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May 15, 2017

U.S. Environmental Protection Agency
Office of Regulatory Policy and Management
1200 Pennsylvania Ave. NW.
Mail Code 1803A
Washington, D.C. 20460-0001

Submitted via Federal eRulemaking Portal

Re: Request for Comments on Evaluation of Existing Regulations; Docket ID No. EPA-HQ-OA-2017-0190

On behalf of the Agricultural Retailers Association (ARA), I am submitting written comments to the U.S. Environmental Protection Agency (EPA) on its evaluation of existing regulations in accordance with Executive Order (EO) 13777, Enforcing the Regulatory Reform Agenda.

Statement of Interest

ARA represents the nation's agricultural retailers and distributors, also referred to as farm supply dealers. ARA members are located throughout the United States, ranging in size from local-family held businesses and farmer cooperatives to larger companies with multiple outlets. ARA members play an important role in providing farmers with essential crop input products such as fertilizer, plant nutritional, pesticides, seed, adjuvants and equipment. Our industry is a cooperating partner in the regulated community and fully understand the importance of chemical safety and security. ARA members communicate and engage with employees, local first responders, and the community to enhance Environmental, Health, Safety and Security (EHS&S) matters. They regularly train their employees on the core EHS matters such as hazard communications, hazardous energy, confined spaces, air, water, waste, and driving.

Comments

Restore the principle of scientific risk-based regulation as required by FIFRA, and push back against efforts to change it to hazard-based as unscientific and harmful to innovation and public health

EPA has historically been the scientific global gold standard for risk-based regulation of pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[1]. Historically the Agency has

[1] https://www.epa.gov/laws-regulations/summary-federal-insecticide-fungicide-and-rodenticide-act; 7 U.S.C. §136 et seq. (1996)

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capably defended this principle in international forums where others wish to pursue a hazard-based regulatory scheme. Exposure absolutely must be part of the equation to have a regulatory system that reflects the real world and supports innovation.

Agribusiness, growers, and consumers all rely on an EPA that has rigorous and credible risk-based scientific review. EPA must continually assure and aggressively defend the quality of its scientific work. EPA should review its pollinator guidance to ensure that it is based on risk analysis rather than hazard analysis; if it finds the basis is hazard rather than risk, the guidance should be withdrawn and refined.

Restoring science and predictability to the pesticide registration process

It is critical for the EPA to restore science and predictability to the pesticide registration process. For example, the chlorpyrifos petition from NGOs was properly handled by EPA and was a welcome signal of a return to scientific risk-based regulation. The prior EPA relied on epidemiology studies which were criticized as inadequate by EPA's own Scientific Advisory Panel (SAP) convened on the topic. None of the raw data from the Columbia epidemiology paper was shared with anyone for peer review – including, EPA's own scientists – yet the previous Agency leadership relied extensively on its conclusions despite the reservations expressed by the SAP. Administrator Pruitt's reversal on this point was correct, vital and scientifically rational.

This decision signaled a welcome return to hard science, relying on traditional toxicology studies instead of correlations that don't prove cause and effect. The public and even anti-pesticide activists should be happy with a system where EPA defines the protocols for tests that must be done but the registrants must bear the costs. Yet even after this proper decision, unfortunately the Agency again finds itself the subject of litigation when it has complied with its obligations under FIFRA relative to this product.

Under FIFRA, pesticides undergo rigorous study and registrants spend hundreds of millions of dollars to evaluate risk to human health and the environment prior to a pesticide being registered for approved use. EPA needs to continue to follow a risk-based approach that is fair, transparent, and relies on verifiable scientific input.

