National Association of State Departments of Agriculture
4350 North Fairfax Drive
Suite 910
Arlington, VA 22203
Tel: 202-296-9680 | Fax: 703-880-0509
www.nasda.org

Submitted via Federal eRulemaking Portal

January 22, 2016

Environmental Protection Agency
Office of Pesticide Programs Docket
OPP Docket: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Docket ID No: EPA-HQ-OPP-2011-0183; RIN: 2070-AJ20 (*Pesticides; Certification of Pesticide Applicators; Proposed Rule*)**

The National Association of State Departments of Agriculture (NASDA) submits the following comments on the U.S. Environmental Protection Agency's (EPA) Certification of Pesticide Applicators (40 CFR Part 171) proposed rule changes (docket number EPA-HQ-OPP-2011-0183), published on August 24, 2015.

NASDA appreciates the Agency providing an additional 60 day extension to the public comment period. NASDA notes, however, an additional 60 to 120 day extension (as requested by numerous impacted entities) would have provided a more meaningful review to this significant and substantial regulatory proposal.

I. About NASDA

NASDA represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the spread of disease, and fostering the economic vitality of our rural communities. Conservation and environmental protection are also among our chief responsibilities.

In forty-three states and Puerto Rico, the state department of agriculture is the lead state agency responsible for the regulation of pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[1]. The Association of American Pesticide Control Officials (AAPCO) is an Affiliate Organization of NASDA and contributed significantly to these comments.

In addition, NASDA participated on the AAPCO Certification & Training (C&T) Work Group, which consisted of program specialists with significant understanding and expertise on pesticide applicator certification programs from thirteen different states. NASDA adopts the AAPCO's comments by

[1] 7 U.S.C. §136, *et. seq.*

reference[2], and NASDA encourages EPA to give great deference to the specific provisions and recommendations included therein.

II. General Comments

NASDA has significant concerns with the proposed rule changes and requests EPA not promulgate a final rule at this time. **If the Agency promulgates a final rule, without fundamentally and comprehensively changing substantial portions of its proposal, the end result will require a significant number of state lead agencies to terminate administration of their certification programs, revert this responsibility and cost back to EPA, result in decreased training and education of the regulated community, and increased risks to human health and the environment.** In short, the proposed rule incentivizes both the state regulatory agencies and the regulated community to respond to implementation and compliance requirements in a manner that is in direct conflict with the Agency's stated objectives for publishing this proposed rulemaking.

In addition to inducing state agencies and the regulated community to take actions contrary to the proposal's stated rationale and objectives, NASDA's concerns include, but are not limited to: EPA's FIFRA requirements under the Regulatory Flexibility Act[3], Unfunded Mandates Reform Act[4], Executive Orders 13132[5] & 13563[6]; EPA's Economic Analysis; findings from the Small Business Advocacy Review Panel; EPA's stated Rationale and Objectives; and specific provisions in the proposed rule [7]addressed below.

NASDA supports a thorough review of all existing regulations, including 40 CFR Part 171, "that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned,"[8] and NASDA believes there are opportunities to update and modernize the current 40 CFR Part 171 to reflect and incorporate scientific and technological advances in pesticide regulation, new product developments, product applications, and agricultural operations that have occurred over the last forty years.

At the same time, NASDA has considerable concerns with EPA's rationale, objectives, findings and conclusions cited as the basis for various proposed revisions. Further, EPA's Economic Analysis (EA) does not fully and accurately account for the costs associated with implementing, complying, and enforcing the proposed changes. NASDA requests EPA update the EA for the proposed changes to better quantify the estimated costs to the FIFRA-state lead agencies (SLA), the state departments of agriculture, the regulated community, and other agricultural stakeholders before the Agency takes any further actions with this proposal.

---

[2] See Attachment A
[3] 5 U.S.C. § 601, *et. seq.*
[4] 2 U.S.C. § 1501
[5] Executive Order No. 13132, *Federalism*, 64 FR 43255 (1999)
[6] Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)
[7] 80 FR 51356
[8] E.O. No. 13563 (2011)

As co-regulatory partners with EPA, NASDA strongly encourages the Agency to not promulgate a final rule at this time. Instead, NASDA requests EPA initiate a working committee comprised of state departments of agriculture and other FIFRA-state lead agency officials to address and incorporate the following concerns and recommendations, combined with an updated and fundamentally sound EA, into a revised proposed rule for publication with a minimum of a 180 day public comment period.

III. FIFRA Review Requirements

NASDA has significant concerns with the Agency's findings under its FIFRA review requirements in complying with the Regulatory Flexibility Act (RFA)[9], Unfunded Mandates Reform Act (UMRA)[10], and controlling Executive Orders.

- Regulatory Flexibility Act

In the preamble, EPA certified the proposed rule will not have a significant economic impact on a substantial number of small entities, including farms, under the RFA. EPA subsequently convened a Small Business Advocacy Review (SBAR) Panel (hereinafter "Panel") to "obtain advice and recommendations"[11] on the potential impacts of the proposed rule, and the Panel made numerous findings and recommendations, which the Agency did not accept or incorporate into the proposed rule. For example, the Panel found "the rule will impose unnecessary and unjustified burdens on [small businesses] and that alternatives exist that would reduce the economic impact of the rule on small entities while still accomplishing the agency's objectives."[12] The Panel further determined "EPA's proposal will result in decreased training and education rather than the agency's goal of increased training and education."[13]

After a thorough review with the AAPCO Technical Work Group and the regulated community, NASDA agrees with the Panel's findings, and NASDA requests EPA specifically address and respond to the Panel's written comments and recommendations, as required under the Small Business Jobs Act of 2010[14], before taking any further actions with this rulemaking.

- Unfunded Mandates Reform Act

The Agency also certified the proposed rule does not contain an unfunded mandate of $100 million or more, as described in UMRA[15], and EPA found the proposal does not significantly or uniquely affect small governments. NASDA notes EPA's EA estimated the proposed rule will impact over 800,000 small

[9] 5 U.S.C. § 601, *et. seq.*
[10] 2 U.S.C. § 1501
[11] 80 FR 51400
[12] Panel Report of the Small Business Advocacy Review Panel on EPA Planned Revisions to Two Related Rules: Worker Protection Standards for Agriculture and Certification of Pesticide Applicators.
[13] Id.
[14] Pub L. No. 111-240 § 124 Stat. 2504 (2010)
[15] 2 U.S.C. § 1531-38

farms and over 400,000 commercial applicators, and as demonstrated in the Texas A&M economic model, EPA's EA significantly underestimates the impact to both the state regulatory agencies, small farms, and the regulated community, which includes "small entities" as defined by the Small Business Act.[16] Given the significant burdens placed on state governmental agencies and the breadth of impact on private entities, combined with the EA's significantly understated costs to both, NASDA contends EPA did not meet the requirements under UMRA.

The proposed rule will significantly and uniquely affect small governments and the state lead agencies charged with implementing the proposed changes. In the vast majority of states, the proposed rule will require comprehensive regulatory changes and/or new state legislative authorities, additional training, staff time, and resources for both the state regulatory agency and regulated community that go far beyond EPA's EA estimates in order to develop, implement, and comply with the proposed changes.

NASDA recommends EPA undertake additional review and sensitivity analysis related to small entities and state lead agencies before certifying the proposed action is not in violation of UMRA, and NASDA stands ready to assist EPA in this critical review.

- Executive Orders

In the preamble to the proposed rule, EPA claims to have "identified the potential for harmonized minimum requirements to enhance State-to-State reciprocity of applicator certifications…"[17] The Agency cites this claim as justification for mandating enhanced national minimum requirements across all fifty states and territories. In essence, EPA proposes to require all state, tribal, and territorial authorities to develop and implement a certification program equivalent to the most robust and comprehensive framework currently in existence. As a result, the proposed rule would place significant undue hardships and enhanced requirements on the vast majority of state certification programs, which do not have the staff, resources, or administrative capabilities to absorb these proposed changes in the timeline identified within the proposed implementation period.

i. Federalism Concerns

EPA states the proposed action does not contain any federalism implications and would not have substantial direct effects on the states or the relationship between the national government and the states. However, the proposal has significant federalism implications and is in direct conflict with Executive Order 13132, which requires "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated."[18]

[16] 13 C.F.C. § 121.201
[17] 80 FR 51369
[18] 64 FR 43257

In conjunction with the AAPCO Work Group, NASDA conducted an in-depth review of the proposal's implications on state regulatory agencies and identified several potential federalism issues, as a significant number of states will be required to amend their state regulations and/or legislative authority to comply with the proposed rule changes.

NASDA calls on EPA to comply with both the spirit and intent of Executive Orders 13132 and work with the state regulatory partners to further review and resolve all potential federalism issues prior to any final rulemaking.

ii. Retrospective Review

As stated in the preamble to the proposed rule[19], **EPA notes this proposed regulatory action was included in the Agency's retrospective review plan; however, EPA did not address accompanying requirements under Executive Order 13563**[20]. For example, the Agency did not include specific plans or identify specific measures needed to effectively evaluate the stated objectives of the proposed rule as required under the retrospective review for ex post evaluation.

The ex post retrospective review is essential to gauge whether the proposed rule was "designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of 'actual results.'"[21] As required under the Agency's own retrospective review, **NASDA calls on the Agency to identify, articulate, and publish the specific criteria EPA will use to analyze and measure the success of the proposed rule before taking any further action with this rulemaking**.

In the preamble[22], EPA also references Executive Order 12866[23], which requires "[e]ach Agency shall identify the problem it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."[24] NASDA notes EPA makes several references to the time period that has elapsed since 40 CFR Part 171 was codified; however, a time interval, in and of itself, is not a sound justification for a proposed rulemaking and is not in compliance with the requirements laid out in any of the above referenced Executive Orders or the Agency's retrospective review standards. NASDA requests EPA provide further explanation and specific information on the problem the Agency intends to address, as required under E.O. 12866.

[19] 80 FR 51368
[20] EO No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)
[21] United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.
[22] 80 FR 51399
[23] 58 FR 51735
[24] Id.

The Agency also cites various studies in the preamble and the EA which claim RUP incidents are significantly under reported and will result in qualitative benefits as justification for this proposal. EPA subsequently, and correctly, acknowledges there are significant data gaps throughout these studies and the EA. Not with standing this acknowledgement, EPA proceeds to draw causal connections and implied links between those studies and the proposed rule's estimated benefits. EPA further states the Agency sees value in obtaining the additional data needed to inform these causal connections but cites the lack of time and resources needed to conduct these studies.

NASDA has significant concerns with EPA's willingness to rely on incomplete data sets for such a significant rulemaking and the Agency's lack of compliance with controlling Executive Orders and retrospective review requirements. **Furthermore, EPA cites a lack of time and resources available to complete this critical information gathering and simultaneously places the burden on state lead agencies, which are much more restrained by staff and resource challenges, to develop and implement comprehensive changes to their state certification programs. This course of action is contrary to both the requirements found in the controlling Executive Orders and the fundamental regulatory partnership between EPA and the states.**

NASDA has significant concerns with EPA's lack of adherence and compliance to the Agency's own retrospective review report submitted to the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA), and NASDA seeks further discussion and clarification with EPA, OMB, and OIRA on these points.

