

**Attorneys General of New York, California, Illinois, Maryland, Minnesota, New Jersey,
and Washington.**

Via Federal eRulemaking Portal

January 30, 2020

The Honorable Andrew R. Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Jackie Mosby
Field and External Affairs Division (7506P)
Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Avenue NW
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Re: Comments regarding Notice of Proposed Rulemaking, *Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements*, 84 Fed. Reg. 58,666 (Nov. 1, 2019), RIN 2070-AK49, docket identification number EPA-HQ-OPP-2017-0543.

Dear Administrator Wheeler and Ms. Mosby:

On November 1, 2019, the United States Environmental Protection Agency (“EPA”) published a proposed rule that would needlessly increase the risk of exposure to harmful pesticides by permitting handlers to continue pesticide applications despite the presence of workers or other persons within the area immediately surrounding the application equipment. *See* Notice of Proposed Rulemaking, *Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements*, 84 Fed. Reg. 58,666 (Nov. 1, 2019) (the “Proposed Rule”). The undersigned Attorneys General of New York, California, Illinois, Maryland, Minnesota, New Jersey, and Washington (“the States”) write to oppose this proposal and to urge the agency to retain the key provisions of the application exclusion zone (“AEZ”) as originally promulgated in 2015, including coverage for persons working on easements, and the extension of the AEZ beyond the boundaries of an agricultural establishment.

I. Introduction.

Federal law requires EPA to take steps to protect humans and the environment from unreasonable adverse effects of pesticides. *See generally* Federal Insecticide, Fungicide, & Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136–136y. Consistent with this obligation, EPA has published regulations intended to reduce the risk of illness and injury resulting from agricultural

workers' 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"). The Worker Protection Standard is "primarily intended to reduce the risks of illness or injury to workers and handlers resulting from occupational exposures to pesticides used in the production of agricultural plants on agricultural establishments." 40 C.F.R. § 170.301.

In 2015, for the first time in nearly twenty-five years, EPA updated and strengthened its Worker Protection Standard ("WPS") "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." *Final Rule, Pesticides; Agricultural Worker Protection Standard Revisions*, 80 Fed. Reg. 67,496 (Nov. 2, 2015) (the "2015 Rule"). 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.

As relevant here, 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. The AEZ 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). The 2015 Rule established several requirements with respect to the AEZ, including (1) that agricultural employers not allow any workers or other persons inside the AEZ 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 AEZ, including where the AEZ may extend beyond the boundaries of the establishment, *see* 40 C.F.R. § 170.505(b). 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 AEZ 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 AEZ, including if the AEZ extends beyond the boundaries of the establishment.

When creating these requirements, EPA acknowledged that the pre-2015 WPS 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. EPA nonetheless determined that the creation of an AEZ, and the requirement to suspend application when workers or other persons come within the AEZ during pesticide application, was a critical *additional* step 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. EPA further concluded that requiring applicators to suspend activities even when the AEZ extends beyond the boundaries of the agricultural establishment was warranted for several reasons, including that (1) it was necessary to protect against harmful worker and bystander exposure, *see id.* ("Out of 17 incidents identified in the comments, only one would have been prevented if the application

exclusion zone was limited to the boundaries of the agricultural establishment”); and (2) the existing “do not contact” requirement likewise extended beyond the boundaries of the establishment. *See id.*

The Proposed Rule would lessen the protections that the 2015 Rule established by revising the AEZ in at least two critical ways. First, it would 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 (*e.g.*, utility workers) are present on easements within the boundaries of the agricultural establishment. *See* 84 Fed. Reg. at 58,670, 58,674 (to be codified at 40 C.F.R. §§ 170.405(a)(2)(ii), 170.505(b)(1)(ii)). Second, it would revise the “suspend application” requirement to limit the AEZ to the boundaries of the establishment—or in other words, to permit continued application of harmful pesticides notwithstanding the presence of workers or other persons within the presumptively dangerous AEZ as long as they are located outside the establishment. *See id.* at 58,670, 58,674 (to be codified at 40 C.F.R. § 170.505(b)(1)).

II. The States’ interest in effective protections against pesticide exposure.

The States have a critical interest in ensuring that agricultural workers and others on or near agricultural establishments are protected from the adverse effects of exposure to harmful pesticides.

