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40 CFR Ch. I (7-1-02 Edition)

them to use or supervise the use of restricted use pesticides in a number of States.

(a) Sections 171.1 through 171.8 will, with the necessary changes, apply to the Government Agency Plan (GAP) for determining and attesting to the competency of Federal employees to use or supervise the use of restricted use pesticides.

(b) Federal employees qualified under the GAP shall:

(1) Be prepared to present the Federal form issued to them attesting to their competency to appropriate State officials.

(2) Fulfill any additional requirements States may have enumerated in their State plans as provided for under § 171.7(e)(4).

(c) The employing Federal agency shall ensure that certified employees using or supervising the use of restricted use pesticides within a Federal facility are subject to the same or equivalent provisions prescribed under § 171.7(b)(1)(iii) (A)-(E).

[40 FR 11704, Mar. 12, 1975]

§ 171.10 Certification of applicators on Indian Reservations.

This section applies to applicators on Indian Reservations.

(a) On Indian Reservations¹ not subject to State jurisdiction the appropriate Indian Governing Body² may choose to utilize the State certification program, with the concurrence of the State, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.

(1) If the Indian Governing Body decides to utilize the State certification program, it should enter into a cooperative agreement with the State. This agreement should include matters concerning funding and proper authority for enforcement purposes. Such agree-

¹The term *Indian Reservation* means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

²The term *Indian Governing Body* means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

ment and any amendments thereto shall be incorporated in the State plan, and forwarded to the Administrator for approval or disapproval.

(2) If the Indian Governing Body decides to develop its own certification plan, it shall be based on either Federal standards (§§ 171.1 through 171.8) or State standards for certification which have been accepted by EPA. Such a plan shall be submitted through the United States Department of the Interior to the EPA Administrator for approval.

(b) On Indian Reservations where the State has assumed jurisdiction under other Federal laws, anyone using or supervising the use of restricted use pesticides shall be certified under the appropriate State certification plan.

(c) Non-Indians applying restricted use pesticides on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan.

(d) Nothing in this section is intended either to confer or deny jurisdiction to the States over Indian Reservations not already conferred or denied under other laws or treaties.

[40 FR 11704, Mar. 12, 1975]

§ 171.11 Federal certification of pesticide applicators in States or on Indian Reservations where there is no approved State or Tribal certification plan in effect.

(a) *Applicability.* This section applies to persons in any State and on any Indian Reservation where, because there is no approved State or Tribal certification plan in effect, the Administrator implements an EPA plan for the Federal certification of applicators of restricted use pesticides.

(b) *Certification requirement.* In any State or on any Indian Reservation where this section is applicable, any person who uses or supervises the use of any pesticide classified for restricted use must be certified in accordance with this section. However, a competent person who is not certified may use a restricted use pesticide under the

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direct supervision of a certified applicator for uses authorized by the certified applicator's certification. Private applicator certification shall authorize only those uses, or the supervision of those uses, described in §171.2(t). Commercial applicator certification shall authorize only those uses, or the supervision of those uses, included within the specific category(ies) or subcategory(ies), described in §171.3(b) or an applicable Federal plan, in which the applicator is certified.

(c) *Certification of commercial applicators*—(1) *Categories for Commercial Applicators*. Categories referred to in this section are the same as those listed in §171.3(b). Determination of competency in each category shall conform to the requirements of §171.4(a).

(2) *Subcategories*. The Administrator may adopt subcategories as he or she deems necessary, consonant with the needs of the individual State or Reservation.

(3) *Standards for certification*. The standards of competency for certification of commercial applicators under this section are the same as those listed in §171.4 (b) and (c) and §171.6.

(4) *Certification procedure*. An individual who desires to be certified or recertified under this paragraph shall complete the EPA certification form and submit the form to the appropriate EPA Regional Office. In order to be initially certified as a commercial applicator under this paragraph, an individual must take and pass written examinations approved by the Administrator and administered by the Administrator or any other party approved by him or her. A general examination will be given, based on the general standards found in §171.4(b) and the standards for supervision found in §171.6. In addition, specific category and subcategory examinations will be given, based on the appropriate category or subcategory standards found in §171.4(c) and the applicable Federal plan. The Administrator will notify the individual in writing of the results of the examinations within 45 days unless special circumstances justify a longer time period. The Administrator will issue to each person who has passed a general examination and one or more

category or subcategory examinations a commercial applicator certificate covering each category and subcategory in which he or she has qualified. A commercial applicator certificate is valid for a period of three years from the date of issuance, unless earlier suspended or revoked by the Administrator (two years from the date of issuance, in the case of certificates issued prior to [effective date of amended rule]), and is valid within the State or Indian Reservation named on the certificate.