EPA's lack of compliance with its own retrospective review requirements is in conflict with the discussions, recommendations and directives from the OMB Retrospective Review Roundtable last February, when NASDA met with OMB Director Shaun Donovan and OIRA Administrator Howard Shelanski to discuss efforts around improving regulatory processes and retrospective regulatory review activities. As part of these discussions, **NASDA made the following recommendations[25] to OMB, OIRA, and EPA on ways to improve engagement in EPA's retrospective regulatory review and to minimize the impact of regulations on both local governments and the regulated community that included the following specific and identifiable actions**:

1. **Enhance Federalism Consultations**: Federal agencies should conduct robust federalism consultations early in the regulatory process, and include participation of a wide range of state regulatory agencies, including state departments of agriculture.
2. **Improve economic analyses that more realistically account for economic costs to states**: Federal agencies should engage state regulatory agencies and stakeholders to evaluate proposed regulations, availability of required resources, and whether expected outcomes merit those expenditures.

[25] National Association of State Departments of Agriculture. (2015, March 6). NASDA Letter: OMB Retrospective Review Roundtable. http://www.nasda.org/Policy/filings/Letters/33163/33289.aspx

3. **Enhance public participation and greater transparency of the regulatory process**: OMB should exercise its authority to improve public participation and increase transparency of the regulatory process.
4. **Incorporate flexibility in state regulatory programs**: Federal agencies should engage state regulatory partners in creating programs that may provide local and state flexibility.
5. **Renew focus on utilization of best available science**: OMB should ensure agencies consistently and appropriately apply best available science to the regulatory system.
6. **Improve stakeholder outreach, especially to rural communities**: Federal agencies should enhance educational and outreach efforts to rural communities and provide teleconference access for oral comments, which can be submitted in the docket and become part of the official record.

In addition to NASDA's above referenced actions and recommendations, OIRA charged all federal agencies to increase early participation by representatives of state and local governments in the development of regulations that impose significant costs and to place emphasis on reforming rules that will introduce flexibility and reduce compliance costs for states and local governments.

NASDA is disappointed EPA acted counter to OIRA's charge in the Agency's proposed rulemaking, and NASDA requests EPA provide additional, specific information to NASDA, OMB, and OIRA explaining how the Agency complied with the requirements of the controlling Executive Orders and EPA's own retrospective regulatory review.

NASDA calls on the Agency to: (1) clearly identify and define the problem the proposed rule is intended to address; (2) obtain the necessary data needed to support the proposal; (3) develop specific plans and identify specific measures needed to effectively evaluate the Agency's stated objectives; and (4) work with the state regulatory agencies to ensure compliance with the above referenced Executive Orders before taking any further action with this rulemaking.

IV. Economic Analysis

EPA's Economic Analysis[26] (EA) claims the proposed rule changes will result in an estimated $80.5 million in monetized benefits with corresponding estimated costs to be $47.2 million; however, the Agency's EA significantly underestimates the costs of the proposed rule and overstates the anticipated economic benefits the proposed changes may bring.

NASDA urges EPA to republish an updated EA based on sound methodology that takes into consideration the numerous factors outlined in both the Small Business Advocacy Review Panel's (hereinafter "Panel") comments and the Texas A&M AgriLife Extension Service, Agricultural Economics, Agricultural & Environmental Safety's EA.

[26] *Pesticides; Certification of Pesticide Applicators*, 80 FR 51356 (Aug. 24, 2015) (to be codified 40 CFR 171)

As EPA is aware, Texas A&M AgriLife Extension compiled a comprehensive EA tool to assist states in determining an accurate depiction of the anticipated economic impact to the state lead agencies. This economic model demonstrated numerous shortfalls in the EPA EA. Following review and application of the Texas A&M model to their individual programs under the proposed rule changes, **states found the estimated cost to their state program will actually increase by multiple factors of ten above the what EPA's EA stated**. For example, EPA's EA failed to identify the significant amount of funding states contribute to their own certification programs, which is not accounted for in cooperative agreement budgets. In several states, EPA funding contributes only five to ten percent of the state's total cost to conduct their certification program. In addition, the Agency's EA did not fully account for the significant internal administrative costs (including but not limited to information technology and tracking programs) state lead agencies will be required to absorb in order to implement these proposed rule changes. Many of these administrative operations require multi-year agreements and obligations, which cannot be unwound or altered without significant financial investment and/or penalties.

In addition to the significantly understated costs to the state lead agencies, the Agency's EA failed to account for a number of factors impacting the regulated community. For example, the SBA Panel noted "EPA did not estimate travel expenses for applicators to obtain training or take exams for certification or recertification," which will "…impose excessive costs in operating their businesses as a result of increased time away from the job, travel expenses to attend recertification trainings, and the class fee for attending the CEUs."[27] The SBA Panel also found "EPA's proposal will result in decreased training and education rather than the Agency's goal of increased training and education."[28] The SBA Panel's findings are greatly concerning and further demonstrate the significant oversight in the actual estimated costs of the proposed rule. The Agency should be concerned with the lack of the EA's thoroughness, and NASDA recommends EPA work to correct the EA associated with this proposed rulemaking and implement further actions to ensure future EA's are actuarial sound.

EPA's EA claims the primary economic benefits are monetized benefits from avoided acute pesticide incidents, qualitative benefits that include reduced latent effects of avoided acute pesticide exposures, and reduced chronic effects from lower chronic pesticide exposures (chronic diseases). To support this claim, EPA's EA cites estimates of poorly reported data and anecdotal evidence from poison control centers. **EPA acknowledges the lack of economic integrity in these numbers, and it is inappropriate for EPA to indicate or imply a causal association between these data sources and any estimated benefits**. EPA is intimately familiar with the routine and robust investigations state lead agencies conduct in response to alleged pesticide exposure incidents, and NASDA is disappointed EPA has drawn various conclusions through unknown and unsubstantiated data to support the EA's estimated benefits associated with this proposed rule.

The Agency cites a reduction in exposures and associated risks under the EA's estimated benefits to the proposed rule, but the Agency subsequently notes it is "not able to quantify the benefits expected to

[27] Panel Report of the Small Business Advocacy Review Panel on EPA Planned Revisions to Two Related Rules: Worker Protection Standards for Agriculture and Certification of Pesticide Applicators.
[28] Id.

accrue from the proposed changes." NASDA considers it inappropriate to estimate benefits based on possible associations when there is no scientific evidence supporting such causal connections. EPA conducts a comprehensive and rigorous process for registering and re-evaluating pesticides, and EPA devotes significant resources to the regulation of pesticides to ensure each pesticide product meets the FIFRA requirement to not cause unreasonable adverse effects to the human health and the environment. NASDA fully supports EPA's scientifically-based review and registration approval process. However, the EA identifies estimated benefits based on implied or causal connections not supported by scientific data. This is in direct conflict with the Agency's registration and reregistration review programs.

In reviewing the oversights of EPA's EA and applying the sound methodology of Texas A&M's model, it is clear the actual estimated cost of the proposed rule significantly understates the cost and burden to both the state lead agency and the regulated community without sufficient or comparable benefits. NASDA requests EPA work with Texas A&M AgriLife Extension, the state departments of agriculture, and the regulated community to revise and republish an updated EA to better quantify the actual estimated costs and benefits, if any, of the proposed rule changes before the Agency takes any further action with this proposal.

V. Responses to EPA's Specific Request for Comment

As noted above, NASDA participated on the AAPCO C&T Technical Work Group, which undertook a comprehensive review of each provision in the proposed rule, and NASDA reiterates and incorporates the AAPCO comments here by reference. NASDA directs EPA to "Attachment A" for further review and consideration to specific insights and recommendations related to the proposed rule revisions.

VI. Reciprocity & Equivalency

As the Agency is intimately aware, FIFRA delegates the authority to individual states to regulate, certify, and train pesticide applicators using RUPs. Further, state lead agencies administer the training, testing, certification, and enforcement programs that ensure competency of applicators using RUPs. Without this essential state-federal partnership, EPA would not be able to administer the national applicator certification program. NASDA appreciates this critical and mutually beneficial partnership with EPA under the current regulatory structure, and NASDA provides the following recommendations to ensure this productive partnership continues.

In consultation with the AAPCO Technical Work Group and representatives from the Association of Structural Pest Control Regulatory Officials (ASPCRO), which is also a NASDA Affiliate Organization, and the State FIFRA Issues Research & Evaluation Group (SFIREG), NASDA supports further discussion in identifying principles related to a potential state equivalency program.

As part of these future discussions, and in conjunction with the AAPCO Work Group, NASDA notes two proposed elements that should not be included in the final rule or any aspect of a state equivalency

agreement. The first is the aspect of a national reciprocity standard, and the second is the proposed requirement for specific information on state-issued certification credentials.

States should remain the final decision maker with which jurisdictions they will or will not reciprocate, and EPA should give great deference to the state lead agencies in this space. Additionally, state-issued certification credentials are typically stipulated by state law or regulation (sometimes broad, blue-sky laws for all state-issued licenses), and the state lead agency is the only appropriate entity to determine what information should, or should not, be included. These two issues are strongly held by the state lead agencies and are not to be considered part of any equivalency discussion.

NASDA recommends EPA engage the state departments of agriculture and the state lead agencies for future discussions needed to identify specific concepts that may logically benefit from national consistency.

VII. Conclusion

After a comprehensive review of the proposed rule and significant consultation with the AAPCO Technical Work Group and the regulated community, NASDA strongly requests the Agency not promulgate a final rule at this time.

If the Agency promulgates a final rule, without fundamentally and comprehensively changing substantial portions of its proposal, the end result will require the vast majority of state lead agencies to terminate administration of their certification programs, revert this responsibility and cost back to EPA, result in decreased training and education of the regulated community, and increased risks to human health and the environment.

Instead, NASDA requests EPA activate an updated working committee comprised of state department of agriculture and other FIFRA-state lead agency officials to: (1) ensure compliance with all FIFRA review requirements; (2) republish a fundamentally sound EA; and (3) specifically address and respond to the concerns and recommendations included in these comments (and the AAPCO Technical Work Group comments attached below) to develop a revised proposed rule for publication with a minimum of a 180 day public comment period.

NASDA stands ready to assist EPA in this process, and we appreciate the opportunity to submit these comments. Please contact us if you have any questions or would like to discuss further.

Sincerely,

Barbara P. Glenn

Barbara P. Glenn, Ph.D.
Chief Executive Officer
NASDA

cc: Hon. Tom Vilsack, Secretary, U.S. Department of Agriculture
Hon. Gina McCarthy, Administrator, Environmental Protection Agency
Hon. Shaun Donovan, Director, Office of Management and Budget
Hon. Howard Shelanski, Administrator, Office of Information and Regulatory Affairs
Mr. Jim Jones, Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention
Mr. Ron Carleton, EPA Agricultural Counselor to the Administrator

ATTACHMENT A: ***Association of American Pesticide Control Officials (AAPCO) Comments: EPA-HQ-OPP-2011-0183*** **(Proposed Rule; Pesticide Applicator Certification)**

DOCKET NUMBER:	EPA-HQ-OPP-2011-0183 Pesticides; Certification of Pesticide Applicators
COMMENTS SUBMITTED BY:	Association of American Pesticide Control Officials (AAPCO)
SUBJECT:	Formal Comments on Proposed Rule; Pesticide Applicator Certification
SUBMITTED BY:	Mr. Charles Moses, President, AAPCO
DATE:	December 22, 2015

INTRODUCTION:

The Association of American Pesticide Control Officials (AAPCO) represents all 50 states and U.S. Territory pesticide lead agencies. AAPCO was established in 1947, and has had a close working relationship with the U.S. Environmental Protection Agency (EPA) since 1972, when FIFRA was first transferred from USDA to EPA. It is important to note that AAPCO State Lead Agencies (SLAs) have, since the very earliest days of Federal pesticide applicator certification, taken the lead on many aspects of pesticide applicator training and certification. Through the state/federal cooperative agreement process identified in Sections 26 and 27 of FIFRA, EPA has granted most states primacy in the training, certification and enforcement of state and federal regulations governing the application of restricted use pesticides (RUPs). It is not an exaggeration to say that without the direct involvement of SLAs, the federal government would be unable to adequately administer or enforce FIFRA.

