

**EPN Comments on EPA's Proposed Rule:
"Pesticides; Certification of Pesticide Applicators:
Further Extension to Expiration Date of Certification Plans"**

Docket Number: EPA-HQ-OPP-2021-0831

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Founded in 2017, the [Environmental Protection Network](https://www.epn.org/) (EPN) harnesses the expertise of more than 550 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators with decades of historical knowledge and subject matter expertise.

Summary of EPN Comments

In 2017, EPA promulgated a set of amendments to 40 CFR part 171, the rule that establishes the framework under which states, federal agencies, and tribal and territorial governments may certify applicators to use restricted use pesticides (RUPs), the pesticides that could pose very serious risks to human health and/or the environment if not used properly. EPN supports the efforts of EPA to effectuate improvements to the regulatory framework for using RUPs by implementing the new, more stringent requirements of the agency's 2017 amendments. Under the 2017 rule, existing programs for certifying applicators would remain in effect until March 2022 (since extended until November 2022), while entities revised their programs to meet the new requirements of the 2017 rule.

EPN recognizes that both EPA and some governmental entities—states, federal agencies, tribal and territorial authorities ("certifying entities")—seeking to administer plans for the certification of pesticide applicators ("CPA plans") may need some additional time beyond November 2022 to complete the development, review, and approval processes. EPN feels it would be appropriate to allow entities making reasonable progress toward approval to continue to administer their existing CPA plans until the process finishes. EPA's proposed across-the-board extension for all existing CPA plans, however, seems overly broad and unnecessary. Likewise, the proposed extension of two years (i.e., to November 2024) seems unwise and unreasonably long. Instead, EPN recommends that EPA issue a final rule that gives itself the authority to grant legitimately needed extensions on a case-by-case basis. Under such authority, the agency could carefully examine the status of its review of each certifying entity's submission and extend the expiration date of the entity's existing CPA plan only for as long as necessary to allow submission and approval of a revised plan that meets the new requirements of EPA's 2017 rule amendments.

If EPA decides not to finalize a proposal to allow case-by-case extension decisions, EPN suggests that the agency extend the deadline for existing CPA plans only as long as needed to review and approve a majority of CPA plans. In any case, we recommend that the extension issued by this rulemaking should be no longer than a year (i.e., to no later than November 2023). The shorter duration of the extension will create a greater sense of urgency for certifying entities to complete their work to prepare acceptable plans.

The primary reason, however, for limiting an extension to one year is to create a sense of urgency for completing the process and to allow EPA, only if necessary, to formulate and promulgate a second rule, which would take a more thoughtful and nuanced approach than the current rulemaking to granting additional extensions. If it appears that, at the end of any extension issued pursuant to this rulemaking, there are likely to be entities that still legitimately need additional time to complete the review and approval process, EPA could promulgate another rule granting additional extensions. But, rather than an automatic, across-the-board extension for everyone, we recommend that such a rule should provide the agency with discretion to grant an entity an additional extension only for as long as it appears reasonably necessary. Thus, we recommend that additional extensions should be granted on a case-by-case basis to entities, and the length of time may well vary from entity to entity. Not only could the duration of these extensions be tailored to each entity's situation; but also, the approval of an extension could require, while the review continues, the entity to implement all accepted plan elements as quickly as possible (rather than wait for all outstanding issues to be resolved). Moreover, such a rule could give EPA the option to reduce the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) enforcement and FIFRA programmatic grants awarded to an entity until EPA approves the entity's plan.

Further, in any rule extending the deadline, EPN recommends that EPA prohibit the use of any pesticide classified for restricted use by a person younger than 18 years old and prohibit use by an uncertified individual who has not received the basic training specified in the 2017 rule. In addition, EPA could consider providing that applicator certifications issued by a certifying entity are valid for no longer than two years.

Finally, EPN thinks the justification for EPA's proposed rule is not sufficiently explained and strongly encourages the agency to provide more information to support its rationale. The lack of supporting details may make the agency's rulemaking vulnerable in the event of judicial review.