(5) *Re-examination*. Individuals failing to pass the required certification examination(s) may be re-examined after notification of failure. An individual seeking re-examination need take only the examination(s) which he or she originally failed.

(6) *Renewal of commercial applicator certification*. A certified commercial applicator may qualify for recertification by taking and passing written examinations as specified in paragraph (c)(4) of this section, or by successfully completing any available training program approved for this purpose by the Administrator. Recertification procedures must be completed by the certified commercial applicator during the twelve month period preceding the expiration date of his or her certificate.

(7) *Recordkeeping requirements*. (i) Each self-employed certified commercial applicator, each firm employing a certified commercial applicator, and each person who contracts with a certified commercial applicator (or his or her employer) to have a restricted use pesticide applied on property owned or operated by another person shall keep and maintain at their principal place of business true and accurate records of the use of restricted use pesticides, providing the following information:

(A) Name and address of the person for whom the pesticide was applied;

(B) Location of the pesticide application;

(C) Target pest(s);

(D) Specific crop or commodity, as appropriate, and site, to which the pesticide was applied;

(E) Year, month, day, and time of application;

(F) Trade name and EPA registration number of the pesticide applied;

(G) Amount of the pesticide applied and percentage of active ingredient per unit of the pesticide used; and

(H) Type and amount of the pesticide disposed of, method of disposal, date(s) of disposal, and location of the disposal site.

(ii) *Availability of required records.* Each certified commercial applicator shall keep all records required under this paragraph current and shall make such records available for inspection and copying by representatives of EPA for a period of at least two years from the date of use of the pesticide.

(d) *Certification of private applicators—*
 (1) *Certification procedures.* An individual who desires to be certified or recertified under this paragraph shall complete the EPA certification form and submit the form to the appropriate EPA Regional Office. In order to be certified or recertified as a private applicator to use restricted use pesticides, an individual must be determined competent with respect to the use and handling of pesticide. Standards for such determination are the same as those listed in §§ 171.5 and 171.6. The Administrator will offer one or more of the following certification options, including at least one option which does not require the applicator to take an examination—

(i) *Approved training course.* The individual may successfully complete an approved training course. Approved training courses may include courses sponsored by EPA, State cooperative extension services, State vocational agricultural courses, or private educational groups. Each training course for certification must be approved for that purpose by the Administrator and include, at a minimum, coverage of the private applicator standards listed in §§ 171.5 and 171.6, and a demonstration that the individual has successfully completed the training course. Subject to the approval of the Administrator, this demonstration may be accomplished by completion of a no pass/no fail written questionnaire or a workbook, receipt of a passing grade in an approved course offered by an educational institution, or any other equivalent procedure.

(ii) *Written examination.* The individual may pass a written examination

approved by the Administrator and administered by the Administrator or any other party approved by him or her.

(iii) *Self-study program.* The individual may successfully complete a self-study learning program approved by the Administrator and administered by the Administrator or any other party approved by him or her.

(iv) *Non-reader certification.* Non-readers may be certified for specific use(s) of a single product by successfully completing an approved training course as specified in (d)(1) (i) of this section, or by passing an oral examination approved by the Administrator and administered by the Administrator or any other party approved by him or her. Such training or testing shall incorporate a specific procedure relating to label comprehension, as described in § 171.5(b)(1).

(2) *Issuance of certificates.* The Administrator will issue a private applicator certificate to each individual who successfully completes any available certification option. Individuals who, for any reason, fail to complete successfully a certification option may attempt to complete the same option or, if available, an alternative option. A private applicator certificate is valid for a period of four years from the date of issuance (three years from the date of issuance, in the case of certificates issued before [effective date of amended rule]), unless earlier suspended or revoked by the Administrator, and is valid within the State or Indian Reservation named on the certificate.

(3) *Renewal of private applicator certification.* A certified private applicator may qualify for recertification by successfully completing any available certification option during the twelve month period preceding the expiration date of his or her certificate.

(e) *Recognition of other certificates.* The Administrator may issue a certificate to an individual possessing any other valid Federal, State or Tribal certificate without further demonstration of competency. The individual shall submit the EPA certification form and written evidence of valid certification to the appropriate EPA Regional Office. The Administrator may deny issuance of such certificate if the

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standards of competency for each category or subcategory identified in the other Federal, State or Tribal certificate are not sufficiently comparable to justify waiving further demonstration of competency. The Administrator may revoke, suspend, or modify such certificate if the Federal, State or Tribal certificate upon which it is based is revoked, suspended, or modified. Unless suspended or revoked, a certificate issued under this paragraph is valid for two years for commercial applicators and three years for private applicators, or until the expiration date of the original Federal, State or Tribal certificate, whichever occurs first.

