

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, STATE OF
CALIFORNIA, STATE OF ILLINOIS,
STATE OF MARYLAND, and STATE
OF MINNESOTA,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; and
ANDREW WHEELER, *in his official
capacity as Administrator of the United
States Environmental Protection Agency,*

Defendants.

20 Civ. 10642

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges a U.S. Environmental Protection Agency regulation that needlessly increases the risk of exposure to harmful pesticides by permitting pesticide handlers to continue pesticide applications despite the presence of farmworkers or other persons within the area immediately surrounding the application equipment.

2. Federal law requires EPA to take steps to protect humans and the environment from unreasonable adverse effects of pesticides. Consistent with this obligation, EPA has published regulations known as the “Worker Protection Standard” intended to reduce the risk of illness and injury resulting from exposure to pesticides. *See* 40 C.F.R. Part 170.

3. In 2015, for the first time in nearly twenty-five years, EPA updated and strengthened its Worker Protection Standard “to prevent unreasonable adverse effects from exposure to pesticides among agricultural workers and pesticide handlers, vulnerable groups

(such as minority or low-income populations, child farmworkers, and farmworker families) and other persons who may be on or near agricultural establishments.” *Pesticides; Agricultural Worker Protection Standard Revisions*, 80 Fed. Reg. 67,496, 67,496 (Nov. 2, 2015) (the “2015 Rule”).

4. Among the measures included in the 2015 Rule to address exposure to pesticides, and to reduce the chronic and acute health impacts associated with those exposures, was the creation of an “Application Exclusion Zone,” referring to the area around pesticide application equipment that must be free of all persons other than trained and equipped handlers during pesticide applications. *Id.* at 67,496-97, 67,521–25, 67,564.

5. But in October 2020, EPA issued a rule that significantly curtails the protections of the Application Exclusion Zone, threatening the health and safety of farmworkers, their families, and others. *Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements*, 85 Fed. Reg. 68,760 (Oct. 30, 2020) (the “Final Rule”) (appended as Ex. 1).

6. In promulgating the Final Rule, EPA departed from the agency’s recent prior position without adequate justification or factual support; relied on an analysis of costs and benefits that fails to justify any changes to the Application Exclusion Zone; made a decision that runs counter to the evidence before the agency, including with regard to the ability of Plaintiffs and other States to comply with the 2015 Rule; and failed entirely to identify and address the disproportionately high and adverse effects of this policy change on minority and low-income populations.

7. The Final Rule’s unjustified and unwarranted changes to the Application Exclusion Zone will increase the risk of pesticide exposure among farmworkers, their families,

and others, and will injure Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests.

8. Plaintiffs the State of New York, State of California, State of Illinois, State of Maryland, and State of Minnesota therefore bring this action to vacate the Final Rule and enjoin its implementation because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); and because it exceeds and is contrary to Defendants' statutory jurisdiction, authority, and limitations in violation of the APA, 5 U.S.C. § 706(2)(C).

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). Jurisdiction is also proper under the judicial review provisions of the APA, 5 U.S.C. § 702.

10. Declaratory and injunctive relief is sought consistent with 5 U.S.C. § 706 and as authorized in 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiff the State of New York is a resident of this judicial district, and a substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

12. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized under N.Y. Executive Law § 63 to pursue this action.

13. Plaintiff the State of California, by and through Attorney General Xavier Becerra, is a sovereign state of the United States of America. As California's Chief Law Officer, the Attorney General has the authority to file civil actions to protect public rights and interests and promote the health and welfare of Californians. Cal. Const. art. V, § 13. This challenge is brought pursuant to the Attorney General's independent constitutional, statutory, and common law authority to represent the public interest.

14. Plaintiff the State of Illinois brings this action by and through Attorney General Kwame Raoul. The Attorney General is the chief legal officer of the State of Illinois, Ill. Const., art. V, § 15, and "has the prerogative of conducting legal affairs for the State," *Env't'l Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 51 (Ill. Sup. Ct. 1977). He has common law authority to represent the People of the State of Illinois and "an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State." *People v. NL Indus.*, 604 N.E.2d 349, 358 (Ill. Sup. Ct. 1992).

15. Plaintiff the State of Maryland, represented by its Attorney General, is a sovereign state of the United States of America. The Attorney General has general charge of the legal business of the State of Maryland, Md. Code Ann., State Gov't § 6-106, and is authorized to investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government's action or inaction that threatens the public interest and welfare of the residents of the State with respect to, among other things, protecting the health of the residents of the State or protecting the natural resources and environment of the State, *id.* § 6-106.1(b).

16. Plaintiff the State of Minnesota, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Keith Ellison is the chief

legal officer of the State of Minnesota and his powers and duties include filing lawsuits in federal court on behalf of the State of Minnesota. Minn. Stat. § 8.01.

17. Plaintiffs are aggrieved by Defendants' conduct and have standing to bring this action because the Final Rule harms Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury until the Final Rule is invalidated.

18. Defendant EPA is an agency within the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). EPA promulgated the Final Rule and is responsible for its enforcement.

19. Defendant Andrew Wheeler is the current Administrator of EPA and is responsible for the operations of the agency. He is sued in his official capacity.

ALLEGATIONS

I. Statutory and regulatory background.

20. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136–136y, requires EPA to take steps to protect humans and the environment from unreasonable adverse effects of pesticides.

21. Consistent with this obligation, EPA has published regulations intended to reduce the risk of illness and injury resulting from occupational exposure to pesticides while working on farms or in forests, nurseries, and greenhouses. *See* 40 C.F.R. Part 170 (the "Worker Protection Standard").

22. The Worker Protection Standard is “primarily intended to reduce the risks of illness or injury to workers¹ and handlers² resulting from occupational exposures to pesticides used in the production of agricultural plants on agricultural establishments.” 40 C.F.R. § 170.301.