NPDES Pesticide General Permitting requirements

In 2009, the U.S. 6th Circuit Court of Appeals drastically expanded the enforcement reach of the Clean Water Act (CWA) into pesticide policy in *National Cotton Council, et al., v. EPA, et al.* The court ruling invalidated decades of precedent and an EPA regulation that had exempted pesticide applications made into, over, or near water from the numerous requirements of CWA's NPDES permits. The court ruled that such applications require compliance with NPDES discharge permits whenever they occur "into, over or near" one of the many types of "waters of the U.S." This, even though the FIFRA already regulates pesticide use. FIFRA requires, through years of extensive

testing, demonstration that registered pesticides can be safely applied per product labels in a manner that poses no unreasonable risk to humans or the environment.

EPA implemented the court decision in 2011 when it began enforcing its NPDES Pesticide General Permit (PGP) for aquatic pesticide applications for control of mosquitoes, aquatic weeds, invasive aquatic animals, and forest canopy pest control. these PGPs impose a gamut of performance and recordkeeping requirements on applicators across the country who apply pesticides into, over, and near waters of the U.S. Additional burden falls on the backs of environmental agency officials.[2] The PGPs add also open the door to citizen suits and other environmental lawsuits authorized by the CWA. Legal costs associated with these lawsuits can bankrupt application businesses. The CWA authorizes fines for civil violations of up to $51,570 per day/per violation, and much greater fines for repeated or willful violations.

Numerous aerial applicators nationwide have shut down their mosquito and invasive species control efforts due to the paperwork cost and threat of lawsuits associated with the NPDES PGP requirements. EPA estimated the paperwork costs alone to be $50 million per year. State and local officials advised EPA that the costs would far exceed that estimate. Currently, mosquito control programs are vulnerable to lawsuits for simple paperwork violations of the CWA where fines may be up to $35,000 per day for activities that do not involve harm to the environment. To attempt to comply with this potential liability, these governmental agencies must divert scarce resources to CWA monitoring. In some cases, smaller applicators have simply chosen not to engage in vector control activities. Requiring NPDES permits for the discharges of mosquito control and other pesticide products provides no additional environmental protections beyond those already listed on the pesticide label, yet the regulatory burdens are potentially depriving the public of the economic and health benefits from the use of important pest control products.

Rep. Bob Gibbs (R-OH) has introduced the "*Reducing Regulatory Burdens Act*" (H.R. 953) to end NPDES PGP requirements for applications of pesticides already determined by EPA to present no unreasonable risk to humans or the environment. Senators Crapo and McCaskill have introduced its companion, the "*Sensible Environmental Protection Act*" (S. 340). In the 114th Congress, a version of Congressman Gibbs' bipartisan bill passed the U.S. House of Representatives by an overwhelming margin, marking the third time the elimination of NPDES PGP requirements received bipartisan support in the House. That same Congress, the Crapo-McCaskill proposal passed the Senate EPW Committee by voice vote.

ARA requests EPA support these bipartisan proposals (H.R. 953 / S. 340) to exempt pesticide applications from requiring NPDES pesticide general permits for the use of EPA FIFRA approved pesticide products.

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[2] https://www.epa.gov/npdes/pesticide-permitting-2016-pgp

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Pesticide Registration Improvement Act (PRIA)
The Pesticide Registration Improvement Act (PRIA)[3] established a new section of FIFRA, which put in place a fee schedule for pesticide registration requests. It lists specific decision time periods for EPA to make a regulatory decision on pesticide registration and tolerance actions submitted to the Agency. The goal of PRIA was to create a more predictable and effective evaluation scheme for affected pesticide decisions and couple the collection of individual fees with specific decision review periods. It also promoted shorter decision review periods for reduced-risk applications. PRIA expires September 30, 2017.

PRIA has been beneficial for stakeholders: it has provided predictable timelines for industry, new products for consumers, funds for completion of various registration activities (tolerance reassessment/re-registration), and funds for pesticide safety education for farmworkers. These have been accomplished by providing stable funding for EPA. It has also seen positive implementation with process improvements and strong stakeholder involvement, and furthered the openness and transparency of good government. ARA requests EPA work with Congress on quickly passing a PRIA reauthorization bill.