(f) *Denial, suspension, modification or revocation of a certificate.* (1) The Administrator may suspend all or part of a certificate issued pursuant to this section, or, after opportunity for a hearing, may deny issuance of, or revoke or modify, a certificate issued pursuant to this section, if he or she finds that the applicant or certificate holder has been convicted under section 14(b) of the amended FIFRA, has been subject to a final order imposing a civil penalty under section 14(a) of the amended FIFRA, or has committed any of the following acts:

- (i) Used any registered pesticide in a manner inconsistent with its labeling;
- (ii) Made available for use, or used, any registered pesticide classified for restricted use other than in accordance with section 3(d) of the amended FIFRA and any regulations promulgated thereunder;
- (iii) Refused to keep and maintain any records required pursuant to this section;
- (iv) Made false or fraudulent records, invoices or reports;
- (v) Failed to comply with any limitations or restrictions on or in a duly issued certificate; or,
- (vi) Violated any provision of the amended FIFRA and the regulations promulgated thereunder.

(2) If the Administrator decides to deny, revoke, or modify a certificate, he or she will:

(i) Notify the applicant or certificate holder of:

(A) The ground(s) upon which the denial, revocation or modification is based;

(B) The time period during which the denial, revocation or modification is effective, whether permanent or otherwise;

(C) The conditions, if any, under which the individual may become certified or recertified; and,

(D) Any additional conditions the Administrator may impose.

(ii) Provide the applicant or certificate holder an opportunity to request a hearing prior to final Agency action to deny, revoke or modify the certificate.

(3) If a hearing is requested by an applicant or certificate holder pursuant to paragraph (f)(2)(ii) of this section, the Administrator will:

(i) Notify the affected applicant or certificate holder of those assertions of law and fact upon which the action to deny, revoke or modify the certificate is based;

(ii) Provide the affected applicant or certificate holder an opportunity to offer written statements of facts, explanations, comments, and arguments relevant to the proposed action;

(iii) Provide the affected applicant or certificate holder such other procedural opportunities as the Administrator may deem appropriate to ensure a fair and impartial hearing; and

(iv) Appoint an attorney in the Agency as Presiding Officer to conduct the hearing. No person shall serve as Presiding Officer if he or she has had any prior connection with the specific case.

(4) The Presiding Officer appointed pursuant to paragraph (f)(3)(iv) of this section shall:

(i) Conduct a fair, orderly, and impartial hearing, without unnecessary delay;

(ii) Consider all relevant evidence, explanation, comment, and argument submitted pursuant to paragraphs (f)(3)(ii) and (iii) of this section; and,

(iii) Promptly notify the affected applicant or certificate holder of his or her decision and order. Such an order is a final Agency action subject to judicial review in accordance with Section 16 of the amended FIFRA.

(5) If the Administrator decides to suspend all or part of a certificate, he or she will:

(i) First determine that the public health, interest or welfare warrants

immediate action to suspend the certificate;

(ii) Notify the certificate holder of the ground(s) upon which the suspension action is based;

(iii) Notify the certificate holder of the time period during which the suspension is effective; and,

(iv) Notify the certificate holder of his or her intent to revoke or modify the certificate, as appropriate, in accord with paragraph (f)(2) of this section. If such revocation or modification notice has not previously been issued, it will be issued at the same time the suspension notice is issued.

(6) In cases where the act constituting grounds for suspension, revocation, or modification of a certificate is neither willful nor contrary to the public interest, health, or safety, the affected certificate holder may have additional procedural rights under 5 U.S.C. 558(c).

(7) Any notice, decision, or order issued by the Administrator under paragraph (f) of this section, and any documents filed by an applicant or certificate holder in a hearing under paragraph (f) of this section, shall be available to the public except as otherwise provided by section 10 of the amended FIFRA or by part 2 of this title. Any such hearing at which oral testimony is presented shall be open to the public, except that the Presiding Officer may exclude the public to the extent necessary to allow presentation of information which may be entitled to confidentiality under section 10 of the amended FIFRA or under part 2 of this title.