As President of AAPCO, I assembled a work group of SLA representatives to study the proposed C&T Rule ("the rule"). Past AAPCO President Tim Creger of the Nebraska Department of Agriculture chaired this work group, and his work group consisted of certification specialists or program managers from the following states: Arizona, California, Florida, Georgia, Idaho, Indiana, Iowa, Nebraska, New Mexico, Michigan, Oregon, Vermont, and Washington, as well a representative from the National Association of State Departments of Agriculture (NASDA). The individuals on the AAPCO C&T Rule Work Group (WG) are experienced and have a deep, comprehensive understanding of pesticide applicator certification programs. Some of these individuals have more than 30 years' experience. I consider the comments they have provided to me as the best and most accurate representation of where SLAs are currently at in the certification of pesticide applicators, and I am asking that you take their comments seriously, as well as those that will be submitted by other state and tribal agencies, since they represent the partners EPA relies on exclusively to ensure pesticide applicators are trained, certified and competent to apply pesticides of all types, not just RUPs. I need to emphasize that while I am submitting comments on behalf of AAPCO, it is critical that EPA consider on the same level of importance those comments submitted by individual state and tribal agencies, since the AAPCO

comments are, by necessity, somewhat generic in approach, while states and tribes will provide a much more detailed look into their certification programs that is essential for EPA to understand.

The following comments are organized according to the Unit Numbers used in the proposed rule. For each subject the Unit Number is provided along with a brief subtitle of the topic. AAPCO has made every effort, in the short amount of time given for public comment, to research and gather appropriate data and provide substantive comments. The comments that follow provide background and reasoning for AAPCO's comments, and in subject areas that allow it, we offer recommendations for alternatives that we believe would be better options. The AAPCO comments also attempt to answer those questions posed by EPA in the proposed rule, and have been organized in outline format.

Unit VI.A: Private Applicator Competency.

EPA specifically asks for input on the following questions: 1) Should EPA consider adding or deleting proposed competency standards from the rule? 2) Are the competencies necessary to protect pollinators adequately covered in the proposed standards? 3) Provide comment on the proposed structure of the non-exam option. 4) Would a different training requirement adequately convey the necessary information to private applicators? 5) Is it necessary for EPA to specify a minimum length of time for the training program?

1) Should EPA consider adding or deleting proposed competency standards from the rule?

   The AAPCO WG recommends eliminating the proposed competency standards for private applicators for the following reasons: A) Private applicators generally apply a limited number of pesticides to a static number of sites only a few times each year, as opposed to commercial applicators that deal with numerous pesticides on a wide variety of sites. The frequency and risk potential of pesticide exposure to private applicators and the environment are therefore much less with that group than for commercial applicators and their training and competency is adequately met by current standards. B) Adding new competency standards for private applicators will result in numerous states having to revise certification regulations or state laws. While this may be unavoidable for the entire rule, it is not something that is warranted for private applicator competency standards.

2) Are the competencies necessary to protect pollinators adequately covered in the proposed standards?

   The AAPCO WG is not certain whether EPA is asking if the proposed competency standards go far enough to protect pollinators, or if the proposed rule should include competency standards for pollinators. The majority of states on the WG (but not all members) believe stipulating specific species, sites or situations that warrant special consideration as part of the private applicator competency standards is unwarranted and sets a troubling precedent. Most of the WG members believe competency standards for private applicators should be limited to basic concepts of understanding a pesticide label, knowing the difference between mandatory and optional label language, and what each specific section of a pesticide label means. After that, the WG feels it should be left to the state certification plans to determine what the state lead agency believes meet the standard of competency. The WG would also like to point out that the proposed rule has no definition of what "competency" is. Specific to private applicators, FIFRA prohibits the federal agency from testing for competency. Therefore, it is better left to the

states to define it and decide how to measure and demonstrate it. Members of the WG felt it is not appropriate to stipulate competency standards for pollinators when the federal agency has not yet mandated protection, and believes the issue is better addressed through clear, concise and enforceable label language.

3) Provide comment on the proposed structure of the non-exam option.

   While state members of the WG believe the mandatory non-test option required by FIFRA is inadequate to demonstrate competency of private applicators, they recognize it is required by statute. Therefore, the WG has no substantive changes or recommendations to make to this part of the proposed rule.

4) Would a different training requirement adequately convey the necessary information to private applicators?

   The WG believes the question is targeted toward soliciting comments on the amount of time and content proposed for the private applicator certification program. The WG feels that both the minimal time requirement and the training content are inappropriate. Regarding the proposed Continuing Educational Unit (CEU) time of 6 CEUs for the core training and 3 CEUs for each category, the AAPCO WG feels this is excessive, and must point out their firm belief that private applicators are currently competent and adequately trained without this amount or type of training. The WG is unconvinced by EPA's assertion private applicators are inadequately trained, and to expand the mandatory number of hours and information will result in any decrease in the number of human health or environmental impacts. The WG recommends EPA not assume private applicators (or anyone for that matter) will learn more just because the total time in a classroom is lengthened. In fact there is every reason to believe an applicator will lose interest and patience with applicator training after two or three hours, and it would be better to improve the quality of the training offered over the amount time spent on delivery. *The AAPCO WG notes there did not appear to be any evidence in the proposed rule of actual examples of state applicator certification programs producing incompetent private applicators. This then begs the question: Where is the problem that this solution is meant to fix?* The WG also is concerned whether EPA believes experienced, dedicated professional educators in numerous land grant universities are failing to properly educate private applicators, since that is who conducts the majority of the training for this audience.

5) Is it necessary for EPA to specify a minimum length of time for the training program?

   The WG is unanimous in our assertion the minimum time period for training should not be included in the final rule, and that EPA should instead stipulate state certification plans should be the determining authority for establishing training content and time.

Unit VI.C: Eliminate the Non-Reader Option.

EPA asks the following questions for public comment: 1) Would the elimination of the non-reader provision cause hardship to specific groups of private applicators? 2) Should EPA allow private applicators currently certified under the non-reader provision to retain their certification if the non-reader provision was eliminated ("grandfathering in")?

1) Would the elimination of the non-reader provision cause hardship to specific groups of private applicators?

   The WG believes eliminating the non-reader provision would cause limited hardship to the SLAs, however, there is very definitely a percentage of the population of pesticide applicators who are illiterate and are employed to apply RUPs. WG members are concerned about how states will verify the literacy of non-English speaking applicators. WG member also voiced a common belief that asking someone to demonstrate reading proficiency amounts to an examination, and if this is a requirement for private applicators, EPA may be mandating a requirement specifically prohibited by FIFRA. The WG also refers EPA to the CTAG policy paper on applicator reading ability as a useful reference document in how to approach reading proficiency.

2) Should EPA allow private applicators currently certified under the non-reader provision to retain their certification if the non-reader provision was eliminated ("grandfathering in")?

   The WG has no comments regarding grandfathering currently certified applicators, except to note any previous regulations that attempted have demonstrated it results in a double tiered system of testing and certification in states, even when that was not the intent of the proposal.

Units VII and VIII: Private and Commercial Applicator Method-Specific Categories (soil fumigation, non-soil fumigation, aerial).

EPA asks for comments on the following questions: 1) Would the proposed categories adequately establish competency for the specified application methods? 2) Should EPA consider adding or deleting any of the proposed private applicator application method-specific certification categories? 3) Provide feedback on whether EPA has proposed sufficient detail on private applicator application method-specific categories. 4) Should EPA consider adding or deleting any of the proposed commercial applicator application method-specific certification categories? 5) Should EPA require that commercial applicators be certified in one or more pest control categories in order to be certified in one of the application method-specific certification categories? If so, specify which categories should be pre-requisites for which sub-categories. 6) Should EPA add a method-specific certification category for chemigation? 7) Should EPA consider adding any commercial categories? 8) What are the factors EPA should take into account to allow for a limited-use category for commercial applicators? 9) Provide any relevant information on how the regulation could best balance flexibility and uniformity of the certification categories used in different jurisdictions? (The WG assumes this refers to reciprocity.) 10) Does the Ag Animal category adequately cover treating bee hives with RUPs? 11) What were the impacts of EPA's decision to make all soil fumigants RUPs and require certification for applicators? 12) Would states encounter additional changes or regulatory burdens if EPA includes soil fumigation as a method-specific category? 13) Please provide an analysis of the costs incurred by the state for implementation of the soil fumigation certification labeling requirements. 14) Provide comments on the use of 1080 collars and M-44 capsules in the state and what adding those pesticides as single categories would result in burden to the state.

1) Would the proposed categories adequately establish competency for the specified application methods?

   The answer would be no. The WG acknowledges that a number of states already include all or most of these categories for commercial applicators, however, not as many do for private

applicators. The WG believes the risk-based competency standards for soil and non-soil fumigation are likely warranted, given the history of human health impacts those applications have created, however, the WG is not convinced EPA's approach to aerial application is the best method to address their concerns. It should be noted that aerial applicators are already working in a sector of the industry that is heavily regulated. While this method of pesticide delivery might be unique, the pesticides applied and the target sites are similar to those of ground-based applicators. To create a requirement that mandates aerial applicators also obtain primary certification in every area of competency they might apply would result in an unwarranted over-regulation of that sector. The WG recommends EPA identify aerial application a stand-alone category that places a strong emphasis on label compliance, not identify aerial application as a method-specific category that is secondary to multiple target sites. To do so would require some aerial applicators to obtain certification in four, five or six different categories, which in turn expands their training requirements dramatically, and does nothing to improve their competency of operating an aircraft.

2) Should EPA consider adding or deleting any of the proposed private applicator application method-specific certification categories?

   The WG recommends EPA delete aerial application as a category for private applicators, since the total population of those applications likely is much fewer than what EPA estimates, and those applicators would already be required to obtain additional certification for operation of a spray apparatus under FAA regulations.

3) Provide feedback on whether EPA has proposed sufficient detail on private applicator application method-specific categories.

   The WG believes that the proposed rule provides adequate detail on private applicator application-specific categories, except for that of aerial, which should be deleted from the proposed rule.

4) Should EPA consider adding or deleting any of the proposed commercial applicator application method-specific certification categories?

   The WG recommends removing the aerial category for private applicators, and as discussed below, recommends EPA reconsider the approach to sub-categories. Other than that, the WG makes no recommendations on adding or deleting categories.

5) The WG is opposed to the approach EPA has proposed for application method-specific categories. In practice, there are two basic methods of classifying pesticide applicators; by the type of work they do, or the type of pesticide or method of application they use. Some states use only one approach; others use both, depending on the needs of their regulated population. It is a mistake for the federal agency to force states to change effective certification programs just for the sake of national consistency. The proposed rule would result in many applicators who are already well trained and competent to add more categories to their certification, attend more training meetings, spend more time traveling, taking more time away from work or home, and all for very little added value. The WG is opposed to making any category a pre-requisite to other method-specific categories.

6) Should EPA require that commercial applicators be certified in one or more pest control categories in order to be certified in one of the application method-specific certification categories? If so, specify which categories should be pre-requisites for which sub-categories.

   The WG believes EPA's proposed rule assessment that indicated they would not pursue chemigation as a category is correct, and recommends EPA not reconsider this position.