23. In 2015, EPA updated and strengthened the Worker Protection Standard to better protect against unreasonable adverse effects from exposure to pesticides among agricultural workers, pesticide handlers, vulnerable groups, and other persons near agricultural establishments. 80 Fed. Reg. at 67,496.

24. The 2015 Rule established interrelated exposure-reduction measures to address the continuing exposure of workers, handlers, and bystanders to pesticide applications, and to reduce acute and chronic health impacts associated with these exposures.

25. Among these measures, the Worker Protection Standard established requirements to be followed by agricultural employers, commercial pesticide handler employers, and handlers to “take measures to protect workers and other persons during pesticide applications.” *Id.*

26. As relevant to this lawsuit, the 2015 Rule included the creation of an Application Exclusion Zone, referring to the area around pesticide application equipment that must be free of all persons other than appropriately trained and equipped handlers during pesticide applications. 80 Fed. Reg. at 67,496-97, 67,521–25, 67,564.

¹ The Worker Protection Standard defines a “worker” as “any person, including a self-employed person, who is employed and performs activities directly relating to the production of agricultural plants on an agricultural establishment.” 40 C.F.R. § 170.305.

² A “handler” is any person “who is employed by an agricultural employer or commercial pesticide handler employer” and who performs activities such as “mixing, loading, or applying pesticides,” “disposing of pesticides,” “handling opened containers of pesticides,” or “assisting with the application of pesticides.” 40 C.F.R. § 170.305.

27. The Application Exclusion Zone is a circle surrounding the location of the application equipment that moves as the application equipment moves, and whose radius varies from 25 to 100 feet depending on the method of application. *Id.* at 67,523, 67,564; *see also* 40 C.F.R. § 170.405(a)(1).

28. The 2015 Rule established several requirements with respect to the Application Exclusion Zone, including (1) that agricultural employers not allow any workers or other persons inside the Application Exclusion Zone within the boundaries of the establishment until the application is complete, *see* 40 C.F.R. § 170.405(a)(2), and (2) that handlers performing a pesticide application immediately suspend the application if any workers or other persons (excluding trained and equipped handlers) are present within the Application Exclusion Zone, including where the Application Exclusion Zone may extend beyond the boundaries of the establishment, *see* 40 C.F.R. § 170.505(b).

29. In other words, the 2015 Rule creates both a “keep out” requirement, 40 C.F.R. § 170.405(a)(2), obligating employers to keep workers and other persons out of the Application Exclusion Zone within the boundaries of the establishment; and a “suspend application” requirement, *id.* § 170.505(b), obligating handlers to suspend pesticide application if any person is within the Application Exclusion Zone, including if the Application Exclusion Zone extends beyond the boundaries of the establishment.

30. When creating these requirements, EPA acknowledged that the pre-2015 Worker Protection Standard already included a “do not contact” requirement—that is, a requirement that “employers and handlers . . . assure that no pesticide is applied so as to contact, either directly or through drift, any worker or other person, other than an appropriately trained and equipped handler.” 80 Fed. Reg. at 67,523.

31. EPA nonetheless determined that the creation of an Application Exclusion Zone, and the requirement to suspend application when workers or other persons come within the Application Exclusion Zone during pesticide application, were critical *additional* steps necessary to protect human health: “EPA has identified a need to supplement the ‘do not contact’ performance standard because exposure to drift or direct spray events still happen despite the ‘do not contact’ requirement.” *Id.* at 67,524.

32. EPA further concluded that requiring applicators to suspend activities even when the Application Exclusion Zone extends beyond the boundaries of the agricultural establishment was warranted for several reasons, including that it was necessary to protect against harmful worker and bystander exposure, and because the existing “do not contact” requirement likewise extended beyond the boundaries of the establishment. *See id.*

II. Farms, pesticide use, and farmworkers in the Plaintiff States.

33. Agriculture is a critical component of the economy in each of the Plaintiff States, and each Plaintiff’s agricultural sector employs tens of thousands of farmworkers each year.

34. Nearly one-quarter of New York, or 7.2 million acres, is covered by farms. Of this farmland, 59 percent is dedicated to crops. As of 2012, New York was home to more than 35,500 farms. *See N.Y. State Comptroller, The Importance of Agriculture to the New York State Economy*, at 1 (Mar. 2015).³

35. Agriculture occurs in every region of New York State. For example, New York’s Hudson Valley Region (including Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester counties) has approximately 2,400 farms occupying 340,000 acres of farmland. *See id.* at 4.

³ Available at http://www.osc.state.ny.us/reports/economic/importance_agriculture_ny.pdf.

36. New York ranks in the top ten, by sales, for a number of agricultural commodities. For example, New York ranks second nationwide in apple production, third for grapes, and fourth for pears. *Id.* at 2. The State is also one of the top ten producers nationwide of cherries, peaches, strawberries and for many types of vegetables, including cabbage, cauliflower, cucumbers, onions, pumpkins, beans, squash, sweet corn, and tomatoes. *Id.*

37. The New York State Comptroller's Office reported that, during 2012, nearly 61,000 individuals were employed as hired farm labor. *Id.*

38. The New York State Department of Labor cites the agriculture industry in New York as employing 40,000 to 80,000 farmworkers every year, including domestic, guest worker, year-round, and migrant and seasonal farmworkers. *See* N.Y. State Dep't of Labor, *State Monitor Advocate—New York*.⁴

39. In New York, the Worker Protection Standard regulations are enforced by the New York State Department of Environmental Conservation ("NYSDEC"), which informs regulated entities of their obligations under the regulations, conducts routine inspections of regulated entities, and investigates complaints of violations of those regulations.