Annual Pesticide Production Reports – EPA Form 3540-16
The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 7 requires that production of pesticides, active ingredients or devices be conducted in a registered pesticide-producing or device-producing establishment. ("Production" includes formulation, packaging, repackaging, labeling and relabeling.) Establishments that produce pesticides, active ingredients or devices, including companies or establishments that import into the United States, must first obtain a company number; second, register the establishment, then file initial and annual production reports with EPA.[4] EPA assigns a unique number to each establishment which is included on the FIFRA label or immediate container of each pesticide, active ingredient or device produced. Registering an establishment is required once. ARA supports the requirement to register these pesticide production and distribution facilities.

However, these same facilities are required to submit a report to EPA annually on or before March 31st. An annual report is required, even when no products are produced or distributed. Failure to final an annual report may result in civil penalties up to $7,500 per violation or criminal penalties. This EPA reporting requirement has led to years of confusion. ARA recommends these annual reports be eliminated for facilities that repackage pesticides as they do not provide useful information and are unnecessary.

[3] https://www.epa.gov/pria-fees
[4] https://www.epa.gov/compliance/pesticide-establishment-registration-and-reporting

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Agricultural Worker Protect Standard (WPS)

The EPA issued new Agricultural Worker Protection Standard (WPS)[5] regulations in November 2015 that requires new guidance, educational materials, training, added record keeping requirements and new provisions such as "designated representative" and "application exclusion zone." ARA believes that based upon experience the best course of action is to revert to performance oriented training and remove requirements for Train the Trainer and EPA approved training materials.

ARA remains concerned with the "designated representative" (DR) proposal. Farmers and ranchers are entitled to a reasonable expectation of privacy and this DR provision provides no protection from fraudulent claims, no constraints on what DRs may do with the information once obtained, and no assurance it will be shared with workers. EPA never cited any data or facts to demonstrate how this provision will improve worker safety. ARA recommends eliminating this provision as it exposes farmers and ranchers to potential legal liability with no real worker safety benefits.

ARA is also concerned with the Application Exclusion Zone (AEZ) provision. We believe this new requirement unduly burdens agricultural operations and state agencies. This new term and requirement would create a buffer of 100 feet for aerial, air blast, fumigant, smoke, mist and fog applications, as well as spray applications using very fine or fine droplet sizes.[6] An AEZ of 25 feet is required when the pesticide is sprayed using droplet sizes of medium or larger and from more than 12 inches above he plant medium. These new application restrictions extend beyond the agricultural establishment, potentially jeopardizing the farmer's ability to manage all their land and prohibiting necessary pest mitigation services if there is any kind of structure within the AEZ, whether inhabited or vacant. This could also include a passing vehicle as well. The EPA's interpretative guidance to clarify the agency's intent does not carry the same legal weight as the codified federal regulation or necessary help for state agencies with compliance and enforcement responsibilities. ARA recommends EPA revoke the AEZ provisions and maintain the regulatory protections that existed prior to the issuance of the new WPA rules.

Certified Applicator & Training Rules

On December 12, 2016, the EPA finalized new standards for applicators who apply restricted-use pesticides.[7] The responsibility of administering pesticide applicator certification programs belong to state agencies. The new certification and training requirements for pesticide applicators provides some significant changes and increased requirements which applicators must now comply, and states certifying authorities to implement in their respective state certification programs. These new unfunded federal mandates, underestimates the time and costs to overhaul state certification programs. It is our understanding that at least 10 states will require changes in state law by their respective state legislatures, no easy task in today's political environment. For example, the new rule

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[5] 40 CFR Part 170; 80 Fed. Reg 67496

[6] https://www.epa.gov/pesticide-worker-safety/worker-protection-standard-and-application-exclusion-zone-frequently-asked

[7] https://www.epa.gov/pesticide-worker-safety/revised-certification-standards-pesticide-applicators; 82 Fed. Reg. 952;

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sets a new minimum age requirement for commercial Restricted Use Pesticide (RUPs) applicators at 18 years. Prior to the new rule, individuals under the age of 18 could apply RUPs if they met certification and training requirements. No health or environmental risk or rationale is provided to justify or support such a change.