7) Should EPA consider adding any commercial categories?

   The WG recommends no other categories be added to the proposed rule.

8) What are the factors EPA should take into account to allow for a limited-use category for commercial applicators?

   The WG recommends EPA consider this concept. While the WG was not unanimous in their position on limited use categories, many of them feel that there is a place for niche categories, *but it should be the exclusive responsibility of the states* to decide what they consider as a limited-use category, since each state has a unique set of circumstances that are best met by allowing states the greatest degree of flexibility in their certification programs. For this reason, the WG believes allowing states to certify applicators in a limited-use category that is further identified in the state certification plan (which identifies applicable training) is an appropriate delegation of authority to the states.

9) Provide any relevant information on how the regulation could best balance flexibility and uniformity of the certification categories used in different jurisdictions? (WG assumes this refers to reciprocity)

   See the comments provided on reciprocity under Question 6 of Unit XIV.B, Recertification CEU Program.

10) Does the Ag Animal category adequately cover treating bee hives with RUPs?

    The concept of classifying bees as animals for the purpose of applicator certification makes no common sense. EPA should not lump bee hives into animal agriculture, since there is no education offered in that category that applies to bee keepers. The only RUPs that might potentially be applied to empty bee hives are fumigants, which also have nothing to do with Ag Animal, and would be more appropriately classified in structural pest control or non-soil fumigation. EPA needs to remove any reference of addressing bee hives in the proposed or final rule.

11) What were the impacts of EPA's decision to make all soil fumigants RUPs and require certification for applicators?

    EPA should have a significant body of comments gathered during and after the re-registration eligibility decision process as well as input from AAPCO/SFIREG and AAPSE during both Phases 1 and 2 of the relabeling effort. To summarize those impacts, states were and still are seriously challenged to monitor soil fumigation compliance, provide training and certification services and response to alleged misapplications of soil fumigants. Industry was seriously affected by the overwhelming number of new requirements that effectively hampered operations in higher risk

areas. It could be argued that further revision to fumigant labels will have the same impact, but at what cost? What added value or reduced risk will EPA realize by adding new burdens to certification programs that already are unable to keep up with the new requirements?

When discussing alternative options considered by EPA but not proposed, EPA cited four references in the proposed rule (reference numbers 46, 47, 48 and 49) when stating "The Agency learned that applicators, States, and cooperative extension service programs did not support this approach and faced significant burdens when this approach was used to regulate soil fumigants." In review of these references (two were AAPCO/SFIREG letters, two were AAPSE letters), it is possible that EPA misunderstood the intent and focus of the letters. The AAPCO/SFIREG letters were written to address serious concerns state lead agencies had about the implementation timeline to accomplish a significant amount of work, as all soil fumigant labels would require additional training of applicators. These two letters made no mention that SLAs felt risk-reduction through label revision wasn't appropriate. The two AAPSE letters to EPA expressed similar concerns, but from the standpoint of mandating industry training that would usurp university training programs. Neither AAPSE letter expressly spoke to concerns about adding risk-reduction language to soil fumigant labels as a way of improving applicator compliance. Because of this, the AAPCO WG feels method-specific risk reduction efforts are more appropriate in label language and not as an expansion of state certification programs.

12) Would states encounter additional changes or regulatory burdens if EPA includes soil fumigation as a method-specific category?

Yes, many states would be required to revise state laws and regulations, mostly for private applicators. Some states have a broadly inclusive commercial fumigation category that includes both soil and structural fumigations, therefore those states would have to create new categories and require applicators to either add or drop the certification they currently have. Many states that see few private applicator fumigations have no method-specific categories, and those states would either need to add these to the private certification program, or prohibit private application of fumigants entirely. In any scenario, states would be faced with statutory or regulation revisions to accommodate a rule that has questionable added value or risk reduction.

13) Please provide an analysis of the costs incurred by the state for implementation of the soil fumigation certification labeling requirements.

The AAPCO WG is unaware of any state that has actually captured data relating to the cost of implementing the soil fumigation label revisions.

14) Provide comments on the use of 1080 collars and M-44 capsules in the state and what adding those pesticides as single categories would result in burden to the state.

The use of 1080 livestock collars and M-44 capsules is limited to those states with predator control issues. It is a small subset of states, and is currently well regulated under existing labeling and rules. To further require states to create product-specific categories is an unnecessary exercise to those states that will be impacted. Of concern to a number of states is whether this proposal represents a mandate for states to add these product-specific categories to state certification plans where there is no use of the products. EPA should not mandate categories by product just because the products carry a high risk, when there is no data to

support that decision (i.e. no documented evidence of human health impacts since labels were last revised to provide for added applicator safety.

Unit IX: Exam and Training Security.

EPA asks for specific comment on the following questions: 1) Should EPA consider an exception for requiring government-issued ID? If so, under what circumstances and what options are available? 2) Are there other options for training and testing security that should be considered?

1) Should EPA consider an exception for requiring government-issued ID? If so, under what circumstances and what options are available?

   The WG believes EPA should consider as many options as possible for applicator identification, given the many different forms of personal identification that are currently available and reliably trustworthy. EPA must be very careful to take into consideration the cultural and religious aspects of applicators who might not be allowed to have their image taken or shown, as well as those who may not be able to drive, therefore they cannot present a valid driver license.

2) Are there other options for training and testing security that should be considered?

   The WG strongly encourages EPA to consider requiring valid personal identification for anyone involved in initial testing, but allow states the option of making it mandatory for recertification. The WG also encourages EPA to find language that allows for future avenues of initial certification and recertification training so that it includes electronic identification methods not currently widely used by states.

Unit X.A: Non-Certified Applicator Competence.

EPA is asking for comment on the following questions: 1) Should EPA allow states to adopt different non-certified applicator training standards than what EPA has proposed? 2) Should EPA require non-certified applicators to receive training on pollinator protection? 3) Should EPA consider a single recertification training period for all non-certified applicators, rather than the 1-year for training and 3-year for core testing?

1) Should EPA allow states to adopt different non-certified applicator training standards than what EPA has proposed?

   The WG has determined that there are many approaches to how states deal with non-certified applicators and their training. Some states have very specific rules on how long non-certified applicators may operate without certification, how much training they must receive, how frequently that training is given, and how the training is documented. There are also states that prohibit any application of RUPs by non-certified applicators. The WG feels EPA should make no rules regarding mandatory national standards for training non-certified applicators. The WG also would like to point out that the proposed rule uses the term “recertifying non-certified applicators” is unnecessarily confusing, since logic would hold an uncertified person cannot be recertified. The WG is also split in their opinion on whether the proposed rule is logical by indicating non-certified applicators could qualify as trained by taking the core exam. Some on the WG believe that if a non-certified applicator takes and passes the core exam, there is no

reason to classify them as non-certified, while others question the sense in requiring testing for someone who is likely non-certified primarily because they cannot pass the core exam.

2) Should EPA require non-certified applicators to receive training on pollinator protection?

   While the WG recognizes the importance of creating an appreciation of protecting pollinators for all pesticide applicators, we are not convinced it warrants placing this subject material into federal regulation. The WG is deeply concerned doing so would set a precedent of adding future "hot topics" to the national applicator competency standards, which places additional burden on the states that implement the rule. The WG also believes not all applicators need to know this information, since many do not apply pesticides that impact pollinators (i.e.: termiticides, non-soil fumigants, algaecides, sewer treatments, etc.). The WG urges EPA to not mandate pollinator protection for any category, but instead allow it to be an optional part of the larger competency standards for the core training.

3) Should EPA consider a single recertification training period for all non-certified applicators, rather than the 1-year for training and 3-year for core testing?

   In a similar vein as the response to the first question, the WG believes it should be left to the states to determine how and when a non-certified applicator is trained or tested. The WG is opposed to mandating a national standard of three years for non-certified applicators, and allow states to determine what is appropriate as currently specified in state law or regulation.

Unit X.B: Non-Certified Applicator Competence.

EPA proposes all trainers of non-certified applicators either be a certified applicator, a state-designated trainer of certified applicators, or a person who has completed the WPS train-the-trainer course.

AAPCO Comments: There are a number of concerns the AAPCO WG has with this part of the proposed rule.

1) First and foremost, EPA decided that on-site supervision of non-certified applicators was not a feasible option, when many states allow or require this option, but the AAPCO WG believes it is the most responsible and enforceable option. AAPCO requests EPA reconsider and allow this option to states as an acceptable method of ensuring non-certified applicators apply pesticides correctly. This option would allow illiterate applicators to operate, which in turn would provide a favorable alternative for EPA's proposal to eliminate the non-reader option.

2) The AAPCO WG believes the proposed language is unnecessarily confusing, and appears to be nothing more than attempt to establish a supervisor training standard similar to that already required for the Worker Protection Standard. While the WG agrees with the concept of allowing a broad range of who is allowed to train an uncertified applicator, we do not agree with EPA's proposal to allow WPS trained trainers to do so for all non-certified applicators.

Unit X.C: Non-Certified Applicator Competency.

EPA proposes to require all certified applicators who supervise non-certified applicators to be certified in the same category of the non-certified applicator, provide a copy of every label the non-certified application is expected to apply, ensure a means of immediate communication between supervisor and non-certified applicator, provide specific instruction on each type of application, and explain and comply with all labeling restrictions.

EPA is requesting specific comment on the following questions: 1) Would non-certified applicators and their supervisors rely on cell phones rather than two-way radios as a means to establish immediate communication? 2) Should EPA consider other qualifications for supervising applicators? 3) Should EPA require certified applicators to be within a certain distance or time of the non-certified applicator? 4) Should EPA limit the number of non-certified applicators a single certified applicator can supervise?

1) Would non-certified applicators and their supervisors rely on cell phones rather than two-way radios as a means to establish immediate communication?

   The type of communication devices applicators use varies widely, and is dependent on the cost and coverage of the devices. EPA should not specify any specific communication technology, but allow for future technologies that allow immediate "two-way communication in real time" rather than limit it to voice contact.

2) Should EPA consider other qualifications for supervising applicators?

   The AAPCO WG encourages EPA to require supervising applicators to be certified in the same category as the type of work the non-certified applicator does, that the supervisor be aware of any situations, hazards or circumstances unique to the application, and that the supervisor has direct responsibility for the actions of the non-certified applicator.

3) Should EPA require certified applicators to be within a certain distance or time of the non-certified applicator?

   There are a number of approaches states have regarding the supervisor's time and distance from the site of application. The WG recognizes that some states require physical on-site line-of-site supervision, while others allow for a distance or maximum response time for supervision. The AAPCO WG recommends EPA recognize these differences and allow for them in the final rule. Specifically, the WG recommends EPA allow for a maximum of three hours response time for supervisors to be physically on-site in case of an emergency situation, and that the supervisor is available immediately in real time communication with the non-certified applicator. The AAPCO WG also recommends EPA add a definition of what "immediate" or "immediately available" means in the terms and definitions of the rule.

4) Should EPA limit the number of non-certified applicators a single certified applicator can supervise?

   The AAPCO WG recognizes the importance of limiting the number of non-certified applicators any one supervisor can supervise; however, we do not have substantive data of what an appropriate number would be. Some states set arbitrary limits of 10 or 20 non-certified applicators supervised by any single supervisor, other states stipulate no limit but require line-of-site or immediate response by the supervisor, thus limiting the number of non-certified

applicators to the circumstances of each site of application. The AAPCO WG recommends EPA not set an arbitrary number of non-certified applicators to any given supervisor, but allow for states to set that number based on each state's laws or regulations addressing this issue.