Background

EPA regulates the sale, distribution, and use of pesticides under the authority of FIFRA. Among the regulatory authorities available to EPA under FIFRA is the authority to classify a pesticide for "restricted use." A restricted use pesticide (referred to as a "RUP") may be used only by individuals who have been certified as competent to handle RUPs (referred to as "certified applicators") and by individuals under the direct supervision of a certified applicator. A state, federal agency, or tribal or territorial authority (referred to as a "certifying entity") may request EPA approval to administer a plan for certification of pesticide applicators (referred to as a "CPA plan") for users who apply RUPs within its jurisdiction.

In 1974, EPA promulgated a regulation at 40 CFR part 171 that governed the approval of CPA plans submitted by certifying entities. 39 Fed. Reg. 36449 (October 9, 1974). To be approved by EPA, this rule established certain requirements for the plans relating to the entities' legal authority and administrative support. The 1974 rule also required CPA plans to establish different categories for certified applicators and to have ways to determine that they meet standards for the essential types of knowledge a certified applicator in each category must possess. Pursuant to that regulation, most states and several tribal authorities and federal agencies sought EPA approval to administer CPA

plans. Within four years, by 1978, certifying entities had developed and submitted, and EPA had reviewed and approved, over four dozen CPA plans.

In 2017, EPA promulgated a final rule amending the 1974 regulation. 82 Fed. Reg. 952 (January 4, 2017). This rule required CPA entities wanting to administer CPA plans to meet additional requirements beyond those specified in the 1974 regulation. These requirements included: establishing new applicator certification categories, strengthening testing security measures, imposing training requirements for individuals using RUPs under the supervision of certified applicators, conducting periodic renewal of certifications, and setting a minimum age of 18 for users of RUPs. Altogether, EPA predicted that the new certification standards would elevate the care with which RUPs were used and would prevent a significant number of incidents that harmed human health and the environment.

The 2017 rule directed certifying entities to submit new or revised CPA plans to EPA by March 2020. In response to the 2017 rule, 68 state lead agencies, tribal authorities, and federal agencies have submitted draft CPA plans to EPA. The 2017 rule further provided that such entities' existing CPA plans would remain in effect until EPA approved the revised plans or until March 2022, whichever came first. After March 2022, a certifying entity would lose the authority to administer its existing CPA plan if EPA had not approved its revised CPA plan. EPA began to review these CPA plan submissions, but the agency has not, to date, approved any certifying entity's new or revised CPA plan.

The 2017 rule gave certifying entities three years to develop and submit their CPA plans and EPA two years to review and approve plans. But, because this apparently was not enough time, in late 2021 EPA issued an interim final rule that extended the March 2022 deadline for expiration of existing CPA plans until November 2022. 86 Fed. Reg. 71831 (December 20, 2021). EPA also justified the eight-month extension by claiming the costs of allowing existing plans to expire (principally losses due to the inability to use RUPs for a range of public health and other purposes) would exceed the benefits of implementing EPA-administered CPA plans that met the more stringent standards of the 2017 rule.

Now, EPA is proposing an additional two-year extension of the deadline to November 2024 using essentially the same rationale as it gave for its eight-month extension. If this proposal is finalized, certifying entities and EPA could have almost eight years to develop, review, and approve revised CPA plans.

EPA's Proposal Doesn't Explain Adequately Why a Two-Year Extension Is Necessary

Just as it did for the 2021 interim final rule extension, EPA has provided a somewhat general explanation for its decision to propose the further extension. EPA summarily justifies its proposal for a two-year extension, on top of its eight-month extension, by saying that the agency has not had adequate time to review and approve the new and revised CPA plans it has received. The agency offers several reasons for its position that more time is needed. Foremost, they explain that the staff responsible for reviewing CPA plan submissions had to spend valuable time to address issues arising from the COVID-19 pandemic that affected the operation of existing CPA plans. As a result, the staff did not finish their reviews as quickly as expected. (EPN believes the agency dealt with those

issues within a year of the start of the pandemic, so it is difficult to understand why that important work would necessitate an extension of nearly three years.) It would be helpful if the preamble to the proposal provided detail on the status of EPA's reviews of the 68 submissions, such as when the agency estimates it will complete the reviews of different certifying entities' revised CPA plans.

