



Federal Agency Certification Plans for Pesticide Applicators Q&As

The Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) Section 3 gives EPA the authority to classify pesticides as restricted use or general use. Restricted use pesticides (RUPs) may be used only by a person who is a certified applicator or under the direct supervision of a certified applicator. Federal agencies that certify persons as applicators of RUPs must have an EPA-approved certification plan. In January 2017, the EPA revised the federal minimum applicator certification program requirements and the certification plan contents in the Certification of Pesticide Applicators (CPA) regulation at 40 CFR 171. Federal agencies with existing EPA-approved certification plans must submit to EPA by March 4, 2020 a revised certification plan to align with the January 2017 federal minimum program requirements and certification plan contents.

The following questions were submitted to EPA by federal agencies. The answers are intended to assist federal agencies in the administration of certification programs and the revision or development of federal agency certification plans. EPA may add more questions and answers at a future date.

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Question 1: EPA is deliberating FIFRA 24(c) State-specific labelling of pesticides, specifically more-restrictive labelling vs. additional uses [see, for example: <https://www.dtnpf.com/agriculture/web/ag/crops/article/2018/11/01/State-restrictions-federal-pesticide>]. How does EPA intend to apply label requirements to multi-State applications of 24(c) products by Federal agency employees, who are certified by their agency, on Federal lands?

Response: EPA is currently re-evaluating its approach to reviewing 24(c) registrations and the circumstances under which it will exercise its authority to disapprove those registrations. Before making any changes in this regard, EPA intends to take public comment on any potential new approaches before adopting them. EPA is not making any immediate changes in this area and does not expect any potential changes will impact 24(c) registrations that States approve ahead of the 2019 growing season.

While those determinations are yet to be made, EPA can address some of the issues concerning Federal agency applicators' responsibilities regarding State requirements in the table below:

Table – Federal Agency Applicator Responsibilities Regarding Compliance with State Requirements* under 40 CFR §171.305(e)			
If a restricted use pesticide product is labeled...	Does the State have pertinent laws or regulations governing the product?	Use takes place on lands within the State’s boundaries <i>and</i> not subject to exclusive Federal jurisdiction	Use takes place on lands subject to exclusive Federal jurisdiction that are within the State’s boundaries
...with State-specific requirements	Yes	The Federally-certified applicator must comply with all labeling requirements, including the State-specific requirements on the label	The Federally-certified applicator must comply with all labeling requirements, including the State-specific requirements on the label
...without State-specific label requirements	No	The Federally-certified applicator may use those quantities of the product in any manner consistent with the EPA-approved label and labeling	The Federally-certified applicator may use those quantities of the product in any manner consistent with the EPA-approved label and labeling
	Yes	The Federally-certified applicator must comply with all applicable State pesticide laws and regulations when using RUPs outside of areas of exclusive Federal jurisdiction, as provided by 40 CFR 171.305(e)(1).	The federally-certified applicator may use those quantities of the product in any manner consistent with the EPA-approved label and labeling
* Note: State requirements do not apply to anyone in Indian country. Therefore, Federally-certified applicators may use those quantities of the product in any manner consistent with the EPA-approved label and labeling and must comply with all applicable Tribal pesticide laws and regulations when using RUPs within Indian country, as provided by 40 CFR 171.305(e)(1).			

In contrast to restricted use pesticide (RUP) use in the table above, a Federal employee using containers of a general use or unclassified pesticide product is not subject to the requirements of part 171, and therefore not required by 171.305(e)(1) to comply with State regulations. However, Federal agencies are expected to make efforts to comply with State and local requirements per Executive Order 12088. EO 12088 directs Federal agencies to comply with “applicable pollution control standards,” defined to mean “the same substantive, procedural, and other requirements that would apply to a private person.” EO 12088 requires that Federal agencies “cooperate” and “consult” with State and local agencies regarding their environmental requirements, but EO 12088 (like other Executive Orders) creates no legal rights or obligations on any person.

Question 2: In States that certify “commercial” applicators of “general use” and “restricted use” pesticides, will a Federal agency certification for RUP use suffice for applications of both “general use” (including unclassified pesticides) and “restricted use” pesticide?