Unit XI: Expand Commercial Applicator Recordkeeping to Include Noncertified Applicator Training.

EPA proposes requiring the certified applicator supervising non-certified applicators keep records of the training provided. EPA requests comments on the following questions: 1) Should EPA require this provision and why? 2) Should EPA require a copy of the training record be provided to the non-certified applicator and any subsequent certified applicators supervising the non-certified applicator?

1) Should EPA require this provision and why?

   The AAPCO WG recognizes the value in training non-certified applicators, however, due to the wide range of training required in states, there is also a similar wide range in how that training is recorded and reported or available to the state regulatory agency. The AAPCO WG recommends that record keeping of non-certified applicator training be required, but not to stipulate what those records are past the name and credentials of the trainer, name and certification category of the non-certified applicator, and date the training took place. This basic information should provide enough information to allow a state regulatory agency to assure when training was conducted, who was trained, and who the trainer was. It would then be left to the state's compliance and enforcement program to determine if training was appropriate, and compliant with state and federal requirements.

2) Should EPA require a copy of the training record be provided to the non-certified applicator and any subsequent certified applicators supervising the non-certified applicator?

   While the AAPCO WG believes training records should be made available to the state or federal agency and the person receiving the training, we are opposed to any requirement in federal regulation that places a burden on the trainer or employer to provide those records to anyone outside of the immediate hierarchy of the trainer's employer. The records should be considered confidential employee records, and not something that becomes a right of a future employer to demand from a previous employer.

Units XII and XIII: Establish a Minimum Age for Certified and Non-Certified Applicators.

EPA requests comments on the following questions: 1) What would be the impacts to the state if the mandatory minimum age was set at 18? 2) Are there additional benefits or burdens associated with establishing a minimum age that EPA has not considered? 3) Would this proposal have an impact on training programs for adolescents (such as FFA or 4-H)? 4) Is there a need for an exemption from the minimum age requirement for immediate family members of farmers?

1) What would be the impacts to the state if the mandatory minimum age was set at 18?

   The AAPCO WG recognizes states have a wide variety of minimum age for applicators, with some states having no minimum age and others ranging from 14 to 18. The AAPCO WG would prefer EPA not promulgate rules regarding any mandatory minimum age, since any state that

would have to change their current laws or regulations would face a negative acceptance by state elected officials and advocacy groups. Specific to the question, the AAPCO WG believes a number of states would amend their laws and regulations to match the federal standard, but others would be unable to do so due to current or future political considerations in state legislatures. Fiscally, the impact would not be dramatic in the agricultural sector, but could impact those sectors with a large number of seasonal temporary workers such as lawn care, mosquito and weed control, and structural pest control. These sectors rely heavily on minimum wage earners during peak work seasons, many of which are likely under the age of 18.

2) Are there additional benefits or burdens associated with establishing a minimum age that EPA has not considered?

   The AAPCO WG believes EPA's assessment in the proposed rule has taken into consideration many of the aspects of setting a national minimum age, but recommends EPA reconsider this proposal in favor of allowing states to set their own minimum age, but require those applicators under the age of 18 to pass an exam demonstrating their understanding of the inherent risks of applying RUPs. In this regard, young applicators would demonstrate some level of competency they may not already have to demonstrate. This then eliminates the concerns for question 3 below.

3) Would this proposal have an impact on training programs for adolescents (such as FFA or 4-H)?

   While state lead agencies tend to have no direct involvement in youth education programs, we do wish to support those efforts as a way of training up the next generation of applicators in a way that provides a well-educated workforce. The AAPCO WG understands that a number of states have youth vocational education programs that include the use of pesticides, and therefore we believe setting a minimum age of 18 would unnecessarily hamper those quality programs.

4) Is there a need for an exemption from the minimum age requirement for immediate family members of farmers?

   The AAPCO WG believes if EPA decides not to allow for states to set their minimum age standards that they allow for an exemption of the minimum age for immediate family members of farmers.

Unit XIV.A: Establish a National Certification Period and Standards for Recertification.

EPA proposes to require a maximum of three years between recertification cycles. EPA asked the following question in the proposed rule: 1) Should EPA consider a different maximum recertification period? If so, what period and why?

1) Should EPA consider a different maximum recertification period? If so, what period and why?

   Without a doubt, this will cause serious issues for many states. It will require changes to statutes, regulations, policies, computer programming and applicator databases, website revisions (many of which are under contract), revenue and billing cycles, and internal administration and management structures.

For those states with recertification periods longer than three years, changing to a maximum 3-year cycle will effectively increase the number of applicators the state agency has to handle in a single year's time (i.e. if a state certified 30,000 people in a 5-year period of time, the new rule would require the same number of people be recertified in a 3-year period of time). This then puts a significant additional stress on the certification agency and the university training program to accomplish the same amount of work in three years they previously had four or five years to accomplish.

The AAPCO WG feels it will not be practical for states to administer parallel certification programs; one for RUP applicators and another for all other applicators, therefore, the proposed rule will likely force states to implement the federal standards for all state-specific categories. This was not taken into account in the economic assessment in the proposed rule, and it is without question under-estimating the total number of applicators states will have to deal with. Many states that have a number of state-specified categories, and those states will be hard pressed to choose between maintaining those categories due to the added burden, or eliminate them and force applicators into categories that might not apply to the kind of specialized work they perform.

The WG is concerned about what appears to be a lack of guidance on how states are to determine what training constitutes core training and what constitutes category training (for purposes of continuing education credits). Related to this concern is how states are to determine when or if training in one category or core is also allowed for credit in another category. If states were able to accept a single training event to count toward both core and category, or toward multiple categories, it would make meeting the federal standard much easier. The AAPCO WG would like to point out there are many overlaps in training that applicators deal with, such as similar sites of application, similar application equipment, similar label language, and similar pests. The WG feels it would be logical and realistic to allow states to decide which training events count toward more than one category or core competency.

Unit XIV.B: Recertification Requirements (CEU Program).

EPA is requesting comments on the following questions: 1) Is the proposed number of recertification CEUs too low or too high? 2) Is EPA's proposal to require that applicators earn a minimum of one-half of the required CEUs during the 18-month period preceding the expiration date of the certification clear? 3) Should EPA reconsider the proposal to require that applicators earn a minimum of one-half of the required CEUs during the 18-month period preceding the expiration date? 4) Should EPA consider a different time period for applicator recertification? 5) Should EPA require commercial and private applicators to have the same recertification requirements for category recertification? 6) Should EPA do more to harmonize requirements for recertification to further facilitate reciprocity?

1) Is the proposed number of recertification CEUs too low or too high?

The AAPCO WG spent many hours of discussion on this part of the proposed rule. There are many differences in how states administer CEU programs, and some states do not allow or offer this type of program at all. While the WG recognizes there are sound reasons for mandating RUP applicators receive a minimum amount of training on a regular basis, there is no consensus of what type of program is best to suit the needs of both the regulatory agency and the applicator. The primary variables that must be taken into account are: A) The complexity and personal risk of the category that stipulates both the amount and type of education needed to

adequately train the applicator, b) the available training material for any category, since some categories have a limited amount of training material available, c) the ability of the applicator to retain information over time, and d) the ability of the state lead agency and state education institution (typically a land grant university) to administer the educational program.

After much discussion, the WG believes the number of hours EPA has proposed in the rule is inappropriate, and appears to be more arbitrary than based in a clear understanding of the variables listed above. Specific to the question, the proposed CEU hours are both too high and possibly too low, based on the category in question. The WG also believes establishing a CEU program as proposed will force the majority of states to either revise their current CEU tracking programs, or create new ones all together. This is not something that appears to have been taking into account in the economic assessment in the proposed rule, and many states believe they would face software and hardware costs in the hundreds of thousands or millions of dollars to do, depending on the complexity of their state programs. The WG recognizes the advantages a set standard would provide, which is primarily more consistency for reciprocity between states; however, those advantages do not outweigh the added resource and financial burden to state lead agencies and universities, when carefully considering the available resources that are in place to administer such a broadly expanded program. EPA has indicated the only added funding that will be available to states is through two national cooperative agreements, and then only for those categories that are similar across the county. This means specialty or niche categories, or those that vary in nature geographically, will not likely benefit from federal funding. It also means the funding to pay for state tracking programs would likely come from applicator certification fees, since most state legislatures are no longer interested in adding more fees or taxes to the general population. The categories that will not be taken up by EPA's cooperative agreements are the exact categories that should not be boxed into a minimum number of hours to obtain recertification, since they will have to be customized by the state using whatever resources are available. The APPCO WG strongly urges EPA to reconsider setting mandatory credit hour standards of 6 CEUs for the core and 6 CEUs for all categories, and instead allow states to make this determination based on their current state laws and regulations.

2) Is EPA's proposal to require that applicators earn a minimum of one-half of the required CEUs during the 18-month period preceding the expiration date of the certification clear?

The AAPCO WG wishes to express to EPA, in the strongest way possible, that mandating a minimum of 50 percent of the total required CEUs be obtained in the last 18 months of the certification cycle is not reasonable or acceptable by states, university extension educator or applicators. This proposal discredits the intelligence of professional applicators, which should be considered similar to other professional practitioners. Commercial applicators demonstrate and refine their competency every time they make a pesticide application, whether or not the pesticide is an RUP. To believe a professional applicator forgets these core competencies in 18 months is a rather myopic perspective, and appears to demonstrate a lack of understanding of the pesticide applicator industry.

The WG wishes to make a strong point that merely requiring a minimum number of CEUs for core and category training doesn't mean that training will be available in all states and at times when it can be attended by applicators. It is already hard to find appropriate training opportunities for applicator certification without CEU programs in place. Mandating a certain number of CEUs be earned in three or less years, with at least 50% of those CEUs earned in the

18 month period before the recertification cycle ends, places a significant burden on applicators to find the time and appropriate training opportunities.

The AAPCO WG strongly urges EPA to eliminate any and all language that would mandate any percentage of CEUs be acquired by an applicator in any shorter time period than the maximum allowed by the state for recertification.

3) Should EPA reconsider the proposal to require that applicators earn a minimum of one-half of the required CEUs during the 18-month period preceding the expiration date?

   Yes, absolutely. See response above.

4) Should EPA consider a different time period for applicator recertification?

   The AAPCO WG believes EPA absolutely needs to reconsider the proposed 3-year maximum recertification period. Given the number of states that have recertification programs other than 3 year cycles, it is evident that this proposal, which the WG believes is not based in sound logic, would be directly responsible in forcing a majority of states with excellent certification programs to change both state laws and regulations for no other reason than to create a national standard. The WG believe states should be allowed to establish an equivalency program that demonstrates the state meets minimum educational standards, not mandate an amount of time to obtain recertification. The WG suggests the following alternative: Take the total number of training hours required in a state that currently uses 4 or 5 years for recertification, divide that total by the number of years in that state's recertification cycle, and use the resulting number of average annual hours as a minimum number of CEUs an applicator would earn in a given year. In this way EPA would be assured RUP applicators are receiving regular training, and states would be allowed to establish how long those applicators have to recertify. This would be the preferred alternative to any mandatory national recertification time period. It would take a substantial effort for any of these states to establish a new program. Most would likely decide that a new CEU program is not possible under the new regulations. The AAPCO WG recommends EPA consider as an alternative to a mandatory CEU program a program that allows states, tribes and territories to demonstrate equivalency in the certification plans that meets EPA's revised competency standards. This recommendation is explained in more detail in the Conclusion and Recommendations section at the end of these comments.

