

OPP Update: Federal Certification Plan for Indian Country and Section 18/24(c) Finding

Region 9 RTOC Meeting

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Proposed Federal Plan for Certifying Applicators of Restricted Use Pesticides within Indian Country

Overview

- ❑ Overview of Plans
- ❑ Consultation Call/Letter Summary
 - How comments were addressed
- ❑ Status of the Plans
- ❑ Timeline for the National Plan
- ❑ Comment Process

Plan Overview

- The purpose of the Plan is to allow the certification of applicators and legal use of RUPs in Indian Country where there are currently no legal mechanisms in place for such certification and use.
- The plan will be implemented in areas of Indian country where no other EPA-approved or EPA-implemented plan applies.
- Tribes may
 - Continue to pursue the other available options available under 40 CFR § 171.10
 - Choose to further restrict or prohibit the use of RUPs in their areas through the implementation of tribal codes, laws, regulations, or other applicable tribal requirements.

Plan Overview (cont.)

- Certification will be based on an underlying certificate from a state or tribe (except some private applicator certificates)
- States or tribes who issued the original certificate do not assure compliance in Indian country with the federal certification
- EPA will administer routine maintenance activities associated with implementation of this Plan and will conduct inspections and take enforcement actions as appropriate.

Summary of Comments Received during Consultation Calls/Letters

Consultation

- Comment: Some tribes believe that calls are not consultation
- Response:
 - EPA believes the call is government to government consultation
 - Additional consultation can be arranged if a tribe feels their questions were not addressed or they did not have an opportunity to offer their views during the original consultation

Notification

- **Comment:** Notification provision would require that applicators of RUPs to notify the tribe before each application
 - Would provide tribes some benefit in knowing where and when RUP applications occur
 - Discussed some variations of the TPPC proposal
- **Response:**
 - Understand how this could be useful but concerned about burden
 - Also considering other mechanisms that may meet need
 - Requesting broader tribal and public comment on this in the *Federal Register* notice

Opt-Out

- ❑ **Comments:** Some tribes want an opt-out option and some tribes believe this would present significant implementation burdens for their tribe.
- ❑ **Response:** At this point we have not included this option in the draft plan. However, we will seek public comment on this issue in the *Federal Register* notice.

Enforcement

- ❑ Comment: Tribes raised concerns about enforcement responsibilities and the enforcement of tribal ordinances
- ❑ Response:
 - EPA is responsible for enforcement of the plan
 - EPA will enforce federal law; does not have authority to enforce tribal laws

Other Comments

- Contiguous (e.g., need to clear with regards to checkerboarding)
 - Contiguous refers to the state that is sharing a boundary with the area of Indian country
 - All lands within the boundaries of Reservation
- Language needs to make it clear that the plan applies to Indian country and it is differentiated from states
 - Have tried to make it clear that the plan applies to Indian country

Other Comments (cont.)

- Additional concerns were raised that we respect tribal sovereignty, not require unfunded mandates, and provide adequate enforcement to assure RUPs are used legally and safely.
 - EPA agrees and believes that the proposed Plan addresses all of these concerns.

Status, Timeline and Comment Process

Status of Plans

- ❑ Region 8 Plan – Published in the *Federal Register* on April 20, 2011
 - Very similar to national plan
 - 45 day comment period
- ❑ National Plan – In the process to be signed by the Assistant Administrator

Timeline for National Plan

- ❑ Expect proposal to publish in the Federal Register within next month or so
 - 45 day comment period
- ❑ Respond to comments/resolve issues
- ❑ Earliest plan could be implemented is late summer/fall 2011

Comment Process

- An FR Notice will publish announcing the comment period; OPP has communication plan
 - Will notify Regions, tribes, etc.
- Tribes, and the public can comment via the methods described in the FR Notice
 - On-line at www.regulations.gov
 - Mail to OPP Regulatory Public Docket
 - Delivery to the docket
- After the comment period closes, OPP will review the comments and determine next steps

Section 18/24(c) Finding

Overview

- Section 18 Emergency Exemption
 - Allows for the temporary use of an unregistered pesticide to address an emergency pest issue
 - Requested by state and federal agencies
 - Emergency criteria must be met
 - EPA target turnaround is 50 days
- Section 24(c) Special Local Needs Registration
 - States can register additional uses of EPA-registered pesticides
 - Active ingredient must be registered
 - Active ingredient must have a tolerance in crop
 - Justification of pest management need
 - EPA has 90 days to object
- Both types of pesticides are intended to enable states to deal with local situations that are not provided for on existing EPA-approved labels.

The Problem for Indian Country

- ❑ FIFRA does not explicitly provide growers in Indian country access to emergency exemption or special local need pesticides
- ❑ These pesticides may be needed to control pests in Indian country just as they are in neighboring state lands.

Current Pilot Program

- A step toward developing a consistent application of the section 18 emergency exemption and section 24(c) special local needs programs in Indian country.
- Designed to give farmers and other pesticide applicators in Indian country legal access to most of the pesticides available outside Indian country.
- Put in place by the EPA Administrator under FIFRA Sec. 2(ee)(6)
 - Known as a “finding” that the use is consistent with the purposes of FIFRA and will not be considered a misuse
- Three-year duration ends Nov. 28.

How it's Working

- ❑ Pilot applies to 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
- ❑ Users must obtain and follow the label approved under section 18 or section 24(c)
 - Failure to do so could mean action under FIFRA for use of a registered pesticide in a manner inconsistent with its label or labeling.
- ❑ Because this is a pilot program, EPA offered a way for tribes not to participate in the pilot
 - Users must also verify lands within their area have not been excluded from this finding by checking an EPA web site.
- ❑ Enforcement done by the EPA regions
- ❑ Users are also responsible for complying with applicable tribal laws or regulations.
 - Tribal laws or regulations may be enforced by the relevant tribes.
- ❑ The pilot confers NO new rights or responsibilities on states

More Details

- ❑ If the additional use of these products in Indian country adversely affects the risk concerns for the section 18 or section 24(c) products, the pilot will not apply in those areas and they will be noted in EPA's action on the section 18 emergency exemption or section 24(c) registration.
- ❑ Pilot does not allow the use of RUPs unless the applicator is certified to apply the pesticide in the jurisdiction where the pesticide is being applied.
- ❑ Limited to Section 18s and 24(c)s that are based on registered pesticides

Pilot to Permanent

- ❑ Anticipate holding tribal consultations in early to mid June
- ❑ Intend to have a permanent program in place by expiration of the pilot on Nov. 28

Some Questions for your Input

- Is it of value to you to continue to have legal access to these pesticides?
- Are you aware of any implementation issues?
- Do you receive or have access to information about 18s and 24(c)s that you could use in your area of Indian country?

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