The agricultural sector ranks among the most hazardous industries nationally. *See* Centers for Disease Control & Prevention, National Institute for Occupational Safety & Health (“NIOSH”), *Agricultural Safety*, <https://www.cdc.gov/niosh/topics/aginjury/default.html>. Farmworkers experience particularly high rates of fatal and nonfatal injuries and illnesses. Ramya Chari, Amii M. Kress, & Jamie Madrigano, RAND Corporation, *Injury & Illness Surveillance of U.S. Agricultural Workers* (2017). In 2015, these rates were higher than those experienced by workers in other known hazardous occupations, such as fishing and hunting, forestry and logging, mining, and construction. *Id.* at ix.

EPA determined in promulgating the 2015 Rule that a “sizeable portion of the agricultural workforce may be exposed occupationally to pesticides and pesticide residues.” 80 Fed. Reg. at 67,498. According to NIOSH, during the period from 1998 to 2011, there were numerous reported cases of acute pesticide-related illnesses of those employed in the farming, forestry, and fishing sectors. *See* NIOSH Worker Health Charts, Acute Pesticide-Related Illnesses Charts, <https://wwwn.cdc.gov/Niosh-whc/chart/sensor-pe>. And studies further indicate that underreporting of occupational illness and poisoning is common, with an estimate of underreporting ranging from 20 to 70 percent. EPA, *Economic Analysis of the Proposed Agricultural Worker Protection Standard Revisions*, EPA-HQ-OPP-2011-0184-2522 (“EPA Economic Analysis”) at 132. 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.*

The 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.

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

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. 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.

Exposure to harmful levels of pesticides causes adverse effects on the States' farmworkers, pesticide handlers, and their families. Although underreporting and gaps in oversight data are recognized problems with respect to occupational illness among farmworkers, estimates of acute pesticide poisoning range as high as 1,400 cases per year per hundred thousand farmworkers. Susan Rankin Bohme, *EPA's Proposed Worker Protection Standard and the Burdens of the Past*, 21(2) *Int'l J. of Occupational & Envtl. Health* 161, 161–65 (2015), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4457125/>. For instance, based on the New York State Comptroller's figure of approximately 61,000 people employed as farmworkers in New York, the number of annual acute pesticide poisonings could be as high as 854 people in the State. The New York State Department of Labor's upper bound New York employment figure of 80,000 annual farmworkers would yield an estimate of up to 1,120 annual acute pesticide poisonings in the State. With 423,700 farmworkers in California, the number of annual acute pesticide poisonings could be as high as 5,931 people in California. These estimates do not even include chronic illnesses associated with pesticide exposure to adults and children.

The exposure of farmworkers, pesticide handlers, and their families to harmful levels of pesticides also results in financial harm to the States. For example, the States incur costs associated with health care for farmworkers, pesticide handlers, and their family members who develop illnesses from acute or chronic exposure to pesticides. The States also experience financial harm when farmworkers and others exposed to harmful pesticides fall ill and miss work or school. And state regulations can only do so much to combat these harms. As agricultural workers are often transient due to the seasonal nature of their work, they may be exposed to pesticides while working in unregulated states before returning to their home states.

EPA previously recognized these harms in its economic analysis of the 2015 Rule, which estimated that the quantified benefits from reducing acute worker and handler exposure total up to \$2.6 million annually. *See* 80 Fed. Reg. at 67,498. Even this figure is a conservative estimate of benefits, as it includes only the avoided costs in medical care and lost productivity to farmworkers and pesticide handlers, and assumes that only ten percent of acute pesticide incidents are reported. EPA further found 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. Although EPA was unable to provide quantifiable estimates of the benefits from reducing chronic exposure to pesticides, the economic analysis for the 2015 Rule concluded that for six chronic diseases, ranging from asthma to cancer, even if the rule prevented only a relatively small (under 0.8 percent) number of cases, its total benefits would outweigh its costs. *See* EPA Office of Pesticide Programs, *Economic Analysis of the Agricultural Worker Protection Standard Revisions*.

III. The Proposed Rule would, if finalized, increase the risk of human exposure to pesticides and likely violate the Administrative Procedure Act.

To justify the Proposed Rule, EPA must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.” *Id.*

Agencies must also provide a reasoned explanation for changing their policies. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Id.* Further, where, as here, a new policy rests on factual or legal determinations that contradict those underlying the agency’s prior policy, the agency must provide a more detailed explanation for its policy. *Id.* “Unexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

If finalized, EPA’s revisions to the AEZ would likely violate the APA because the revisions reflect an unjustified and unsupported departure from the agency’s prior position; the agency’s analysis of costs and benefits fails to justify the proposed changes; the agency’s explanation that changes are necessary to facilitate state compliance efforts is contrary to the evidence; 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.