In addition, EPA has justified proposing to grant an additional extension by asserting that the costs of allowing existing CPA plans to expire would exceed any benefits of such action. Specifically, if an existing CPA plan expired, EPA argues that no use of RUPs could legally occur in the certifying entity's jurisdiction, unless EPA assumed responsibility for administering a CPA plan and made such an EPA plan operational.¹ Loss of access to RUPs, EPA asserts, would cause harm to public health and serious economic damage to users. Moreover, the resources EPA would need to devote to administering CPA plans would diminish the agency's ability to focus on other health and environmental concerns relating to pesticide use. These costs, EPA argues, would outweigh the health and environmental benefits of implementing new CPA plans with more rigorous certification standards. Further, EPA asserts that some certifying entities' existing CPA plans provide greater protections against pesticide risks than would be provided by meeting the requirements of an EPA-administered CPA plan.

While these explanations offered a reasonable basis for the limited, eight-month extension to November 2022, EPA could provide a much better rationale to justify the length and design of the current proposed two-year extension. As detailed below, further—probably shorter—extensions might be justified by additional information. Specifically, EPA's rulemaking could address the following topics in depth:

Status of the agency's review and the projected dates of approval of the 68 CPA plans EPA could make information on each CPA plan public: when a plan was initially submitted, what deficiencies EPA found and when these were conveyed back to the certifying entities, whether EPA expects the certifying entity will correct the deficiencies in the entity's next submission, when EPA expects such submission (i.e., was there a due date for a revised plan?), and when EPA expects to review and approve the submission, assuming the submission adequately addresses the deficiency. This information is key to evaluating the need for a two-year extension for all certifying entities, as EPA has proposed.

¹ EPN does not necessarily agree with EPA's characterization of the legal framework governing the use of RUPs in jurisdictions without approved CPA plans. Specifically, EPN is not convinced that EPA has to administer a CPA plan in a jurisdiction without an existing plan. Under section 4(d) of the "Federal Environmental Pesticide Control Act of 1972," Pub. L. 92-516, "No person shall be subject to any criminal or civil penalty imposed under the Federal Insecticide, Fungicide and Rodenticide Act, as amended by this Act, for any act (or failure to act) occurring before the expiration of 60 days after the Administrator has published effective regulations in the Federal Register and taken such other actions as may be necessary to permit compliance with the provisions under which the penalty is to be imposed." One possible interpretation of "such other actions" could be that, by the issuance of the 2017 rule, the agency has already done enough to meet the criterion of FEPCA sec. 4(d). As a result, EPN believes that EPA would not be held responsible for any failure to have a new CPA plan in force for a certifying entity. We feel that the 2017 rule provided adequate notice and allotted a generous timeline for certifying entities to revise and submit new CPA plans, and for EPA to review and approve those plans. Thus, we think EPA should be allowed to enforce a prohibition against use of RUPs by people who are not certified applicators.

EPA's Ability to Administer CPA Plans in Jurisdictions if Entities' Existing CPA Plans Expire. EPA justifies its proposal, in part, by pointing out that it has limited resources to administer CPA plans. EPA has not provided any estimate of the resources needed to administer a CPA plan or how many plans it might need to administer. This information is key to understanding an important component of EPA's rationale for its proposal.

The Extent of Harm to Public Health and Economic Activity That Would Result from the Inability to Use RUPs. EPA has not provided any details to illustrate how the inability to use RUPs would affect public health, nor has the agency shown how loss of RUPs would cause economic harm, much less harm sufficient to warrant delaying the protections expected from earlier implementation of the 2017 rule. EPA has registered in the range of 20,000 products containing over 600 different pesticide active ingredients, and there are multiple alternative methods of pest control for addressing almost every different pest control need. Examples showing the alleged necessity of using RUPs would be important to buttress a decision to extend the review and approval process.