40. According to NYSDEC, the total amount of pesticides reported as applied by commercial applicators in 2013 was over 2.9 million gallons of liquids and 24.3 million pounds of solids. *See* N.Y. State Dep't of Env'tl. Conservation, *Final Annual Report For New York State Pesticide Sales and Applications 2013*, at 1 (2013).⁵ In the same year, over 910,000 gallons of liquid pesticides and more than 3.9 million pounds of solid pesticides were sold to private applicators for agricultural use in New York. *See id.* at 3.

⁴ Available at <https://labor.ny.gov/immigrants/state-monitor-advocate.shtm> (last visited Dec. 16, 2020).

⁵ Available at https://www.dec.ny.gov/docs/materials_minerals_pdf/prl2013.pdf.

41. California is home to 69,400 farms and ranches, totaling 24.3 million acres of land. With farm receipts generating over \$50 billion in agricultural output in 2019, California provides more than a third of the nation's vegetables and two-thirds of the country's fruit and nuts. *See* Cal. Dep't Food & Agric., *Cal. Agric. Statistics Review 2018–19*, at 2 (Aug. 2019)⁶; Cal. Dep't Food & Agric., *California Agricultural Production Statistics*.⁷

42. Approximately 829,300 people were employed as farmworkers in California in 2014. *See* Philip Martin et al., *How many workers are employed in California agriculture?*, 71 *Cal. Agric.*, at 30–34 (Aug. 2016).

43. In 2017, reported pesticide use in California totaled 204.7 million pounds of applied active ingredients and 104.3 million cumulative acres treated. *See* Cal. Dep't Pesticide Regulation, *2017 Pesticide Use Report Highlights*, at 2 (June 2019).

44. In California, the Department of Pesticide Regulation enforces federal and state pesticide regulations. The Department's oversight includes pesticide product evaluation and registration; statewide licensing of pesticide professionals; evaluation of pesticides' impacts on human health; environmental monitoring of air, water, and soil; field enforcement, in conjunction with county agricultural commissioners, of laws regulating pesticide use; residue testing of fresh produce; and encouraging development and adoption of least-toxic pest management practices through incentives and grants.

45. In January 2017, California amended its existing worker safety regulations to align with the 2015 federal Application Exclusion Zone provisions. *See* Cal. Code Regs. tit. 3, § 6762. California's Application Exclusion Zone provisions supplement existing state

⁶ Available at <https://www.cdffa.ca.gov/statistics/PDFs/2018-2019AgReportnass.pdf>.

⁷ Available at <https://www.cdffa.ca.gov/Statistics/> (last visited Dec. 16, 2020).

regulations that protect farmworkers, their families, and rural communities from the public health and environmental impacts of pesticide exposure. The Final Rule will sow confusion in this regulatory space, where previously the state's rules were functionally equivalent to the well-reasoned 2015 Rule. In addition, Californians who travel out of the state for agricultural work will not be protected by state Application Exclusion Zone regulations and may be injured by pesticide exposure because of the rule change.

46. Maryland is home to more than 12,400 farms spanning some 2 million acres, or nearly one-third of the state's land area. Most of Maryland's farmland is located on the upper Eastern Shore and in the north central portion of the state. U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *2018–2019 Agricultural Statistics Annual Bulletin: Maryland*, at 4.⁸ The State's most valuable crop products include corn and soybeans. *See id.* at 5-6. Maryland ranks in the top ten states for production of lima beans, watermelons, summer potatoes, and barley. *Id.* at 3.

47. In 2015, more than 16,000 people were employed in Maryland's agricultural sector. *See* Bus. Econ. & Cmty. Outreach Network at Salisbury Univ., *The Impact of Resource Based Industries on Maryland's Economy*, at 10 (Jan. 30, 2018).⁹

48. Within Maryland, the State's Department of Agriculture implements and enforces various pesticide regulations, including the Worker Protection Standard regulations. In addition to conducting on-site inspections, the Department conducts compliance presentations for

⁸ Available at

https://www.nass.usda.gov/Statistics_by_State/Maryland/Publications/Annual_Statistical_Bulletin/2018/2018_2019_MD_Annual_Bulletin.pdf.

⁹ Available at

https://www.marbidco.org/_pdf/2018/Full_Report_All_Maryland_Resource_Based_Industries_Becon_2018.pdf

employers. In 2014, nearly 5 million pounds of pesticides were applied in Maryland. *See* Md. Dep't of Agriculture et al., *Maryland Pesticide Statistics for 2014* (Oct. 2016).¹⁰

49. Minnesota ranks fifth in the nation in agricultural production, with \$17 billion in agricultural sales in 2017. Minnesota Department of Agriculture, *Economic Analysis & Market Research*.¹¹ Agricultural production and processing industries generate over \$112 billion annually and support more than 430,000 jobs. *Id.*

50. Minnesota has 73,200 farms on 26 million acres of farmland, comprising more than half of the state's total land area. Minnesota Department of Agriculture, *Minnesota Agricultural Profile*.¹² Agriculture is Minnesota's top exporting industry. *Id.* Soybeans, corn, and pork are the top three agricultural products exported from Minnesota. *Id.*

51. In Minnesota, the Department of Agriculture enforces federal and state pesticide regulations. The department regulates the use, application, storage, sale, handling and disposal of agricultural chemicals. Agricultural Chemical Inspectors conduct routine inspections statewide and enforcement staff review inspector reports to determine if violations have occurred. *See* Minnesota Department of Agriculture, *Regulation, Inspection & Enforcement*.¹³

¹⁰ Available at <http://mda.maryland.gov/plants-pests/Documents/MarylandPesticideSurveyPub.pdf>.

¹¹ Available at <https://www.mda.state.mn.us/business-dev-loans-grants/economic-analysis-market-research>.

¹² Available at <https://www.mda.state.mn.us/sites/default/files/inline-files/mnagprofile2019.pdf>. The profile was created in 2019 with data through 2017.

