

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 12/29/2020

-----X	:	
RURAL & MIGRANT MINISTRY, ALIANZA	:	
NACIONAL DE CAMPESINAS, EL COMITE DE	:	
APOYO A LOS TRABAJADORES AGRÍCOLAS,	:	
FARMWORKER ASSOCIATION OF FLORIDA,	:	20-cv-10645 (LJL)
MIGRANT CLINICIANS NETWORK, PINEROS Y	:	
CAMPESINOS UNIDOS DEL NOROESTE, RURAL	:	<u>OPINION & ORDER</u>
COALITION, UNITED FARM WORKERS, and	:	
UNITED FARM WORKERS FOUNDATION,	:	
	:	
Plaintiffs,	:	
	:	
-v-	:	
	:	
UNITED STATES ENVIRONMENTAL PROTECTION	:	
AGENCY and ANDREW WHEELER,	:	
	:	
Defendants.	:	
	:	
-----X		

LEWIS J. LIMAN, United States District Judge:

Plaintiffs move for a temporary restraining order (“TRO”) and a preliminary injunction enjoining a regulation of the Environmental Protection Agency (“EPA”), scheduled to be implemented on December 29, 2020, from going into effect. Plaintiffs also move for a stay pursuant to 5 U.S.C. § 705. For the following reasons, the TRO is granted and the Court will stay the effective date of the challenged rule, until January 12, 2021, pursuant to 5 U.S.C. § 705, pending a hearing on the application for a preliminary injunction.

A. Statutory Background

Congress passed the Federal Insecticide, Fungicide & Rodenticide Act (“FIFRA”) in 1947. 7 U.S.C. § 136, *et seq.* “As first enacted, FIFRA was ‘primarily a licensing and labeling statute.’” *N.Y. State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115, 117 (2d Cir. 1989) (quoting

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)). The original version of FIFRA “primarily dealt with licensing and labeling.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 437 (2005). “Under the original version of FIFRA, all pesticides sold in interstate commerce had to be registered with the Secretary of Agriculture. The Secretary would register a pesticide if it complied with the statute’s labeling standards and was determined to be efficacious and safe.”

Id.

In 1972, the statue was substantially revised through the adoption of the Federal Environmental Pesticide Control Act. 86 Stat. 973 (“FEPCA”). As amended by the FEPCA, FIFRA “was transformed from primarily a labeling law into a comprehensive scheme to regulate the use, sale and labeling, of pesticides-partly through EPA registration of the substances, including review, suspension and cancellation of registration.” *Jorling*, 874 F.2d at 117. “As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority.”

Bates, 544 U.S. at 437 (quoting *Ruckelshaus*, 467 U.S. at 991-92 (1984)).

FIFRA requires the EPA “[t]o the extent necessary to prevent unreasonable adverse effects on the environment . . . by regulation [to] limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter.” 7 U.S.C. § 136a. “Unreasonable adverse effects on the environment” are defined as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.” *Id.* § 136(bb).

B. Regulatory Background

Pursuant to its authority under FIFRA, the EPA has implemented measures to protect workers in two primary ways: (1) through specific use instructions and restrictions on pesticide

product labeling; and (2) through the Agricultural Worker Protection Standard (“WPS”). 80 Fed. Reg. 67,496, 67,500.

EPA adopted the WPS in 1974, after passage of the FEPICA, and revised the regulations in 1992 and 2015. The WPS is a uniform set of requirements for farmworkers, pesticide handlers, and their respective employers. Its purpose is “to expand protections against the risk of agricultural pesticides without making individual product labeling longer and much more complex.” *Id.* at 67,500. Its requirements are “generally applicable to all agricultural pesticides and are incorporated onto agricultural pesticide labels by reference.” *Id.* The WPS provides a comprehensive collection of pesticide management practices that apply to agricultural pesticide use in crop production. *Id.* These requirements are “designed to reduce the risks of illness or injury resulting from workers’ and handlers’ occupational exposures to pesticides used in the production of agricultural plants on farms or in nurseries, greenhouses, and forests and also from the accidental exposure of workers and other persons to such pesticides.” 40 C.F.R. § 170.1. The WPS’s requirements are further intended “to reduce or eliminate exposure to pesticides and [to] establish[] procedures for responding to exposure-related emergencies.” *Id.*