ARA supports the EPA's proposed 12-month delay[8] of these new applicator certification and training rules and working with state agencies and impacted stakeholders to modify the proposed changes in a way that provides greater flexibility for state run applicator certification and training programs faced with scarce financial resources. A potential loss of EPA-state partnerships would result in a significantly pared down program and could force states to return the programs to EPA, which does not have the capacity to administer such programs in any effective way.

Risk Management Program (RMP)

ARA supports the EPA's decision to delay the effective date of finalized amendments from June 19, 2017 to February 19, 2019, to evaluate this and other recently submitted petitions and take further regulatory action. ARA believe the current Risk Management Programs (RMP) regulations are working well and the data clearly shows that to be the case. The new regulations will impose additional compliance costs on industry, make sensitive security information available to the public, and not provide any significant safety increases - all of this while the agricultural industry is struggling with low commodity prices and trying to remain competitive in an increasing difficult global marketplace.

The EPA revisions to the Accidental Release Prevention Requirements for Risk Management Programs were initiated because of President Obama's Executive Order (EO) 13650, which directed federal agencies such as EPA to "prevent chemical incidents, such as the explosion in West, Texas on April 17, 2013." However, there are some key facts related to the West Fertilizer explosion and tragic deaths of 15 (12 of whom were first responders), injury to over 260 people and hundreds of homes destroyed, that this Administration needs to be fully aware of.

First, after an extensive investigation by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on May 11, 2016 the fire was rule "incendiary" or intentionally set[9]. All viable accidental and natural fire scenarios were hypothesized, tested, and eliminated.
The explosion related to ammonium nitrate fertilizer which is not regulated under the RMP regulations. Anhydrous ammonia, another important fertilizer, is regulated under the RMP.

Second, the U.S. Chemical Safety Board (CSB) issued a final report[10] on the West Fertilizer Company Explosion in January 2016. On page 166 of that report, it states the "CSB found no evidence to suggest that any detonation of AN in the United States has occurred at a facility

[8] https://www.epa.gov/newsreleases/updated-epa-requests-comment-extending-timeline-pesticide-applicators-rule
[9] https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire
[10] http://www.csb.gov/west-fertilizer-explosion-and-fire-/

compliant with OSHA's 1910.109(i) Storage and Handling requirements for AN." There were two 12,000-gallon anhydrous ammonia pressure vessels located near the AN storage building. While the tanks received some damage both tanks worked as intended without any major failure or off-site release. West Fertilizer Company had an updated RMP Program 2 plan on file with EPA and to our knowledge followed existing RMP regulations. They also had filed their required Tier II reports with the proper state and local officials.

These facts are important as these new EPA RMP requirements were initiated because of an intentionally set fire that caused solid ammonium nitrate fertilizer to explode and is not a product covered under this Clean Air Act program. However, anhydrous ammonia is a covered product and the tanks at West Fertilizer worked as intended. On September 26, 2014, ARA and other impacted trade associations wrote the EPA Assistant Administrator for the Office of Solid Waste and Emergency Response to request the agency utilize existing federal advisory committee structures to provide the agency with industry stakeholder advice and counsel on scientific and technical aspects of the RMP regulations and report back any specific recommended changes to the regulations if necessary. FACA's have been utilized by EPA and other agencies in the past to generate expert advice and recommendations. EPA's existing Clean Air Act Advisory Committee has several subcommittees and work groups, one of which is an inactive "Accident Prevention Subcommittee".

On November 20, 2014, EPA provided a written response rejecting the request, stating "re-establishment of the advisory committee under the Federal Advisory Committee Act (FACA) for the high-priority RMP work will take considerable time and will stretch already extremely thin resources." The EPA letter also discuss the schedule set forth in EO 13650 and the need for quick action.