The Extent to Which Existing CPA Plans Provide Greater Protections Against Pesticide Risks than a CPA Plan Administered by EPA. One argument in EPA's preamble supporting the proposed extension is that some of the existing CPA plans contain more stringent provisions than are required in plans by EPA's 2017 rulemaking. While this may be the case, EPA's preamble does not state how many such plans are in force in jurisdictions which will not have received EPA approval by November 2022, much less by November 2024, nor is there any description of allegedly more protective provisions in such plans. Such information would be useful to evaluate this component of EPA's rationale for its proposal.

Extending Existing CPA Plans for All Certifying Entities for Two Years Feels Unwise and Unnecessary

As discussed earlier, the 2017 rule allowed certifying entities a bit more than three years to develop their initial CPA plan submissions. EPA also allowed itself two years to review, offer feedback, and eventually approve revised CPA plans. Then, EPA gave itself and certifying entities eight more months for the review process to conclude. The current nearly six-year timeline to effectuate specific, discrete revisions to CPA plans, as detailed in the 2017 rule, compares to the four-year process used to develop, review, and approve entire, completely new CPA plans following the promulgation of the 1974 rule. In our view, nearly six years should ordinarily be more than sufficient. However, we recognize the extraordinary pressures that the COVID-19 pandemic has caused and understand that some further time might be needed for some certifying entities to finish their work.

Nonetheless, a full two-year extension seems unnecessary for all of the existing CPA plans. In a February 2022 call with stakeholders, agency staff predicted that they expected to approve a substantial number of the 68 CPA plans before November 2022. If correct, this prediction would mean that many certifying entities—but, certainly not all entities—would not need an extension to their existing CPA plans. Further, this prediction, if correct, shows that it was possible for certifying entities to respond to EPA reviews and correct any deficiencies within the nearly three-year period currently allotted for the agency's review process.

Moreover, proposing a two-year extension seems unwise because it would significantly reduce entities' incentives to act expeditiously. In choosing the length of its extension, EPA should be mindful of Parkinson's Law,² which is summarized as: "work expands to fill the time allotted." This obvious and widely recognized characteristic of human behavior means that the expected duration of EPA's review process will influence how certifying entities apply their resources to correcting the deficiencies noted by EPA's reviews of their CPA plan submissions. If EPA allows existing CPA plans to remain in effect until 2024, many of the certifying entities could feel a reduced sense of urgency to submit revised plans that fully address EPA's feedback and may also move more slowly to implement the required improvements to their CPA plans required by the 2017 rule.

Instead of finalizing a rule that grants a two-year extension of existing CPA plans to all certifying entities, EPA should finalize a rule that extends the existing CPA plans only for those states that legitimately need more time, and then the extension should be only for such period as each entity would reasonably need to make the necessary corrections to its submissions. EPN suggests that EPA generally give entities six months from the date of EPA's reviews to respond to deficiencies and give itself three months to review and approve the plans. If EPA takes this approach, it would, with an additional nine-month time period, allow a total of 41 months to complete the review process. That time frame should be adequate, but certainly the extension should be no more than a year beyond the current deadline.

EPA Could Condition Extensions on Prompt Implementation of Approved CPA Plan Elements:

Neither the 2017 rule, the 2022 interim final rule, nor the current proposal to extend the existing CPA plans contains any provision setting a deadline for implementation of new elements of the revised plans. According to EPA, a revised plan must set out the entity's proposed implementation schedule. EPN understands that, once EPA approves a revised plan, a certifying entity will be bound by the implementation schedule in its newly approved CPA plan to put the required changes into practice, and that, as those changes are made, they will supersede the existing CPA plan.