“Workers” protected by the WPS are individuals who are employed to “perform[] activities relating to the production of agricultural plants on an agricultural establishment . . .” 40 C.F.R. § 170.3. “Handlers” are individuals employed “by an agricultural establishment or commercial pesticide handling establishment,” who are, *inter alia*, “mixing, loading, transferring, or applying pesticides”; “[d]isposing of pesticides or pesticide containers”; “[h]andling opened containers of pesticides”; “[a]cting as a flagger”; “[c]leaning, adjusting, handling, or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues”; or “[a]ssisting with the application of pesticides.” *Id.*

As revised in 1992, the WPS included two primary provisions for protection of nearby individuals during pesticide application: (1) a prohibition on allowing or directing any worker to enter or remain in a treated area; and (2) a general “do not contact” provision that stated that “[t]he handler employer and the handler shall 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.” 40 C.F.R. § 170.210(a).

C. The 2015 Regulation

When EPA promulgated the 1992 Rule, it estimated that approximately 10,000 to 20,000 incidents of physician-diagnosed pesticide poisonings occurred in the WPS-covered workforce annually. That estimate was based on then-current data on occupational pesticide-related incidents. 80 Fed. Reg. at 67,502.

In the intervening years until 2015, EPA continued to seek “to ensure that the [WPS] provides the intended protections effectively and to identify necessary improvements.” *Id.* at 67,499. After meetings with diverse stakeholders, the EPA concluded that the protections of the WPS were not sufficient to ensure safety. The EPA found that, despite the “do not contact” provisions, workers and bystanders continued to suffer contact with pesticides. The EPA estimated that number of physician-diagnosed pesticide poisonings remained between 1,810 and 2,950 incidents annually, and that many of these exposures were avoidable. *Id.* at 67,502.

One particular area of concern was spray drift, “the off-site movement through the air of pesticide droplets or particles originating from pesticides applied as liquids or dry materials.” *Id.* at 67,520. Spray drift can create risk for workers and bystanders outside of a treated area when droplets or particles move outside the area being treated, during or after the pesticide application. *Id.* The EPA found that “as much as 37% to 68% of acute pesticide-related illnesses in

agricultural workers are caused by spray drift.” 79 Fed. Reg. at 15,448; Compl. ¶ 32. It found that another independent study examining 3,646 cases of acute pesticide illness determined that the most common contributing factor was exposure to off-target pesticide drift. *Id.* at 15,448. The EPA also cited a study which found that 14-24% of total occupational pesticide poisoning could be attributed to off-target drift. *Id.* The study also found that over half of drift-related cases were non-occupational. All of these studies were done in the period between 1992 and 2015, during which time the “do not contact” rule was in place.

Based on its conclusions that the existing protections of the WPS were insufficient to protect workers, handlers, and bystanders from exposure to pesticides, the EPA issued a proposed rule revising the WPA. *Id.* at 15,450. The EPA determined that there was “strong evidence that workers and handlers may be exposed to pesticides at levels that can cause adverse effects and that both the exposures and the risks can be substantially reduced” through more protective regulations. *Id.* at 15,446. The EPA concluded that “experiences such as those of workers having to move to get out of the way of the tractor that was applying pesticide . . . and workers being directly sprayed confirm EPA’s position that additional protections are necessary during pesticide applications on farms and in forests.” 80 Fed. Reg. at 67,522.

The proposed revisions to the WPS included a provision that would require a pesticide handler to suspend spraying if an individual came within a specified distance of the area that was being treated with pesticides. *Id.* The provision was intended to address the weaknesses and failings of the “do not contact” rule. *Id.*

The EPA published the proposed rule for notice and comment. Commenters raised logistical problems with the distance elements of the proposal. In particular, commenters were concerned that a handler might not be able to see whether or not any person came near the

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.