ARA had several members participate in the EPA Small Business Advocacy Review Panel. From what we can tell most, if not all panel recommendations, were ignored. For example, local emergency responders receive information on chemicals stored at an RMP facility through what is called Tier II reports. However, the Tier II reports are not simple to understand and in some cases not looked at by local emergency responders. Instead of adding regulatory burdens on facilities, the agency should place more effort and resources to guiding State Environmental departments into reformatting their Tier II formats that are more user friendly and understandable. Why fix something that is not broken? Adding additional regulations on facilities to spend thousands of dollars for more paper does not make the public safer and only leads to the closure of facilities and loss of jobs in rural communities.

EPA and other federal agencies such as OSHA need to work with industry on increased compliance assistance and updating regulations in a more targeted way that will address known issues such as the Tier II reports or updating the storage and handling requirements for anhydrous ammonia and ammonium nitrate that are in alignment with industry consensus standards and practices.

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SARA Tier II Reports (40 CFR 370.20)

ARA recommends EPA use the Central Data Exchange (CDX), the agency's electronic reporting site, for the collection of SARA Tier II reports which are required under Section 312 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). This is a hazardous materials inventory report required annually and reported to the State Emergency Response Committees (SERC), Local Emergency Planning Committees (LEPC) and fire departments, and the public with specific information on potential hazards. ARA believes that had this report been centralized for all relevant agencies and emergency responders before the West Fertilizer Co. explosion, all relevant agencies would have had access to data they needed.

Spill Prevention, Control and Countermeasures (SPCC)

The goal of the Oil Spill Prevention, Control, and Countermeasure (SPCC) program[11] is to prevent oil spills into waters of the United States. The regulations require farm supply dealers, farmers and other facilities to have an oil spill prevention plan, called an SPCC Plan. These plans can help facilities be prepared to prevent and respond to oil spills and protect water resources needed for farming. Under current regulations, a farm supply dealer and farm is covered by the SPCC program if:

- It stores, transfers, uses or consumes oil or oil products;
- It has an aggregate aboveground oil storage capacity greater than 1,320 U.S. gallons or a completely buried storage capacity greater than 42,000 U.S. gallons; and
- It could reasonably be expected to discharge oil into or upon waters of the U.S. or adjoining shorelines, such as interstate waters, intrastate lakes, rivers, and streams.

In addition, the regulation requires covered facilities to implement containment or an equivalent to prevent oil and fuel spills, a security plan and self-certification. A facility will need to have their SPCC plan certified by a Professional Engineer (PE) if their aboveground storage is greater than 10,000 U.S. gallons or if they had an oil spill greater than 1,000 U.S. gallons or two oil spills of more than 42 U.S. gallons to water in any 12-month period in the 3 years prior to the date the SPCC Plan is certified. Generally, SPCC certification that requires the hiring of a Professional Engineer costs between $2,000 and $5,000 or more per location. This expenditure, in addition to costs of implementing new containment, is very costly to farm supply dealers.

During the promulgation of the EPA SPCC regulations, ARA sent spill data to EPA indicating a very low agribusiness spill rate of .0039% with a very low environmental risk to navigable waterways or other ground water sources. Farm supply dealers typically are located long distances from waterways, have secondary containment for oil storage tanks, and well trained and experienced employees. Farm supply dealers typically maintain either general liability insurance coverage, commercial umbrella insurance coverage, or other insurance coverage that covers property or equipment damage or pollution release.

[11] https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations

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ARA is requesting EPA modify the regulations by providing similar regulatory treatment under the SPCC rules for farm supply dealers and farmers. The fuel or oil storage tanks at a farm supply dealer are generally better maintained than storage tanks located on a farm, include secondary containment, regularly inspected, and not located in environmentally sensitive watershed areas. In addition, a farm supply dealer has well trained employees that are better equipped to deal with any potential spills and carry insurance to cover property or environmental damage associated with any potential oil spill. ARA supports common-sense regulations that will help protect the community and the environment. We also want the federal regulations being imposed on the agricultural industry to be equitable.