¹³ Available at <https://www.mda.state.mn.us/pesticide-fertilizer/regulation-inspection-enforcement>.

52. In 2018, reported pesticide use in Minnesota totaled over 2 million pounds on corn and 2.3 million pounds on soybeans. U.S. Dep't of Agric., *Minnesota Ag News—Chemical Use*.¹⁴

III. Pesticide exposure among farmworkers, handlers, and their families.

53. The agricultural sector ranks among the most hazardous industries in the country. *See* Centers for Disease Control & Prevention, National Institute for Occupational Safety & Health (“NIOSH”), *Agricultural Safety*.¹⁵

54. Farmworkers experience particularly high rates of fatal and nonfatal injuries and illnesses. *See id.*; *see also* Ramya Chari, Amii M. Kress, & Jaime Madrigano, RAND Corporation, *Injury & Illness Surveillance of U.S. Agricultural Workers*, at ix (2017).¹⁶

55. These injuries and illnesses include occupational exposure to pesticides. *See* 80 Fed. Reg. at 67,498 (EPA determination in promulgating the 2015 Rule that a “sizeable portion of the agricultural workforce may be exposed occupationally to pesticides and pesticide residues”).

56. According to NIOSH, during the period from 1998 to 2011, there were nearly ten thousand reported cases of acute pesticide-related adverse health effects resulting from exposure

¹⁴ Available at https://www.nass.usda.gov/Statistics_by_State/Minnesota/Publications/Other_Press_Releases/2019/MN-Ag-Chem-Corn-Soybeans-2019.pdf.

¹⁵ Available at <https://www.cdc.gov/niosh/topics/aginjury/default.html> (last visited Dec. 16, 2020).

¹⁶ Available at https://www.rand.org/pubs/research_reports/RR1500.html.

to a pesticide product while at work. See Centers for Disease Control & Prevention, NIOSH Worker Health Charts, *Acute Pesticide-Related Illnesses Charts*.¹⁷

57. In addition, as EPA has previously acknowledged, “illness resulting from pesticide exposure to workers and handlers is underreported,” with studies indicating that underreporting ranges from 20 to 70 percent for occupational illnesses and for poisoning incidents. See U.S. Environmental Protection Agency, Office of Pesticide Programs, *Economic Analysis of the Agricultural Worker Protection Standard Revisions*, at 123, 132 (Nov. 12, 2015) (the “2015 EPA Economic Analysis”).¹⁸

58. Moreover, many pesticide exposures do not result in acute symptoms but, when accumulated over time, can result in chronic symptoms that may occur many years after exposure. *Id.* at 132.

59. Acute symptoms from overexposure to pesticides vary, and can range from mild skin irritation to more severe effects. Severity of symptoms depends largely on the dose and route of exposure. For example, exposure to organophosphate pesticides can result in headaches, fatigue, dizziness, nausea, cramps, diarrhea, and impaired vision. Severe acute exposures can result in seizures, respiratory depression, loss of consciousness, and death. *Id.* at 122.

60. In addition to these acute effects, there are chronic health effects that may be associated with generalized pesticide exposure. There is a wide range of literature demonstrating statistical associations between pesticide exposure and cancer, including blood cancers, prostate cancer, and lung cancer. *Id.* at 162. In addition, preliminary investigations have identified

¹⁷ Available at <https://www.cdc.gov/Niosh-whc/chart/SENSOR-PE> (last visited Dec. 14, 2020)

¹⁸ Available at <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OPP-2011-0184-2522&contentType=pdf>.

elevated risks of respiratory and neurological effects, including asthma, chronic bronchitis, and Parkinson's disease, from chronic exposure to pesticides. *Id.* at 159–66.

61. Pesticides pose particularly dangerous risks to the children of farmworkers and pesticide handlers. Studies have shown an association between mothers exposed to pesticides during pregnancy and increased risk of birth defects and fetal death. Other studies have reported delayed mental development and development of behavior related to attention-deficit / hyperactivity disorder associated with increased childhood exposure to organophosphate pesticides. *Id.* at 124–27.

62. Children in the families of farmworkers may be exposed to pesticides when their parents or siblings transport the pesticides into the home on their skin, clothing, and shoes. As EPA has recognized, “[c]hildren may experience different exposures than adults due to behavioral differences like crawling on the floor and putting objects into their mouths, and they can be more sensitive to these exposures because their organ systems are still developing, and they have relatively low body weights.” *Id.* at 119.

63. Communicating the risks of pesticides to farmworkers can be challenging due to language barriers and other factors. According to the U.S. Department of Labor, 75 percent of farmworkers in the United States were born in Mexico and 2 percent were born in Central America, and 81 percent of this group speaks Spanish as a native language. *See Pesticides; Agricultural Worker Protection Standard Revisions; Proposed Rule*, 79 Fed. Reg. 15,444, 15,452 (Mar. 19, 2014). Approximately 44 percent cannot speak English at all and 53 percent cannot read any English. *Id.*

64. EPA has noted that the “low literacy rates, range of non-English languages spoken by workers and handlers, economic situation, geographic isolation, difficulty accessing

health care, and immigration status of workers and handlers pose challenges for communicating risk management information and ensuring that these groups are adequately protected.” *Id.* at 15,457.

65. Farmworkers are predominately low-income and Hispanic, and are particularly vulnerable to exploitative labor conditions and resultant overexposure to harmful pesticides due to linguistic barriers, immigration status, and other factors. *See* U.S. Dep’t of Agric., Econ. Research Serv., *Farm Labor*.¹⁹

66. As of 2017, the majority of farm laborers are people of color (68 percent), most of whom are Hispanic of Mexican origin (57 percent). *Id.* Farm laborers in 2019 made an average of \$13.99 per hour, less than 60 percent of the average nonfarm wage. *Id.*

67. Among these minority farmworkers, occupational pesticide-related illness is already underreported. *See* Joanne Bonnar Prado et al., *Acute Pesticide-Related Illness Among Farmworkers: Barriers To Reporting To Public Health Authorities*, 22 *J. Agromedicine* 395 (2017).