5) Should EPA require commercial and private applicators to have the same recertification requirements for category recertification?

   The AAPCO WG believes requiring private and commercial applicators to have the same recertification standards is not fair or practical. Private applicators work on the same fields and in the same structures on a repeated basis, and therefore probably don't need as much special training as commercial applicators that face new situations every time they make an application. Private applicators also may only deal with applications once or twice a year rather than as a profession year-round. Due to the limited number of application sites, application methods and pesticides used by private applicators, CEU requirements should be less for this audience than for commercial applicators.

6) Should EPA do more to harmonize requirements for recertification to further facilitate reciprocity?

The AAPCO WG strongly urges EPA not promulgate rules that mandate reciprocal certification standards, nor establish any rule that encourages states to do so. States that do not offer reciprocity are unlikely to do it anyway, since those states will not be likely to ignore already established laws and regulations that mandate higher equivalency standards than other states. There are simply too many regulatory reasons to make changes to reciprocity.

Unit XV.3.i and viii: Revise State Certification Plan Requirements.

EPA has proposed that states will have flexibility in how they revise their state certification plans, but will mandate that states copy the requirements for the supervision of non-certified applicators exactly as published in the final rule. The proposed rule sets forth a timeline for states to submit revised plans, and also for EPA review and determination of those plans.

The AAPCO WG wishes to provide the following comments regarding state certification plans and EPA's proposed revision to the plans and processes involved in submitting and reviewing those plans.

1) The AAPCO WG believes the two-year time period provided to states to submit revised certification plans is insufficient, given the complexity of how many state systems are set up. Many states will be faced with a bit of a Catch 22; they will be required to provide a near-final draft of their revised certification plan in order to promulgate revised statutes and regulations, which are in turn necessary in order for the state agency to know how to revise their plan. In states with biennial legislative sessions, this automatically means it will take longer than two years to submit revised statutes and obtain approval, barring political push-back. Some states have indicated they believe the number and extent of changes will be so large that they might never be able to get their state legislatures to accommodate law and regulation changes, thus preventing them from ever submitting a revised plan to EPA. The WG strongly urges EPA revisit this timeline and either place a three-year minimum for the states to submit their revise plans, and an another three year period during which EPA and the states will negotiate the final accepted plan. The WG also urges EPA to clearly articulate in the final rule that the entire period of time during which states revise and submit plans to EPA, and EPA reviews those plans, is intended for open and transparent negotiations with the states. Without this language in the final rule, state lead agencies will have a much harder time convincing state elected officials the federal rule is warranted.

2) States are deeply concerned of the possible impact to their delegated primacy should EPA decide the state certification plan is unacceptable. For this reason, the AAPCO WG strongly urges EPA to include in the final rule a clear and understandable outline showing the expected process by which the state and federal agency will work toward a mutually acceptable outcome, and what the consequences to the state will be if EPA cannot accept the state's revised plan. Again, this is a question that has already been asked by numerous agency heads and state legislators, which state pesticide programs are unable to answer at this time.

Unit XV.3.ii: Program Reporting and Accountability.

EPA proposes: 1) To require all license types and categories be reported annually by states by providing data on new, recertified and total applicators, and 2) Require that states report the number of

new, recertified and total applicators holding the categories and subcategories identified in the state's certification plan, and a narrative description of enforcement actions taken for any violations of federal or state laws and regulations involving RUPs during the reporting period.

1) To require all license types and categories be reported annually by states by providing data on new, recertified and total applicators.

   The AAPCO WG recognizes that FIFRA currently requires states to report certification data similar to what the proposed rule lists. However, if the proposed rule is implemented unchanged, the reporting by states will increase dramatically, further adding to the burden handed to the states by the regulation.

2) Require that states report the number of new, recertified and total applicators holding the categories and subcategories identified in the state's certification plan, and a narrative description of enforcement actions taken for any violations of federal or state laws and regulations involving RUPs during the reporting period.

   States strongly object to section 171.303(c)(1)(x) which stipulates states will be required to submit, as part of their annual reporting, "a narrative summary and causal analysis of any misuse incidents or enforcement actions related to use of restricted use pesticides during the last 12 month reporting period. The summary should include the pesticide name and registration number, use or site involved, nature of violation, any adverse effects, most recent date of the certified applicator's certification or recertification and, if applicable, the date of qualification of any non-certified applicator using restricted use pesticides under the direct supervision of the certified applicator. This summary should include a discussion of potential changes in policy or procedure to prevent future incidents or violations."

   This proposed language is redundant with data already reported to EPA's Office of Enforcement and Compliance Assurance, and the recently revised Enforcement Performance Measures (see the *2015-2017 Cooperative Agreement Guidance, Section VII. (Reporting and Enforcement Measures*). The Cooperative Agreement Guidance was revised such that all states would use a national, standardized template to establish mutually agreeable objectives and reporting criteria. In it, EPA and AAPCO worked for three years to revise and adopt significantly improved reporting measures which include much of the information EPA has proposed in the certification and training rule. It is redundant to ask states to report this data twice, and objectionable to states that have worked hard to eliminate the amount of narrative dialog submitted with annual reports, given EPA's own admission that those narratives are rarely reviewed by management at EPA Headquarters. The AAPCO WG strongly urges EPA's Office of Pesticide Programs consult with EPA's Office of Enforcement and Compliance Assurance to share the data states already report.

Unit XV.3.iii: Civil and Criminal Penalty Authority.

EPA proposes to "expressly require that states have both civil and criminal penalty provisions."

The AAPCO WG recognizes FIFRA already requires this as part of a state's certification plan, and that the current regulation is unclear regarding the requirement that states have both civil and criminal penalty authority. However, the WG strongly objects to EPA's inclusion of record keeping violations

being a part of criminal penalty prosecution. The WG also is deeply concerned that expanding the language in the manner that EPA has done will serve notice to industry and the public that states are obligated to prosecute minor infractions under criminal code, and we believe that will potentially create conflict at the state level, and eventually weaken the ability of the states to effectively enforce their laws. The AAPCO WG recommends EPA leave this portion of the regulation unchanged, or finds language that removes the stipulation of pursuing record keeping violations under criminal code.

Unit XV.3.iv: Commercial Applicator Record Keeping.

The proposed rule appears to repeat current recordkeeping requirements in FIFRA, with the possible addition of records "related to the supervision of noncertified applicators working under the direct supervision of a certified applicator described in Unit XI."

The AAPCO WG has no changes to present or objections to this part of the proposed rule.

Unit XV.3.v: RUP Dealer Record Keeping.

The proposed rule correctly identifies that all states currently require RUP dealer record keeping, and the AAPCO WG believes a minimum of two years for the stipulated records is appropriate. The WG has no other changes to present or objections to this part of the proposed rule.

Unit XV.3.vi: Certified Applicator Credentials.

EPA proposes uniform information be displayed on issued applicator licenses.

The AAPCO WG believes this is an unwarranted and unnecessary requirement in the proposed rule. States believe the content of any state-issued certification should be left to the states, and changing it to provide for national consistency is not only a serious burden to most states, but has no apparent benefit to our programs. In some cases, the content and appearance of a state-issued certification is not decided by the state lead agency, and it would effectively place the SLA in a position of possibly submitting an unacceptable state certification plan.

Unit XV.3.vii: Reciprocal Applicator Certification:

EPA requests comments on the following: 1) Are there approaches to facilitate reciprocity that would minimize burdens and disruption at the lead agency level and improve protections? Should EPA require all States, Tribes and Federal agencies to adopt the same certification standards and to mandate reciprocity between states? 2) Should EPA consider other types of information on required records for RUP dealers or commercial applicators? 3) Is there any other information related to reciprocal certification that EPA should consider incorporating into the regulation? 4) Should EPA consider requiring states to make available publicly a list of all applicators holding a valid certification? If so, should the list be available electronically? Should the list be updated in real time, or would periodic updates be acceptable? If periodic, what period would be acceptable? 5) Should EPA consider requiring

certifying authorities to require their commercial applicators to report incidents that would meet the reporting criteria of 40 CFR 159.184 if known to the pesticide registrant?

1) Are there approaches to facilitate reciprocity that would minimize burdens and disruption at the lead agency level and improve protections? Should EPA require all States, Tribes and Federal agencies to adopt the same certification standards and to mandate reciprocity between states?

   The AAPCO WG discussed this part of the proposal at length, and believes a national standard for certification reciprocity is unreasonable and fails to recognize the uniqueness of state programs that have been developed over more than 30 years to cater to their constituents. In fact, some states are seriously considering the option of discontinuing offering reciprocity of the final rule mandates it, since it is time consuming for the states and results in no added benefits to their certification program.

2) Should EPA consider other types of information on required records for RUP dealers or commercial applicators?

   The AAPCO WG believes the proposed rule adequately addresses the kind and amount of information a RUP dealer should record. We have no additional recommendations for this part of the proposed rule.

3) Is there any other information related to reciprocal certification that EPA should consider incorporating into the regulation?

   Uniform reciprocity won't work under state-delegated programs, since so many states have such a wide range of how their programs run. States will not be motivated to revise their laws or regulations to accept or revise reciprocity, and mandating states identify what circumstances would result in denial or revocation of a reciprocal license is an unnecessary exercise.

4) Should EPA consider requiring states to make available publicly a list of all applicators holding a valid certification? If so, should the list be available electronically? Should the list be updated in real time, or would periodic updates be acceptable? If periodic, what period would be acceptable?

   The AAPCO WG strongly objects to this proposal, since many states have implemented blue sky laws restricting what information can be made publicly available, and to require states to publish a list of valid certified applicators will likely be in direct conflict with other state laws.

5) Should EPA consider requiring certifying authorities to require their commercial applicators to report incidents that would meet the reporting criteria of 40 CFR 159.184 if known to the pesticide registrant?

   The AAPCO WG believes the proposed regulation should not require applicators to report incidents that registrants are already required to report. Doing so would add an extra level of bureaucracy to an already burdensome rule, and likely result in poor compliance, since there is no provision in the rule for enforcement or compliance.

Unit XV.3.viii: State Plan Maintenance, Modification and Withdrawal.

EPA indicates in the proposed rule they will clarify regulatory language that stipulates when and how a state certification plan meets the term of "substantial modification", which would then require additional review and approval by EPA.

The AAPCO WG believes adding clarifying language is a positive proposal, but is concerned that the way the proposal is worded places a burden on the state to conduct regular reviews and inform EPA of any certification plan modification. The WG recommends the language clearly indicate that states would only need to notify EPA of proposed substantial modifications at the year-review or pre-award negotiation meeting.

Unit XIX: Add, Revise and Delete Certain Definitions.

EPA proposes a number of new, revised and to-delete definitions and locate those definitions at 40 CFR 171.3.

The AAPCO WG has already indicated one suggested additional term in our comments for Unit X.C (define the term "immediate" or "immediately accessible", or both). The WG also has serious concerns about the proposed definition of the words "application", "mishap" and "use". Each term is discussed in detail below.

1) The term "application" as proposed in the rule would include: "the dispersal of a pesticide on, in, at or around a target site." The AAPCO WG believes the inclusion of the word "around" in this definition effectively opens the door to allowing pesticide overspray or drift, since a target site is a defined area, and applying a pesticide around that area is assumed by a reasonable person to be outside of that area. The WG strongly urges EPA to not include the word "around" in this definition.

2) The term "mishap" is not appropriate in the proposed rule, and inconsistent with terminology used for pesticide incidents or events. The WG urges EPA to remove this term from the proposed rule, or revise it such that it is more consistent with what the majority of states already have in statute or regulation.