(g) *Pesticide dealer reporting and recordkeeping requirements, availability of records, and failure to comply*—(1) *Reporting requirements.* Each person who is a restricted use pesticide retail dealer in a State or on an Indian Reservation where the Administrator conducts the applicator certification and training program shall:

(i) Report to the Environmental Protection Agency (EPA) the business name by which the restricted use pesticide retail dealer operates, and the name and business address of each of his dealerships. For dealers or dealerships in Nebraska this initial report must be submitted to EPA, Region VII,

324 E. 11th Street, Kansas City, MO 64106. For dealers or dealerships in Colorado this initial report must be submitted to EPA, Region VIII, 1860 Lincoln Street, Denver, Colorado 80295. This report shall be submitted to the appropriate EPA regional office no later than 60 days after the date the person first becomes a restricted use pesticide retail dealer, or within 60 days after the publication of the effective date of this final rule, whichever date is later.

(ii) Submit revisions to the initial report to the appropriate EPA regional office listed above reflecting any name changes, additions or deletions of dealerships. Revisions shall be submitted to EPA within 10 days of the occurrence of such change, addition or deletion.

(2) *Recordkeeping requirement.* Recordkeeping is required when making restricted use pesticides available to:

(i) *Certified applicators.* Each restricted use pesticide retail dealer shall maintain at each individual dealership records of each transaction where a restricted use pesticide is made available for use by that dealership to a certified applicator. Record of each such transaction shall be maintained for a period of 24 months after the date of the transaction, and shall include the following information:

(A) Name and address of the residence or principal place of business of each person to whom the pesticide was made available for use.

(B) The certification number on the document evidencing that person's certification, the State (or other governmental unit) that issued the document, the expiration date of the certification, and the categories in which the applicator is certified, if appropriate.

(C) The product name, EPA registration number, and the State special local need registration number, granted under section 24(c) of the FIFRA (if any) on the label of the pesticide.

(D) The quantity of the pesticide made available for use in the transaction.

(E) The date of the transaction.

(ii) *Uncertified persons.* No dealer or dealership may make a restricted use pesticide available to an uncertified person unless he can document that

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the restricted use pesticide will be used by a certified applicator, and he maintains the records required in this subsection. Each restricted use pesticide retail dealer shall maintain records at each individual dealership of each transaction where a restricted use pesticide was made available to an uncertified person for use by a certified applicator. Records of each such transaction shall be maintained for a period of 24 months after the date of the transaction, and shall include the following information:

(A) The name and address of the residence or principal place of business of the uncertified person to whom the restricted use pesticide is made available for use by a certified applicator.

(B) The name and address of the residence or principal place of business of the certified applicator who will use the restricted use pesticide.

(C) The certified applicator's certification number, the State (or other governmental unit) that issued his certification document, the expiration date of the certification, and the categories in which the applicator is certified, if appropriate.

(D) The product name, EPA registration number, and the State special local need registration number, granted under section 24(c) of the FIFRA (if any) on the label of the pesticide.

(E) The quantity of the pesticide made available for use in the transaction.

(F) The date of the transaction.

(G) At the time of each transaction, EPA recommends that the dealer obtain the information required in paragraph (g)(2)(ii) (A) through (C) of this section and assure himself that the restricted use pesticide is made available for use by a certified applicator by examining one of the following sets of documents:

(1) The original of the certified applicator's certification document, and a driver's license or other State, county, or Tribal identification document issued to the uncertified person to whom the restricted use pesticide is made available.

(2) A photocopy or facsimile of the certified applicator's certification document, together with a statement signed by the certified applicator authorizing the uncertified person to purchase the restricted use pesticide on his behalf, and a driver's license or other State, county, or Tribal identification document issued to the uncertified person to whom the restricted use pesticide is made available.

(3) A photocopy or facsimile of the certified applicator's certification document, together with a copy of a signed contract or agreement, between the uncertified person to whom the restricted use pesticide is being made available for use and the identified certified applicator, which provides for the use of the restricted use pesticide by the identified certified applicator, and a driver's license or other State, county, or Tribal identification document issued to the uncertified person to whom the restricted use pesticide is made available.

(3) *Availability of required records.* Each pesticide dealer shall, upon request of any officer or employee of EPA duly designated by the Administrator, furnish or permit such person at all reasonable times to have access to and copy all records required to be maintained under this section.

(4) *Failure to comply.* Any person who fails to comply with the provisions of this rule may be subject to civil or criminal sanctions, under section 14 of the Act, or 18 U.S.C. 1001. Violations include failure to submit or falsification of any report required under this paragraph, failure to maintain or falsification of records as required under this section, and making available for use any pesticide classified for restricted use to a person who is not a certified commercial applicator other than in accordance with these regulations and section 3(d) of the amended FIFRA or rules promulgated thereunder.

[43 FR 24837, June 8, 1978, as amended at 48 FR 29855, June 29, 1983; 48 FR 53974, Nov. 29, 1983; 49 FR 17759, Apr. 25, 1984; 58 FR 34203, June 23, 1993]