IV. The Final Rule revising the Application Exclusion Zone requirements.

68. On February 24, 2017, President Trump signed an Executive Order entitled “Enforcing the Regulatory Reform Agenda.” Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017). Among other requirements, the Executive Order directed federal agencies to establish a “Regulatory Reform Task Force” to “evaluate existing regulations . . . and make recommendations to the agency head regarding their repeal, replacement, or modification,” and

¹⁹ Available at <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> (last updated Apr. 22, 2020).

to “seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations.” *Id.* at §§ 3(d), 3(e), 82 Fed. Reg. at 12,285–86.

69. On April 13, 2017, as directed by Executive Order 13,777, EPA published a request for comment to seek input on “regulations that may be appropriate for repeal, replacement, or modification.” *Evaluation of Existing Regulations*, 82 Fed. Reg. 17,793, 17,793 (Apr. 13, 2017).

70. Subsequently, on December 21, 2017, EPA published notice “that it has initiated a rulemaking process to revise certain requirements in the Agricultural Worker Protection Standard.” *Pesticides; Agricultural Worker Protection Standard; Reconsideration of Several Requirements and Notice About Compliance Dates*, 82 Fed. Reg. 60,576, 60,576 (Dec. 21, 2017). EPA announced that it was reconsidering three aspects of the 2015 Rule, including the Application Exclusion Zone. *Id.* at 60,576–77.

71. The agency claimed that this reconsideration was based on comments regarding the Application Exclusion Zone that were submitted in response to the “Regulatory Reform Agenda” Executive Order and EPA’s request for comments regarding that Executive Order. 82 Fed. Reg. at 60,576.

A. The 2019 Proposed Rule.

72. On November 1, 2019, EPA published in the Federal Register a Notice of Proposed Rulemaking proposing several changes to the Application Exclusion Zone. *Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements*, 84 Fed. Reg. 58,666 (Nov. 1, 2019) (the “Proposed Rule”).

73. EPA proposed to lessen the protections that the 2015 Rule established by revising the Application Exclusion Zone in two critical ways: First, EPA proposed to revise both the “keep out” and the “suspend application” requirements to allow pesticide applications to occur or

resume while persons not employed by the establishment are present on easements within the boundaries of the agricultural establishment. *See id.* at 58,670, 58,674.

74. Second, EPA proposed to revise the “suspend application” requirement to limit the Application Exclusion Zone to the boundaries of the establishment. *See id.* at 58,670, 58,674.

75. EPA claimed that these proposed revisions were based on “extensive outreach and training efforts” after promulgation of the 2015 Rule, and on approximately 25 comments received in response to the agency’s Regulatory Reform Agenda efforts. 84 Fed. Reg. at 58,668. The agency also claimed to be relying on feedback it had solicited regarding the Application Exclusion Zone during two 2017 meetings of the agency’s Pesticide Program Dialogue Committee. *See id.*

76. EPA received over 28,000 written comments on the Proposed Rule. 85 Fed. Reg. at 68,765. “Most of the comments submitted to the docket expressed opposition to EPA finalizing the proposed changes.” *Id.*

B. The Final Rule.

77. EPA published the Final Rule on October 30, 2020, with an effective date of December 29, 2020. *See* 85 Fed. Reg. at 68,760.

78. The Final Rule largely adopted the changes to the Application Exclusion Zone as proposed. *See Request for Waiver of FIFRA Scientific Advisory Panel (SAP) Review of the Final Rule; Pesticides; Agricultural Worker Protection Standard; Revision of the Application*

Exclusion Zone Requirements (Oct. 6, 2020) (“EPA further notes that there are few substantive changes from the rule as proposed to this draft final rule.”).²⁰

79. First, the Final Rule revised the “suspend application” requirement to limit the Application Exclusion Zone so it applies only within the boundaries of an agricultural employer’s establishment. *See* 85 Fed. Reg. at 68,761, 68,771–73, 68,782 (to be codified at 40 C.F.R. § 170.505(b)(1)). Pursuant to this change, handlers can continue applying harmful pesticides despite the presence of farmworkers or other persons within the presumptively dangerous Application Exclusion Zone, so long as those farmworkers are located outside the employer’s establishment. *Id.*

80. Second, the Final Rule revised both the “keep out” and the “suspend application” requirements to allow pesticide applications to occur or continue while persons not employed by the establishment (for example, utility workers) are present on easements within the boundaries of the agricultural establishment. *See* 85 Fed. Reg. at 68,761, 68,773–74, 68,781–82 (to be codified at 40 C.F.R. §§ 170.405(a)(2)(ii), 170.505(b)(1)(ii)). This change allows handlers to continue applying harmful pesticides in close proximity to utility workers and others who are on the agricultural employer’s property, so long as those workers are on an easement within the property. *See id.*

81. In making these changes, EPA contended that protections against harmful exposure to pesticides will not be weakened because the “do not contact” requirement of the Worker Protection Standard still applies. *E.g.*, 85 Fed. Reg. at 68,768–69, 68,772–73.

²⁰ Available at <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OPP-2017-0543-0156&contentType=pdf>.

82. This determination is counter to extensive evidence before the agency that the “do not contact” requirement alone is insufficient to prevent harmful pesticide exposure, and is an unjustified reversal of the agency’s prior factual finding—just a few years ago—that the Application Exclusion Zone was necessary “to supplement the ‘do not contact’ performance standard because exposure to drift or direct spray events still happen despite the ‘do not contact’ requirement.” 80 Fed. Reg. at 67,524.