3) The term "use" as proposed in the rule is seriously flawed by including pre-application activities. It is also not consistent with how this term is used in other parts of FIFRA, especially Section 12 where "use inconsistent with the label" is perhaps the most frequently used violation states use for enforcement purposes. The AAPCO WG is deeply concerned that the proposed definition would include activities conducted prior to the actual handling of the pesticide, such as arranging for the application of a pesticide. That creates an alarmingly broad universe of possibilities, and would potentially include making any pest control management decision, discussing the application with a crop consultant or salesman, or presenting information on the pesticide in a meeting or seminar. The AAPCO WG strongly urges EPA to remove any "pre-application activities" from the definition of the term "use".

4) The AAPCO WG recommends EPA add a definition for the terms "immediate" or "immediately available" as it applies to the availability of a supervisor of a non-certified applicator. The WG recommends this term allow for the supervisor to be able to arrive at the site of application within three hours of communication from the non-certified applicator, or physically present at the site of application.

Unit XX: Implementation.

The proposed rule stipulates the effective date of the final will be 60 days after publication in the Federal Register, existing state certification plans could remain in place for up to four years after the effective date, and thereafter the plan must meet all standards of an EPA-approved plan. It stipulates that states would have two years after the effective date to submit revised certification plans to EPA for review.

EPA asks for comments on the following questions: 1) Would states be able to submit revised certification plans within 2 years of the effective date of the rule? 2) Would states need additional time after EPA approves the revised state certification plan to implement their new state plan? 3) Would the implementation schedule be reasonable if EPA provided exams and training materials for the proposed changes? 4) What support would states need to receive during the implementation of the final rule? 5) What time frame would be needed for EPA to evaluate the effectiveness and impacts of the final rule? Please provide any ideas of methodology of such evaluation.

1) Would states be able to submit revised certification plans within 2 years of the effective date of the rule?

   The consensus of the AAPCO WG is that two years from the effective date of the proposed rule is insufficient time for states to go through a full certification plan revision. This is due in large part to anticipated requirements of securing approval from both internal agency administrators as well as state legislatures before the plan be finalized and submitted. Many state legislatures operate on a two-year cycle, with some states even restricting routine administrative revisions to only one of the two years. If EPA promulgates the final rule in March of a given year, there could be states that would unable to submit any proposed statutory changes for nearly two years, if the federal rule happened to fall on the first year of the two-year legislative cycle. This then puts the state agency a serious disadvantage, and would likely result in their failure to submit a revised certification plan within the two-year period. The AAPCO WG has previously recommended the final rule be revised so that it allows at least three, if not four years for states to modify and submit their revised certification plans. Please see additional details in the Conclusion and Recommendations section under the proposed equivalency approach.

2) Would states need additional time after EPA approves the revised state certification plan to implement their new state plan?

   The AAPCO WG believes states will need a considerable amount of time to fully implement any revised certification plan, and EPA needs to understand and add language to the final rule recognizing this hurdle. Even if a state were able to submit a revised certification plan within the proposed two-year period, they would be very hesitant to initiate statutory or regulation changes until such time as EPA approves the revised plan. There does not appear to be any provision in the proposed rule that allows states time to initiate statutory and regulatory changes after the revised plan is approved, and in some cases this will take up to ten years for some states that have to overhaul their entire certification programs to accommodate different categories, recertification cycles, tracking mechanisms, and certification credentials. EPA should understand how difficult, costly and time consuming wholesale changes on the scale being proposed will take. The proposed rule, if promulgated unchanged, represents the most

significant change states have faced since EPA was created and states entered into initial cooperative agreements with the agency. It cannot be understated how dramatic and serious the impact will be on state programs.

3) Would the implementation schedule be reasonable if EPA provided exams and training materials for the proposed changes?

   Even with EPA's proposed training and exam development assistance, most states feel the impacts on state programs will be great enough that there will be serious consideration of giving up authority to conduct their certification programs and have EPA assume the regulatory primacy for certification of RUP applicators. The AAPCO WG has heard these comments not only at program management levels, but at the highest administrative levels of state lead agencies.

4) What support would states need to receive during the implementation of the final rule?

   The AAPCO WG believes EPA is ill prepared to provide the kind of support and assistance it would take to implement the proposed rule. States are quite literally facing hundreds of millions of dollars in added costs to their regulator programs, university educational programs, and the applicator industry. It is not an overestimation to say EPA would need to provide a minimum of $500 million nationally in each of the first ten years the new rule was in effect in order for states to adequately meet the added regulatory burden. The AAPCO WG believes EPA has not seriously considered, at least not in a way that was apparent in the proposed rule, what the impact would be to the federal agency if multiple states were to decide to cease certifying applicators, remanding primacy to EPA. It is the WG's belief EPA has no resources in either funding or staff to conduct even one state certification program in the manner proposed in the rule. To expect states to do so without significant financial support places serious doubt that the proposed actually represents an economic benefit greater than the potential economic cost.

5) What time frame would be needed for EPA to evaluate the effectiveness and impacts of the final rule? Please provide any ideas of methodology of such evaluation.

   The WG believes it would take a minimum of ten years to even begin to determine if the new rule was effective in a way that would be measurable for the identified need. States are not currently equipped to measure improved competency of pesticide applicators, and the proposed rule does not appear to offer any suggested or recommended performance measures to do so.

The AAPCO WG feels the proposed rule has failed to adequately address Executive Order 13563, which mandates all federal agencies to establish adequate performance measures for any new or revised federal rule. In the publication *Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations* EPA stated the following: *"A central goal, consistent with Executive Order 13563, is to identify methods for reducing unjustified burdens and costs."* And also: *"Therefore, EPA intends to apply the principles and directives of EO 13563 to both retrospective reviews of existing regulations and the development of new regulations."* Later in that document, Section 2.2.15 cites the following: **Certification of pesticide applicators: eliminating uncertainties and improving efficiencies. Reason for inclusion**: EPA intends to review regulations for certification and training of pesticide applicators (40 CFR 171) to help clarify requirements and modify potentially redundant or restrictive requirements, in keeping with EO 13563's directive to reduce regulatory burden. The AAPCO WG's concerns regarding

the EA are underscored by the explanation in this document that describes the foundational principles EPA indicates they will follow for retrospective reviews: *For example, the first principle listed in EO 13563 is: "[T]o the extent permitted by law, each agency must, among other things propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)."*

It is the consensus of the AAPCO WG that EPA has not convincingly demonstrated the benefits of the proposed rule justify the costs states and pesticide applicators will have to bear.

Recommended Implementation Timeline

The AAPCO Work Group recommends that in order to revise state certification plans, which many states believe will require revision of both state laws and regulations, the final rule should revise the implementation timeline to a "3/2/3 year approach", where the state is given three years to submit a revised plan to EPA, two years for EPA to review and declare a determination on the state plan's equivalency, and then another three years for the state to initiate and complete the process of changing state laws and regulations. The states which have examined the implementation timeline against their current regulatory processes have indicated it takes between six and twelve months to draft and propose statutory and regulatory changes to their executive branch, after which approval for moving forward is not certain, and can take up to two years. If approval by the state executive office is granted, the state agency then submits the proposed law or rule change to either the legislative branch (for statutory changes) or the public hearing process (for regulation changes). Most state legislatures are on a two-year cycle, meaning they either hold short legislative sessions in a two-year period of time (during which one year is dedicated heavily toward the budget and significant legal issues, the other year dedicated to lesser proposals and statutory revisions), or meet once every two years (as in the case in Montana and Nevada). Many states have indicated their state regulatory system requires they may not initiate regulation changes until and unless statutory changes have been made. Is some isolated cases, states have indicated that because their certification plans are incorporated into regulation, they might be required to make changes to their regulations before submitting them to EPA for review and approval.

Once the states submitted their revised plans to EPA HQ for review, EPA would have a two-year period to review the plan, which would result in communication between the state, EPA HQ and the EPA regional office. If EPA HQ found any areas in the state certification plan they deemed as deficient, EPA would enter into negotiations with the state to determine what it would take for the state plan to meet the minimum standards stipulated in the final rule. Upon final agreement on the negotiated certification plan, the state would then have three additional years to revise any state laws, regulations, policies and internal operations required in order to fully implement the plan. The final rule would need to clearly indicate the state was allowed to continue to operate under their current plan until such time as the revised statute or regulations were considered effective.

An example of a typical timeline for many states might help to better understand this proposal. Once a state agency decides to revise their certification plan, if they have to revise state law would require up to 18 months of preparation for legislation. This time includes developing draft language, review internally buy legal and administrative branches, review by the executive branch, and submission to the legislative branch. This all has to happen before the state legislature convenes, which can be in alternate years in some cases. The legislative session then takes 6 or more months to debate and vote on the proposed legislation. In all but one state, this means debate in two houses of the legislature,

similar to what the Federal government system uses. If approved by the legislature, the bill then takes a few weeks to a few months for the governor to sign. Many states place an "active date" on signed bills of between two and six months before the statute actually takes effect. There are few states that actually start the revision process to state regulations until they have a revised statute authorizing them to do so. The process for revision to state regulations is similar to that of legislation, but substitutes a public hearing process for the legislative process. This can take anywhere from 6 to 24 months to promulgate rules. Some states would need more time to revise laws and regulations after approval of the state's revised plan by EPA.

Economic Assessment (EA)

The EA is introduced the Executive Summary, Section E, page 9 of the proposed rule. In it, EPA indicates the economic benefits are estimated at $80.5 M while the estimated costs are $47.2 M. The full EA is provided in detail in Reference 3 of the proposed rule. After significant review and discussion, the AAPCO WG believes the EA falls considerably short of taking into account the full economic impact the proposed rule will have on states and the pesticide applicators it regulates. Texas A&M University Extension specialists analyzed the EA in depth, providing states with a condensed version that helps them better understand how to apply the EA to their own state's situation. In this condensed version, it became quickly apparent that the EA failed to fully account for the amount time and expense a pesticide applicator will have to spend to meet the additional recertification standards states will be expected to implement.

The EA also appears to not fully account for the internal administrative costs states will have to bear in order to revise or overhaul their certification programs to meet the new standards. This is especially true in states that will have to change internal and external information technology and tracking programs. In the EA introduction in the preamble of the proposed rule, EPA indicates the primary benefits are "monetized benefits avoided for acute pesticide incidents", and qualitative benefits that include reduced latent effects of avoided acute pesticide exposures, and reduced chronic effects from lower chronic pesticide exposures (chronic diseases). The AAPCO WG would like to point out that the benefits of the EA are <u>not</u> based on known and demonstrated data, but on estimates of poorly reported data and anecdotal evidence from poison control centers. In EPA's own words from page 2 of the Executive Summary of the EA: "It is difficult to quantify a specific level of risk and project the human health risk reduction that would result from this rule, because people are potentially exposed to such a wide variety of pesticides, and few of these incidents are reported." It is therefore just as accurate to say there may be a high percentage of pesticide exposures reported, or the number represents an over estimate of the actual number of pesticide exposures. States routinely investigate alleged pesticide exposure incidents that are determined to have been falsely reported. To assume (as stated in the EA, same paragraph as the citation above) that "there is sufficient evidence in the peer-reviewed literature to suggest reducing such exposure would result in a benefit to public health through reduced acute and chronic illness" speaks to an apparent philosophical position EPA has that the states and industry perhaps do not share. The AAPCO WG has determined, after numerous meetings and in a survey of state certification programs, that we do not arrive at the same conclusion as EPA did in regard to the benefits of the proposed rule, and in fact, we believe there is very little benefit that would result in expanding state and tribal certification programs in the ways EPA has proposed. It is for this, and other reasons, that the AAPCO WG must make it as clear as possible to EPA that the proposed rule will not achieve the additional protections to humans and the environment that they have stated will occur after the rule is promulgated.

