application of section 18 and section 24(c) pesticides covered by this program and comply with any applicable tribal use restrictions, including tribal notification requirements.

Consultation: One tribe stated in written comments that the EPA must consult with tribes before any proposed pesticide use, including section 18 or 24(c) pesticides, and the tribe should be able to make the final determination on whether to allow any pesticide use.

Response: The EPA believes it would be unduly burdensome for both tribes and the EPA to consult before any pesticide use. The EPA addresses thousands of pesticide uses, registrations, reregistrations, tolerance reassessments, and other actions every year. We recognize that tribal members may be subject to different pesticide risks than other Americans because of unique tribal lifestyles and exposure patterns, and the EPA works to consider and address these factors when evaluating pesticides and their uses.

INTERNAL REVIEW

Staff in the Office of General Counsel, the Office of Enforcement and Compliance Assurance, and the American Indian Environmental Office have reviewed the attached finding, briefed their senior managers and concurred with our request to establish the final program.

PEER REVIEW

There were no major scientific or technical products supporting this action as defined by the agency's Peer Review Handbook; therefore, we did not submit any support documents for peer review.

PLAIN LANGUAGE

This document and its attachment have been composed and edited with the express intent to deliver a clear and concise message to our stakeholder community. Though legal in nature, the document reflects our best effort to make the activity understandable to the broadest audience.

EXTERNAL AGENCY REVIEW

There was no external agency review of this document.

OMB TRANSACTION

This action is not subject to review by the Office of Management and Budget under E.O. 12866, and was not otherwise shared with OMB for informal review or informational purposes.

ANTICIPATED EXTERNAL REACTION

Interested audiences include federally recognized tribes, TPPC, state lead pesticide agencies, select federal agencies (for example, the USDA's Animal and Plant Health Inspection Service and the U.S.

Department of the Interior's Bureau of Indian Affairs), and the Association of American Pesticide Control Officials. We expect each of these groups to support this final program.

CONTACT

Should you or your staff have any questions, please contact Daniel Helfgott, Chief of the Government and International Services Branch, at (703) 308-8054 or helfgott.daniel@epa.gov.

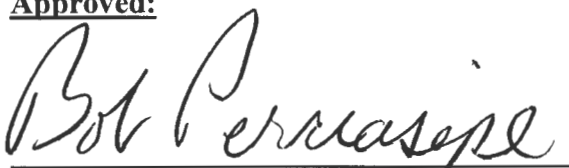
RECOMMENDATION

I recommend you approve this final program.

DECISION

After considering the issue and facts presented in this memo and its attachment, please indicate your decision by signing under the appropriate header.

Approved:



Bob Perciasepe, Acting Administrator

Date: 5/21/2013

cc: Michelle DePass
Brenda Mallory
Cynthia Giles

Attachment

Disapproved:

Bob Perciasepe, Acting Administrator

Date: _____

**Administrator Finding Under
Section 2(ee)(6) of the Federal Insecticide, Fungicide and Rodenticide Act
Regarding Use of Section 18 Emergency Exemption and Section 24(c) Special Local Need
Products in Indian Country**

FINDING

Pursuant to the authority in FIFRA section 2(ee)(6), I find that where a use of a registered pesticide product is authorized under section 18 or section 24(c), it is consistent with the purposes of FIFRA to allow that same use within those areas of Indian country that are within the geographic boundaries of the state(s) or county(ies) to which the emergency exemption or special local need registration pertains.

Sections 18 and 24(c) are intended to enable states to deal with local situations that are not provided for on existing EPA-approved labels. Congress has specifically stated the purpose of section 24(c) is "to give a State the opportunity to meet expeditiously . . . the problem of registering for local use a pesticide needed to treat a pest infestation that is a problem in the State but that is not sufficiently widespread to warrant the expense and difficulties of Federal registration." Federal Pesticide Act of 1978, U.S. Senate Committee on Agriculture, Nutrition, and Forestry, Committee Print, January 1979, p. 170. Areas of Indian country within a state may experience the same pest infestation problem that leads a state to request a section 18 exemption or to issue a section 24(c) registration.