83. The Final Rule further justifies its reliance on the “do not contact” requirement alone by asserting without support that future training efforts may make the “do not contact” requirement more effective. *See* 85 Fed. Reg. at 68,769 (“EPA is open to working with the various stakeholder groups on other training or educational materials so that handlers have the information and tools so as not to spray pesticides in a manner that results in contact with anyone on or off the establishment.”).

84. Speculation about future compliance based on hypothetical future training or educational materials does not constitute a reasoned analysis supporting EPA’s change to the Application Exclusion Zone, and does not provide a rational connection between the facts found and the choice made.

85. The Final Rule relies on a Cost Analysis purporting to analyze potential cost savings for the Application Exclusion Zone revisions. *Id.* at 68,761, 68,780; *see* EPA Office of Pesticide Programs, *Cost Analysis for Revisions to the Application Exclusion Zone in the Agricultural Worker Protection Standard; Final Rule* (Oct. 14, 2020) (the “2020 Cost Analysis”).²¹

²¹ Available at <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OPP-2017-0543-0152&contentType=pdf>.

86. The 2020 Cost Analysis concluded that the “primary benefit of revising the definition of the [Application Exclusion Zone] and the associated requirements is a reduction in the complexity of applying a pesticide.” 2020 Cost Analysis at 10.

87. EPA’s Cost Analysis also concluded that this purported reduction in complexity would result in *no* quantifiable cost savings for agricultural establishments. *See id.* (“In general, revising the [Application Exclusion Zone] requirement is not expected to result in any quantifiable cost savings for farms covered by the [Worker Protection Standard].”).

88. Despite the agency’s prior extensive assessment of the quantitative and qualitative benefits of reducing pesticide exposure through the 2015 Rule, *see* 80 Fed. Reg. 67,498–99; 2015 EPA Economic Analysis at 117–80, and despite detailed evidence from commenters regarding the serious human health risks posed by the proposed revisions to the Application Exclusion Zone, the 2020 Cost Analysis concluded that “EPA is unable to quantify any increased risk of pesticide exposure from revising the [Application Exclusion Zone] requirements.” 2020 Cost Analysis at 10.

89. In relying on a flawed Cost Analysis, EPA failed to adequately consider the harms of the Final Rule to farmworkers, their families, and others; and failed to take account of the substantial data, reports, studies, and other evidence of those harms that commenters submitted to EPA in the course of this rulemaking.

90. EPA also failed to adequately consider the impact of the Final Rule on minority and low-income populations.

91. Executive Order 12,898 directs federal agencies to identify and address disproportionately high and adverse human health or environmental effects of their policies on

minority populations and low-income populations in the United States. Exec. Order No. 12,898 at § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

92. The Final Rule asserts without evidence that “EPA does not believe this rulemaking will have disproportionately high and adverse human health or environmental effects on minority or low-income populations, nor will it have a disproportionate effect on children.” 85 Fed. Reg. at 68,770.

93. This conclusion fails to meaningfully address the environmental justice impacts of the Final Rule, disregards evidence before the agency regarding the disproportionately high and adverse human health effects of the Final Rule on minority and low-income populations, and fails to meaningfully respond to numerous comments urging EPA to analyze and address these effects.

94. EPA’s conclusion that the Final Rule will not cause disproportionate adverse harm to minority and low-income populations also reverses without explanation the agency’s prior conclusion, in promulgating the 2015 Rule, that the Worker Protection Standard as then finalized was necessary “to prevent unreasonable adverse effects from exposure to pesticides among agricultural workers and pesticide handlers, vulnerable groups (such as minority and low-income populations, child farmworkers, and farmworker families) and other persons who may be on or near agricultural establishments, and to mitigate exposures that do occur.” 80 Fed. Reg. at 67,496.

V. The Final Rule harms Plaintiffs.

95. The Final Rule harms Plaintiffs’ sovereign, quasi-sovereign, economic, and proprietary interests.

96. The Final Rule will directly harm Plaintiffs in at least five ways: (1) the Final Rule will harm Plaintiffs’ *parens patriae* interests in the health and well-being of their residents;

(2) Plaintiffs' health care costs will be higher because the Final Rule puts Plaintiffs' residents at greater risk of adverse health impacts, and the States pay health care costs for some of those residents; (3) Plaintiffs will incur financial and economic harm when farmworkers and others exposed to pesticides fall ill and miss work or school; (4) the Final Rule will impose administrative burdens on State-operated programs; and (5) Plaintiffs will incur increased enforcement costs and burdens as a result of the Final Rule.

A. The Final Rule harms Plaintiffs' *parens patriae* interests in the health and well-being of their residents.

97. Plaintiffs have protectable interests in ensuring that agricultural workers and others on or near agricultural establishments are protected from the adverse effects of exposure to harmful pesticides.

98. The Final Rule increases the risk of pesticide exposure by farmworkers, their families, and others, endangering the health and well-being of adults and children who live in Plaintiffs' jurisdictions.

99. The 2015 Rule was based on a factual finding that pesticide drift had continued to cause exposure incidents despite labels instructing handlers to apply pesticides in a manner that does not contact other persons. 80 Fed. Reg. at 67,524.

100. EPA acknowledged that the Application Exclusion Zone as established by the 2015 Rule was necessary to reduce the risk of injury and illness to workers and handlers. *Id.* at 67,521–25 (concluding that “the drift-related requirements [of the Application Exclusion Zone provisions] will help reduce the number of exposures of workers and other non-handlers to unintentional contact to pesticide applications”).

101. By curtailing the protections of the Application Exclusion Zone that the 2015 Rule established, the Final Rule will—by EPA's own analysis—cause more agricultural workers

to be exposed to harmful levels of pesticides, and thus will cause more agricultural workers to develop illnesses from acute or chronic exposure to these pesticides.