To state this in another way, EPA relies exclusively on state, tribal and territorial regulatory agencies to carry out the national pesticide applicator certification program. Without those partners, EPA would not be able to implement the kind of applicator certification program that currently exists in the United States. If the states, tribes and territories do not agree with EPA's economic assessment, or the benefits they believe the rule will produce is based on incorrect assumptions, there is a very high likelihood the national applicator certification program will actually regress in its effectiveness, and the end result will be a higher risk to human and environmental health. This is because there will be some state, tribal or territorial programs that will simply be unable to meet the new higher standards mandated by the new rule. Those programs will be forced to make the undesirable choice of remanding their certification programs back to EPA, or running a much reduced program for applicators that do not apply RUPs. EPA has indicated they do not have the capacity to accept local certification programs and run them on the same scale and level of attention to detail that the states do, and their only choice is to establish a certification program focused exclusively on RUPs. This then ignores the larger percentage of pesticides and pesticide applications that cause the vast majority of pesticide exposures. It is the WG's assertion, based in true and factual data, that if the proposed rule is implemented as written, the result will be an increase in the number of human and environmental health problems, not a reduction. Fewer applicators will be trained and certified, but the total number of applicators actually making pesticide applications will remain the same. This then represents an increase in the number of untrained, uncertified, and less competent applicators. <u>The proposed rule, if left unchanged, will result in the opposite end result of the stated intent.</u>

As to the actual cost estimates of the EA, the AAPCO WG would like to point to the work done by Texas A&M University Extension specialists that show the EA has grossly underestimated the true costs to state regulatory programs, university extension programs, and the applicator industry. The EA fails to accurately take into account the significantly greater number of hours of training and days in training sessions applicators will have to endure in order to retain the same certification they do now. The EA also failed to recognize the significant amount of funding states contribute to their certification programs that is never accounted for in their cooperative agreement budgets. In some cases EPA funding is only five to ten percent of the total cost states spend to conduct their certification program. States that have used the Texas A&M model and modified it for their own specific state situations have found similar results to that of Texas A&M. Those results, while variable from state to state, almost universally show an increase in estimated costs to state programs in multiple factors of ten, not just small percentages over what the EA presented. This is eye-opening, and cannot be ignored if EPA is sincere in their desire to achieve an effective national certification program. The AAPCO WG respectfully requests that EPA reassess the entire economic analysis, and find a way to include states, tribes and territories in the process.

CONCLUSION AND RECOMMENDATIONS

AAPCO wishes to conclude our comments on the proposed national certification and training rule by identifying key areas that merit serious attention, as well as recommendations we believe would result in a higher chance of acceptance by states and the regulated community.

1) First and foremost, EPA must constantly keep in mind that without state, tribal and territorial certification programs, the federal agency would be unable to effectively administer the national applicator certification program. There are simply no resources present in EPA's regional or headquarters offices to take on RUP applicator certification programs and ensure the public that applicators are adequately trained and competent.

2) EPA must understand the economic assessment of the proposed rule did not take critical data into account that radically changes the true potential economic impact to states and industry. The economic assessment underestimated potential costs to states in magnitudes of ten to fifty times of what states believe the true impact will be. This alone should motivate EPA to revisit the proposed rule and initiate a complete and comprehensive re-evaluation of the economic impact of the proposed rule, and that re-evaluation include involvement by state lead agencies and university pesticide safety education specialists.

3) While the preamble to the proposed rule recognizes that some states may have to revise state laws and regulations if the proposed rule is promulgated, EPA has not taken into account the scale of the potential impact on states in this regard, or the political consequences state lead agencies face in attempting to convince elected officials to accept a largely unfunded federal mandate. This is especially true when considering the impact the rule would have on private applicators in rural states that are already hard pressed to conduct adequate applicator training programs.

4) EPA properly indicated in the preamble to the proposed rule that states have, over time, requested changes to the national applicator certification program. Those comments were made and summarized over the last 18 years, and the initiative and motivation to request those changes no longer exists for some of the issues and for many of the states. EPA should not assume the issues identified 15 years ago still exist without determining in current day terms if those issues still warrant revision of the federal regulations.

RECOMMENDATIONS

1) AAPCO recommends EPA reconsider promulgation of the proposed rule until they have allowed the states to assemble and provide better data to inform the economic assessment and an alternative recertification equivalency proposal. As noted by many commenters, EPA has taken years to develop the proposed rule, but only allowed states 90 days, and a 30-day extension, to research and assemble appropriate comments the federal agency has requested. This is not respectful of the close federal-state partnership EPA and AAPCO have developed over the years. There is no sound reason cited in the proposed rule that rationalizes why EPA has chosen such an ambitious and unyielding timeline for promulgating a rule as large and complex and this.

2) AAPCO recommends EPA consider establishing a state certification plan equivalency program similar to that provided for in the container/containment rule. A more detailed explanation of this type of approach is provided in #7 below.

3) AAPCO recommends EPA revise the language of the proposed rule such that it is clearly obvious that states, tribes and territories have the option of offering reciprocal certification on their own terms, not as stipulated by federal regulation.

4) AAPCO recommends EPA not promulgate a rule that mandates states establish a CEU type program for applicator recertification, but make it one of a number of options the states would be allowed to use to recertify applicators, which should include examination or on-site supervision of non-certified applicators.

5) AAPCO recommends EPA reconsider establishing minimum CEU standards for the core and all categories rather than an arbitrary number of hours of training. The approach proposed in the rule has been found to be very difficult to administer in many states, and there is a distinct lack of adequate training materials for many categories that would satisfy the number of training hours proposed in the rule. AAPCO recommends EPA meet with state pesticide regulators and industry representatives to better understand the training needs of pesticide applicators for all federally proposed categories, and set national competency standards based on that consultation.

6) AAPCO recommends EPA revise the proposed rule so that it is imminently clear what the consequences will be for states, tribes and territories when their certification plans are not accepted by the federal agency, and if EPA is sincerely willing to negotiate with states, tribes and territories regarding how their certification plans meet the new federal regulation, then they should clearly articulate the mechanism and when states, tribes and territories would conduct those negotiations. The WG also believes the final rule needs to clearly indicate the negotiation process is between states and EPA Headquarters staff, with involvement by EPA regional offices only for informational purposes, not in a decision-making or oversight role.

7) **Proposed State Certification and Training Equivalency Approach**

The AAPCO C&T Rule Work Group, in consultation with representatives from ASPCRO and the AAPCO SFIREG, offer the following model approach to a state equivalency program for the proposed applicator certification rule.

Broad Approach:

- The final rule would identify specific concepts that logically benefit from national consistency. These concepts would iterate the basic philosophy of the purpose for applicator certification: help keep our communities safe from pesticide exposure, protect the environment while reducing the risk to those who apply pesticides, and allow for the most efficacious control of pests.
- The final rule would identify the core pesticide use and safety standards any state certification plan would need to include. The final rule would also identify specific federal categories that capture the majority of use of RUPs. The rule must clearly indicate that states would have the option of including any or all of those categories in their state certification plan, and if any federal categories were not adopted, the state plan would clearly articulate why the state felt it was not needed, or how it was integrated into other categories of the state plan. The final rule would also provide clear understanding that states could add categories (termed "state categories" in this document for purposes of discussion), and then allow the state certification plan to identify the sites or functions for those state categories, as well as the standards by which the state would establish training and demonstrate applicator competency.

- The final rule would allow negotiation between states and EPA Headquarters, allowing states the option of retaining their current mechanism of training and certifying applicators, non-certified applicators (and their supervisors). The result of this negotiation would be a written acceptance of the state certification plan by EPA, which clearly indicates that the federal agency accepts the state plan as being equivalent to that of the federal regulation. Part of that negotiation would include a description of how a state would meet or exceed the minimum one hour average annual core standards CEU training plus the average annual category CEU training established by state identified need, or the equivalent of those CEU standards. It must be recognized that a state has the option to: 1) demonstrate an equivalent CEU program that is not based solely on contact training hours ; and 2) demonstrate an equivalent CEU program that may account for core plus category CEU training jointly rather than independently.

Specific details for the above referenced concepts:

1. The AAPCO Work Group believes many states already meet or exceed the continuing education unit (CEU) standard proposed in the final rule. While a number of states require a specific number of hours of training applicators need to accumulate during the recertification period, other states have programs that use the same type of seminars, industry meetings, technical hands-on training, and online courses. These "non-CEU states" do not require an accounting of the amount of time in the classroom, but do monitor the quality of the training and make sure all competency standards are covered. The reality of state certification programs is that there are a limited number of quality training programs available, and most states use much of the same material in their training whether or not they count the hours it takes to complete the training. States without CEU programs should not be forced to establish a CEU program just for the sake of saying all states have the same approach. The final rule must allow for a mechanism by which a state certification plan demonstrates a reasonable assurance to EPA that their applicators are receiving an acceptable amount of quality training over a specific period of time.

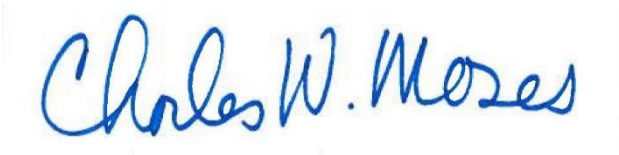
2. The AAPCO Work Group believes the final rule must allow states to retain their existing recertification cycles. The Work Group also believes it is reasonable for EPA to accept a broad range of timelines for recertification, but set the upper limit for recertification at five years, since no states currently appear to have a longer time period that than. The final rule should allow states to set minimum training standards for the recertification cycle, annualized if practical to demonstrate equivalency, for both the general core training and all category training. Two examples of this would be for a state with a five-year recertification cycle, and a state with a two-year recertification cycle. Both states currently have an idea of how much training it takes an applicator to recertify and be considered competent. Let's say for purposes of this discussion that both states believe an applicator should have a minimum of two hours of annual core standards training and one hour of annual training for each category. The state with a five-year recertification cycle would require applicators to obtain a total of 10 credit hours of core training and five hours of category training for a single category applicator. The state with a two-year recertification cycle would require the applicator with one category to complete four hours of core training and two hours of category training in a two-year period of

time. In both examples, it is critical for the final rule to allow either state to decide the training frequency and makeup of the training as it is spread out over the recertification cycle, and not stipulate any percentage of training must be accomplished in a given period of time unless the state decides to run their program that way.

3. In the case of states without a current CEU program, the certification plan would need to present a reasonable amount of detail that explained why their training program accomplished at least two or more hours per year for the core standards and one or more hours per year for each category. At this point it is extremely important to emphasize that not all categories should require the same amount of annual or total training, since some have very limited, and rarely changing material available (examples would be seed treatment and metam sodium use in sewers). States must be allowed the flexibility in their certification plans to set recertification standards for categories that allow for the complexity of the material, while recognizing the amount of available training material.

4. The final rule must allow state certification plans the option of providing detailed information on how the state assures category competency standards are being provided and verified, the frequency the training is required, and the method by which the state assures the training is of the highest quality possible. In reality, category training rarely takes less than an hour to complete, and often takes two or three hours to adequately cover the information needed to provide a thorough understanding of the subject matter.

Respectfully Submitted,



Charles Moses, President
Association of American Pesticide Control Officials

Cc: AAPCO Secretary