We recommend that any final extension rule should require a certifying entity to implement new elements of its CPA plan as soon as possible. In many cases that would be before EPA approves the full plan. Once the agency has determined that a particular part of an entity's revised plan is acceptable, we see no reason why the entity cannot begin immediately to make it operational.³ In fact, EPN recommends that EPA require the entity to begin implementation of an element as soon as it is accepted by the agency. For example, EPN believes that in most, if not all states, a certifying entity can quickly start to enhance the security around the administration of certification exams. Entities can require photo-identification from test takers, and they can take other steps to minimize cheating. The quicker new elements become effective, the sooner the expected benefits of the 2017 rule will be realized.

² See https://en.wikipedia.org/wiki/Parkinson%27s_law

³ EPN appreciates that some revisions to CPA plans will require statutory changes or rulemaking. EPN is recommending that the steps necessary to amend laws or promulgate regulations start as soon as EPA has accepted the part of a CPA plan that details those steps, even if EPA has not yet approved the entire plan. But even if EPA disagrees, there is no reason to delay the implementation of approved changes that do not require rulemaking or legislative action.

EPA's Final Rule Could Give Options to Incentivize Certifying Entities to Complete the CPA Plan Approval Process

Under the current and proposed rules, certifying entities do not have strong incentives to complete the CPA plan approval process. The prospect that EPA will not approve a plan and will instead administer a federally-run CPA plan clearly provides some incentive. Certifying entities and the users of RUPs would probably prefer not to have to deal with an EPA program. An EPA program would almost certainly be less convenient in many ways. But, if EPA is willing to extend existing CPA plans as long as the approval process continues, certifying entities may feel little worry about the threat of an EPA takeover of their CPA programs.

EPA could issue a final rule that gives certifying entities more compelling reasons to try to secure EPA approval of their plans as quickly as possible. For example, EPA's final rule could give itself authority to withhold or reduce FIFRA programmatic and enforcement grants from an entity if, in the agency's view, the entity is not making reasonable progress toward completion of the CPA plan approval process. EPA could also consider other ways it could incentivize entities to move expeditiously to finish the approval process.

EPA Could Promulgate a Rule That Directly Implements Requirements of the 2017 Rule

The 2017 rule establishes a series of very important requirements that a certifying entity must meet if it wishes to administer a CPA plan. EPA intended that many of these requirements would directly affect the users of RUPs who wish to become certified. For example, EPA's 2017 rule prohibits an entity from issuing an applicator certification to anyone younger than 18 years old and requires that the entity prohibit anyone younger than 18 from using a RUP under the direct supervision of a certified applicator. In addition, the 2017 rule prohibits the application of a RUP by an uncertified individual under the direct supervision of a certified applicator unless the individual has received certain basic training. The 2017 rule also requires an entity to establish a renewal period of no longer than five years for applicator certifications. These requirements, however, are not self-executing. To apply to RUP users within its jurisdiction, a certifying entity must codify the requirements in statutes or regulations.

To ensure that these critical new protections become real, EPA could promulgate a rule that makes them binding on RUP users, without depending on the actions of a certifying entity. EPA could use its authority under FIFRA Section 3(d)(1)(C)(ii) to issue rules establishing additional "other regulatory restrictions" on pesticides classified for use only by certified applicators. At a minimum such a rule should prohibit the use of a RUP product by any person who is younger than 18 and prohibit use by an uncertified individual who has not received the basic training specified in the 2017 rule. EPA could also consider a rule which provides that no applicator certification shall be valid for longer than five years; in effect, such a provision would mandate the periodic renewal of applicator certifications.

Concluding Remarks

While we hope that the agency will implement our recommendations in any final rulemaking, we recognize that EPA may feel some of these recommendations should not be implemented in a final rule because they arguably would not be deemed a "logical outgrowth" of the proposal. If so, EPN

strongly encourages the agency to consider incorporating these recommendations into any future rulemaking that might address further extension of existing CPA plans while EPA reviews continue. For example, if the agency decides to grant a shorter, across-the-board extension than it has proposed, there may still be a legitimate need for some additional case-by-case extensions. If EPA were to decide to conduct another rulemaking to grant such extensions, those EPN recommendations that were not accepted could be addressed then.