Waters of the US (WOTUS) Rule

In 2015, EPA released its new definition of Waters of the U.S. (WOTUS)[12], which determines where the NPDES permits are required. The rule extends the geographic area of WOTUS and likely would require NPDES PGPs for all agricultural applications. Nearly 30 states decided to take WOTUS to court. On Oct. 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a stay on the WOTUS rule, which remains in place pending the outcome of the litigation. In February 2016, the Sixth Circuit ruled that it had jurisdiction to review the rule, but many challengers assert that the rule should first be reviewed at the federal district court level. In January 2017, the Supreme Court agreed to review the decision and resolve the jurisdictional issue of whether the Sixth Circuit has the authority to be the first court to hear WOTUS lawsuits, instead of district courts.

On February 28, President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule and to publish a proposal rescinding or revising it. We strongly support the President's EO and urge EPA to pursue this effort aggressively. ARA recommends EPA repeal the existing rule (80 Fed. Reg. 37054) and in a separate rulemaking, to propose a revised rule that more closely adheres to the language of the Clean Water Act and Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

General Duty Clause

In 1990, Congress passed the Clean Air Act amendments, which codified section 112(r)(1), commonly known as the General Duty Clause. The General Duty Clause requires owners and operators of stationary sources to work to identify and prevent accidental releases of hazardous substances. EPA has yet to issue any proposed rule detailing enforcement or compliance requirements. Regardless of these ambiguities and lack of guidance, in recent years, EPA has increasingly used the General Duty Clause to impose substantial penalties on facilities. This situation has created uncertainty for industry, leaving questions about how compliance is measured and when compliance has been achieved. In addition to the uncertainty created by EPA's recent enforcement of the General Duty Clause, certain interest groups have been calling on EPA to expand its use to regulate chemical facility security, notwithstanding the fact that the clause is clear in its limited application to accidental releases

[12] 80 Fed. Reg. 37054, June 29, 2015; 40 CFR 230.3

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ARA recommends EPA take the following action: 1) Complete a rulemaking process before finding any facility in violation of the General Duty Clause; 2) Require definitions of "extremely hazardous substance," "appropriate hazard assessment techniques," and "design and maintain a safe facility" in any General Duty Clause regulation; 3) Issue guidelines to ensure that EPA enforcement procedures are uniform across its Regions; and 4) Clarify that EPA's mission is environmental protection, not homeland security, by prohibiting EPA from regulating chemical facility security under the General Duty Clause, reinforcing exclusive jurisdiction under the Department of Homeland Security.

Focus on Compliance Assistance

In 2014, ARA and The Fertilizer Institute (TFI) created ResponsibleAg Inc. a non-profit organization founded to promote the public welfare by assisting agribusinesses as they seek to comply with federal environmental, health, safety and security rules regarding the safe handling and storage of fertilizer products. The organization provides participating businesses a federal regulatory compliance audit relating to the safe storage and handling of fertilizers, recommendations for corrective action where needed and a robust suite of resources to assist in this regard.

To date, nearly 2,500 facilities have registered and joined the ResponsibleAg program. In January 2017, there were 92 credentialed RA auditors, 1,335 assessments completed, 514 certified facilities, and only 0.4% of issues resolved were of any significance.

ARA recommends the EPA focus its efforts on working with the regulated industries on extensive compliance assistance and educational outreach efforts first and focus on enforcement as a last resort.

Conclusion

ARA appreciates the EPA's consideration of these comments on the "Request for Comments on Evaluation of Existing Regulations." We look forward to working with the agency to implement these necessary regulatory reforms. Please contact me by phone at (202) 595-1699 or via email at richard@aradc.org if you would like to discuss ARA comments in more further detail.

Sincerely,

Richard D. Gupton

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