102. Exposure to harmful levels of pesticides causes adverse effects on the States' residents, including farmworkers, their families, and others. *See supra* ¶¶ 53–67.

103. Although underreporting and other data gaps are recognized problems with respect to determining the full extent of occupational illness among farmworkers, estimates of acute pesticide poisoning range as high as 1,400 cases per year per hundred thousand farmworkers. *See Susan Rankin Bohme, EPA's Proposed Worker Protection Standard and the Burdens of the Past*, 21(2) *Int'l J. of Occupational & Env'tl. Health* 161, 161–65 (2015).²²

104. Based on New York's data regarding the number of individuals employed as farmworkers in the State, *see supra* ¶¶ 37–38, the number of annual acute pesticide poisonings could range as high as 1,120 annual acute pesticide poisonings in New York.

105. These estimates do not include additional health harms associated with chronic illnesses caused by pesticide exposure to adults and children.

106. States have a quasi-sovereign interest in the health and well-being of their residents, and may invoke these *parens patriae* interests in an action against the federal government to enforce federal law.

B. The Final Rule will increase health care costs paid by the States.

107. By limiting the protections of the Application Exclusion Zone, the Final Rule will likely cause more workers and other residents of Plaintiffs' jurisdictions to be exposed to pesticides, and thus cause Plaintiffs to experience more uncompensated care costs.

²² Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4457125/>.

108. Agricultural workers are considerably more likely to be uninsured than the population as a whole. Nationally, only 47% of agricultural workers have health insurance, compared to 91% of the population overall. See U.S. Dep’t of Labor, Employment & Training Administration, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers*, at 40 (Jan. 2018) (the “NAWS Research Report”)²³; U.S. Census Bureau, *Health Insurance Coverage in the United States: 2018*, at 2 (Nov. 8, 2019).²⁴

109. Many farmworkers who require medical care as a result of pesticide exposure therefore will not have the means to pay for it. It is therefore likely that any increase in pesticide exposure caused by the Final Rule will in turn cause an increase in uncompensated care costs for public and private hospitals and clinics in Plaintiff States.

110. In addition, many agricultural workers who reported that they did have health insurance obtain that coverage through Medicaid, the Children’s Health Insurance Program, or other sources partially funded by the Plaintiff States. See NAWS Research Report 41–42. Because the Final Rule will likely increase pesticide exposure, health insurance programs funded partially by the States will face increased expenses.

111. Although most New Yorkers have health insurance, more than one million New York residents are uninsured. See Greater N.Y. Hosp. Ass’n, *NYS Uninsured Rate Continues to Decline* (Oct. 7, 2019).²⁵ Many of New York’s uninsured are poor or low-income: more than

²³ Available at https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

²⁴ Available at <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-267.pdf>.

²⁵ Available at <https://www.gnyha.org/news/nys-uninsured-rate-continues-to-decline/>.

77% (approximately 776,000 people) had incomes below 400% of the federal poverty level.

Many who require hospital care or other medical care due to pesticide exposure therefore will not have the means to pay for it.

112. Given these figures, it is likely that any increase in pesticide exposure caused by the Final Rule will in turn increase uncompensated care costs for public and private hospitals in New York.

113. In addition, many New Yorkers obtain their health insurance through Medicaid, the Children's Health Insurance Program, or other sources partially funded by the State. New York pays health care costs for eligible low-income and moderate-income residents, including children, through a number of programs funded in whole or in part by the State. To the extent there is an increase in any of those individuals being exposed to pesticides and requiring the services of a hospital or other health care provider, health insurance programs funded partially by New York will face increased expenses.

114. In 2014, 91 percent of California farmworkers were immigrants, 91 percent primarily spoke Spanish, 63 percent were parents, and only one-third had health insurance coverage. *See* Susan Gabbard, *Who Are California Crop Workers and How is this Changing*, Presented at the Annual Agricultural Personnel Management Association's Forum for HR and Safety Professionals in the Agricultural Industry (2016).²⁶

C. The Final Rule will cause financial and economic injury to the States.

115. The Final Rule will cause Plaintiffs to suffer economic harm when farmworkers and others exposed to harmful levels of pesticides fall ill and miss work or school.

²⁶ Available at https://www.doleta.gov/naws/pages/research/docs/APMA_pres_Jan2016.pdf.

116. EPA concluded in promulgating the 2015 Rule that the estimated quantified benefits from reducing acute worker and handler exposure to pesticides through the requirements of the 2015 Rule (including the Application Exclusion Zone) total up to \$2.6 million annually, which the agency described as a “conservative estimate includ[ing] only the avoided costs in medical care and lost productivity to workers and handlers.” *See* 80 Fed. Reg. at 67,498–99.

117. EPA further determined that the “unquantified benefit to adolescent workers and handlers, as well as children of workers and handlers is great; reducing exposure to pesticides could translate into fewer sick days, fewer days missed of school, improved capacity to learn, and better long-term health. Parents and caregivers reap benefits by having healthier families, fewer missed workdays, and better quality of life.” *Id.* at 67,499.

118. The Final Rule curtails the protections in the 2015 Rule, and thereby increases the risk of sick days, missed work, and lost productivity caused by exposure to pesticides, with direct and deleterious impacts on Plaintiffs’ economies.

D. The Final Rule will increase the administrative burden on State-operated programs.

119. Plaintiffs will incur administrative costs as a result of the Final Rule.

120. Federal law requires that commercial and private applicators of pesticides be certified as authorized to use or supervise the use of restricted use pesticides. 7 U.S.C. § 136i; *see* 40 C.F.R. §§ 171.1, 171.101–107. EPA’s implementing regulations require certified applicators to be recertified every five years. 40 C.F.R. § 171.107(a). Applicator certifications and re-certifications are issued by a “certifying authority,” which includes State agencies that issue restricted use pesticide applicator certifications pursuant to a certification plan approved by EPA. *Id.* § 171.3.