Response: EPA’s Certification of Pesticide Applicators rule, 40 CFR part 171, applies only to the use of RUPs. EPA has no position on what is required to comply with any individual State’s rules governing use of general use and unclassified pesticides.

However, we note that States do not appear to have the authority to require Federal employees who use pesticides within the scope of their employment to hold a State license. FIFRA does not appear to contain a clear and unambiguous waiver of sovereign immunity, and absent such waiver the Supreme Court decisions in *Hancock v. Train*, 426 U.S. 167 (1976), *EPA v. California*, 426 U.S. 200 (1976), and *Johnson v. State of Maryland*, 254 U.S. 51 (1920), support the conclusion that Federal employees who use pesticides within the scope of their employment cannot be required to hold a State license. As discussed in Answer One above, Federal agencies are expected to make efforts to comply with State and local requirements per Executive Order 12088. Each agency will need to consider whether the training and certification provided to Federal employee pesticide users is comparable to a State's substantive requirements for commercial users of general use and unclassified pesticides.

Question 3: If a Federal employee is certified by his/her agency for a period of 4 years, but the neighboring State uses 2-year certification periods, will the Federal employee need to be recertified more frequently than each 4 years?

Response: The Certification rule at 171.305(e)(1) requires that Federal agency certification plans require their certified applicators to comply with “any substantive State or Tribal standards in regard to qualifications for commercial applicator certification that exceed the Federal agency's standards” if the Federally-certified applicator plans to make any RUP applications in areas not subject to exclusive Federal jurisdiction. Not all State and Tribal pesticide laws and regulations pertaining to certification are considered “substantive State or Tribal standards in regard to qualifications for commercial applicator certification” as that term is used in 171.305(e)(1). EPA considers the length of the recertification period to be a procedural requirement, so Federal agency-certified applicators would not be required to be recertified more frequently under the scenario presented so long as the agency-certified applicators can reasonably be expected to have a level of competency equal to or greater than that required by the State or Tribe and provided that the agency-certified applicator complies with all applicable State or Tribal laws and regulations when applying pesticides outside of Federal jurisdictions.

Question 4: Does EPA consider any State/Tribal “licensing” requirements for pesticide applicators to be “substantive” standards in regard to qualifications for commercial applicator certification that exceed the USDA/FS certification plan standards?

Response: Similar to the response to recertification periods in Question Three, EPA considers “licensing” requirements to be procedural requirements as opposed to “substantive State or Tribal standards in regard to qualifications for commercial applicator certification” under 171.305(e). Substantive standards in regard to qualifications for commercial applicator certification include, but are not limited to, such things as minimum age requirements, subject matter in regard to which the certified applicator is expected to be competent, and the expected level of competency. Other substantive standards that might be addressed in a certification plan include requirements regarding recordkeeping, reporting, and supervision of noncertified applicators.

Question 5: If State Y does not have reciprocity of certification with a second State X, but the Federal agency awards certification based upon State X's certification, is the Federal agency's awarded certification valid in both States?

Response: Under § 171.305(a)(10), a Federal agency may waive any or all of the procedures specified in § 171.103, § 171.105, and § 171.107 when certifying applicators in reliance on valid current certifications issued by another State, Tribal, or Federal agency under an EPA-approved certification plan. The Federal agency certification plan must explain whether, and if so, under what circumstances, the Federal agency will certify applicators based in whole or in part on their holding a valid current certification issued by another State, Tribe, or Federal agency.

The process a Federal agency uses to certify its applicators (e.g., agency's own training/testing versus prior certification by another certifying authority) does not necessarily affect the scope of the Federal agency applicator's certification. Therefore, if an agency wishes to Federally certify an applicator based on one State's certification, the Federal agency certification would be valid wherever the Federal agency says that certification would be valid under its plan. However, if a Federal agency intends for its applicators to use RUPs in areas not subject to exclusive federal jurisdiction (i.e., on State or Tribal lands), the Federal agency certification plan will need to address how the agency will assure that its applicators will meet the pertinent jurisdictions' substantive standards for the qualifications for commercial applicators that exceed the Federal agency's standards or any certifying authority's standards on which the Federal agency plan is relying upon. (See § 171.305(e)(1)).