The EPA's review of section 18 emergency exemption requests and section 24(c) registrations focuses on risks to human health and the environment without regard to whether affected persons or environmental assets are located within or outside Indian country. This review thus includes areas of Indian country geographically located within a given county or state to which a section 18 or 24(c) use pertains. Pesticide users in Indian country who apply products made available through this section 2(ee)(6) finding will be required to follow the same use directions (*e.g.*, application rate, application interval, etc.) as users outside Indian country. Therefore, the EPA's review of the environmental risks of a section 18 application or section 24(c) registration would apply equally to areas of Indian country within an affected county or state. If the additional use in Indian country adversely affects the risk concerns for the section 18 or section 24(c) products, those areas will be noted in the EPA's action on the section 18 emergency exemption or section 24(c) registration.

ADDITIONAL CONSIDERATIONS

1. The EPA consulted with tribes regarding any concerns about this final program, and contacted individually the three tribes that opted out of the pilot program. If a tribe wishes to express concerns later, the tribe should contact the pesticide tribal coordinator in the appropriate EPA regional office listed below. This request should come from a tribal chairperson or other elected official, or a tribal official authorized by the elected tribal leadership to represent the tribe.

The EPA regional pesticide tribal coordinators:

Region 1

Mr. Robert Koethe
EPA-New England, Region 1
Mail Code OES05-4
5 Post Office Square
Suite 100
Boston, MA 02109
617-918-1535

Region 2

Mr. Adrian Enache
U.S. EPA Region 2
USEPA Facilities, Raritan Depot
2890 Woodbridge Avenue
Mail Code 500MS500
Edison, NJ 08837
732-321-6769

Region 4 Ms. Patricia Livingston
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303
404-562-9171

Region 5 Mr. Dan Hopkins
U.S. EPA Region 5
77 West Jackson Boulevard
Mail Code LC-8J
Chicago, IL 60604
312-886-5994

Region 6 Ms. Elizabeth Reyes
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Mail Code 6PD-P
Dallas, TX 75202
214-665-7564

Region 7 Mr. Dick Wiechman
U.S. EPA Region 7
Nebraska Field Office
100 Centennial Mall N. Room 289
Lincoln, NE 68508
402-437-5080

Region 8 Ms. Jaslyn Dobrahner
303-312-6252
Ms. Margaret Collins
303-312-6023
U.S. EPA Region 8
1595 Wynkoop St.
Mail Code 8P-P3T
Denver, CO 80202

Region 9 Ms. Pam Cooper
U.S. EPA Region 9
75 Hawthorne Street
Mail Code CED-5
San Francisco, CA 94105
415-947-4217

Region 10 Ms. Kelly McFadden
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Mail Code OCE-084
Seattle, WA 98101
206-553-1679

2. Pesticide users in areas of Indian country within the geographic boundaries of the state(s) or county(ies) to which an emergency exemption or special local need registration pertains who intend to use pesticide products pursuant to this finding must obtain a copy of the label approved under section 18 or section 24(c) and comply in all respects with that label. Failure to comply fully with those directions would subject a user to possible action under FIFRA for use of a registered pesticide in a manner inconsistent with its label or labeling.

Pesticide users also must comply with applicable tribal laws, codes, regulations or other mechanisms that may impose other requirements with respect to particular pesticides or their use. Information about such tribal requirements should be obtained from the pertinent tribe. Such tribal laws, codes, regulations or other mechanisms may be enforced by the relevant tribes to the extent of their authorities.

3. Enforcement actions for violations of FIFRA from use of these products in Indian country under this finding will be done by the EPA regions with the cooperation of tribes that have entered into relevant cooperative agreements with the EPA.

4. This finding is contingent upon the determination that the section 18 and section 24(c) uses will not increase the risks associated with these pesticides. If the additional use in Indian country adversely affects the risk concerns for the section 18 or section 24(c) products, the finding will not apply in those areas and they will be noted in the EPA's action on the section 18 emergency exemption or section 24(c) registration.

5. This finding does not allow the use of pesticides that are classified as restricted-use products unless the applicator is certified to apply the pesticide in the jurisdiction where the pesticide is being applied.

6. This finding is limited to FIFRA section 18 and 24(c) products that are based on registered pesticides and does not authorize the use within Indian country of any unregistered pesticide. Thus, an unregistered pesticide available under section 18 or section 24(c) for use in a state or county outside of Indian country will not be available for use in Indian country under this finding.