121. Each of the Plaintiff States is an approved “certifying authority” under FIFRA, and is responsible for developing a State certification plan that conforms to federal standards, 40 C.F.R. § 171.303; issuing restricted use pesticide applicator certifications for applicators in their States, *id.* §§ 171.103, 171.105; and issuing recertifications for certified applicators not less than every five years, *id.* § 171.107(a).

122. As a result of the Final Rule, some Plaintiffs’ certification plans and recertification processes may need to be revised to reflect the new Application Exclusion Zone requirements and the changes from the 2015 Rule. 40 C.F.R. §§ 171.107(a), 171.303. These Plaintiffs may need to expend resources revising their certification plans, applying to EPA for approval of those plans, and revising their recertification materials to conform to the new federal standards included in the Final Rule.

123. In addition, Plaintiffs expect to expend and have already expended resources revising their public communications, training materials, and other guidance to ensure the regulated community is aware of EPA’s revisions to the Application Exclusion Zone.

124. In New York, for example, NYSDEC prepared and distributed a bulletin on November 18, 2020, to notify applicators and others that EPA had adopted revisions to the Application Exclusion Zone. *See NYSDEC, Pesticide Worker Protection Standard* (Nov. 18, 2020).²⁷

125. Because the Final Rule curtails the protections afforded by the 2015 Rule, but does not alter State protections that are consistent with the 2015 Rule, *see* 7 U.S.C. § 136v(a), the Final Rule will create confusion among the regulated community, farmworkers, handlers, and others regarding the applicable standards and protections.

²⁷ Available at <https://content.govdelivery.com/accounts/NYSDEC/bulletins/2aac6e1>.

126. The Final Rule will therefore require some Plaintiffs to undertake efforts to educate regulated entities and the public regarding divergent standards under state law and federal law, or to promulgate state regulations or other formal guidance to clarify the relevant standards for pesticide application under state law.

E. Plaintiffs will incur increased enforcement costs and burdens as a result of the Final Rule.

127. Because the Final Rule weakens the Application Exclusion Zone protections included in the 2015 Rule, some Plaintiffs will be forced to bear greater enforcement costs to protect farmworkers, their families, and members of the public from pesticide exposure and its attendant illnesses and injuries.

128. Under FIFRA, primary enforcement of federal pesticide use violations can be delegated to the States. 7 U.S.C. § 136w-1. Here, each Plaintiff has been delegated primary enforcement responsibility for their State, but may refer violations to EPA for enforcement. *See Federal Insecticide, Fungicide, and Rodenticide Act, State Primary Enforcement Responsibilities*, 48 Fed. Reg. 404, 407 (Jan. 5, 1983).

129. As relevant here, a State with primary enforcement authority must have “sufficient manpower and financial resources . . . available to conduct a compliance monitoring program” and “must implement procedures to pursue enforcement actions expeditiously.” *Id.* at 409. States with “enforcement programs determined to be inadequate” may have their primary enforcement responsibility rescinded. 7 U.S.C. § 136w-2(b); 40 C.F.R. § 173.3.

130. Once the Final Rule becomes effective, some Plaintiffs will have state statutory or regulatory schemes more protective than the requirements imposed by federal regulation. *See* Cal. Code Regs. tit. 3, § 6762.

131. These Plaintiffs will face an increased enforcement burden to protect against pesticide exposure because they will no longer be able to refer violations of the more protective Application Exclusion Zone standards to EPA, and will bear the full enforcement burden of ensuring compliance with more protective standards.

132. In addition, Plaintiffs will have to expend greater enforcement resources because the Final Rule makes it more difficult to determine whether pesticide contact has occurred after a farmworker falls ill. States will need to take samples and often get a medical diagnosis from a doctor for any ailments stemming from pesticide exposure, which can be difficult to determine. These processes will cost Plaintiffs extra time, money, and resources.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Administrative Procedure Act—Arbitrary and Capricious)

133. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

134. The Administrative Procedure Act provides that the Court “shall” “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

135. The Final Rule is arbitrary and capricious because EPA departed from its prior recent position without adequate justification; EPA’s analysis of costs and benefits fails to justify the changes to the Application Exclusion Zone; the agency’s explanation of the basis for these changes runs counter to the evidence before the agency; and EPA has entirely ignored its obligation to identify and address the disproportionately high and adverse effects of this policy change on minority and low-income populations.

136. The Final Rule is therefore “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” in violation of the APA. 5 U.S.C. § 706(2)(A).

137. Defendants’ violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF

(Administrative Procedure Act—Exceeds Statutory Authority)

138. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

139. Under the Administrative Procedure Act, courts must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

140. Defendants may only exercise authority conferred by statute. *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013).

141. FIFRA requires EPA to take steps to protect humans and the environment from unreasonable adverse effects of pesticides. The Final Rule violates this statutory obligation by removing protections from pesticide exposure for farmworkers, their families, and others, and by therefore allowing the use of pesticides in a manner that poses an unreasonable risk of harm.

142. The Final Rule is therefore “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” in violation of the APA. 5 U.S.C. § 706(2)(C).

143. Defendants’ violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

2. Declare that the Final Rule is in excess of the Department's statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of 5 U.S.C. § 706(2)(C);
3. Vacate and set aside the Final Rule;
4. Enjoin Defendants and all their officers, employees, and agents, and anyone acting in concert with them, from implementing, applying, or taking any action whatsoever under the Final Rule;
5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and
6. Grant such other and further relief as the Court deems just and proper.

DATED: December 16, 2020

Respectfully submitted,

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