A. EPA’s economic analysis fails adequately to justify the proposed revisions to the AEZ.

In proposing changes to the AEZ, the agency prepared an analysis of potential cost savings. *See* 84 Fed. Reg. at 58,667, 58,673; *see also* EPA Office of Pesticide Programs, *Cost Analysis for Revisions to the Agricultural Exclusion Zone in the Worker Protection Standard* (“Cost Analysis”) (July 10, 2019), at <https://www.regulations.gov/document?D=EPA-HQ-OPP-2017-0543-0006>. As the Supreme Court recently recognized, “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). And “when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). Here, the analysis that EPA has relied on in issuing the Proposed Rule is irreparably flawed in at least two respects.

First, the agency has arbitrarily failed to quantify the costs of the increased pesticide exposure that would result from its proposal. The Proposed Rule acknowledges that farmworkers and others benefit from extending the AEZ boundary beyond the agricultural establishment. *See* 84 Fed. Reg. at 58,669. However, without explanation or support, the proposal characterizes these benefits as “minimal.” *Id.* The Cost Analysis includes no discussion—whether quantitative or qualitative—of the costs of foregoing these protections, or of the increased risks to farmworkers or others of limiting the AEZ to the boundaries of the establishment. Instead, the Cost Analysis states that “EPA is unable to quantify any increased risk of pesticide exposure from revising the AEZ requirements” and then asserts without explanation or support that any increase in this risk “may be negligible.” Cost Analysis 9. But the “consideration of costs is an essential component of reasoned decisionmaking under the Administrative Procedure Act,” *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732–33 (D.C. Cir. 2016); and “[a]n agency may not avoid an obligation to analyze . . . consequences that foreseeably arise from [its action] merely by saying that the consequences are unclear” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

EPA’s refusal to quantify the costs of its proposal, including the costs of adverse human health impacts, is particularly striking given the agency’s statutory mandate under FIFRA to protect humans and the environment from unreasonable adverse effects of pesticides. In light of this congressional directive, the APA does not permit the agency to ignore so central an evidentiary question. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).

Second, the agency has failed to support its assessment of the benefits of weakening the AEZ. EPA first claims that the proposal is expected to reduce the burden of compliance and lead to cost savings, *see* Cost Analysis 3, but the agency then predicts that “[i]n general, revising the AEZ requirement is not expected to result in any quantifiable cost savings for farms covered by the WPS,” *see* Cost Analysis 8. An analysis that predicts cost savings but refuses to quantify those savings—indeed, that claims any such savings cannot be quantified—is not a rational basis for revising the AEZ. *New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm’n*, 727 F.2d 1127, 1130–31 (D.C. Cir. 1984) (agency action is arbitrary when “the reason which the [agency] gave for its action . . . makes no sense”).

Given these flaws in EPA’s assessment of both the costs and benefits of its proposal, the AEZ revisions would likely be arbitrary and capricious if finalized. *See Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 53-55 (D.D.C. 2019) (agency action is invalid where it “fail[s] to adequately account” for relevant costs and benefits). Taken together, the agency’s reliance on an analysis this flawed and cursory bears the hallmarks of arbitrarily “put[ting] a thumb on the scale,” *Ctr. for Biological Diversity*, 538 F.3d at 1198, and would “render the rule unreasonable” in its entirety. *Nat’l Ass’n of Home Builders*, 682 F.3d at 1040.

B. The proposed revisions are not supported by the record and reflect an unjustified change in EPA’s prior position.

In addition, the proposed revisions to the AEZ reflect an unsupported change in the position EPA took just a few years ago when it promulgated the 2015 Rule. Although an agency is not prohibited from changing its policies, the agency must provide a substantial justification when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (internal quotation marks omitted). The Proposed Rule rests on new conclusions based on substantially the same evidence that the agency considered to reach the opposite conclusions in 2015.

In 2015, EPA concluded that the existing “do not contact” rule was not, on its own, sufficient to protect against harmful pesticide exposure, and that the creation of an AEZ was a necessary supplemental protection. *See* 80 Fed. Reg. at 67,523–24. EPA further cited specific instances of pesticide exposure beyond the boundaries of the agricultural establishment that the AEZ as finalized in 2015 would have prevented, but that a more limited AEZ would not. *See id.* The Proposed Rule reverses course entirely and states simply that “EPA has concluded that the ‘do not contact’ provision provides the more appropriate and enforceable regulatory mechanism to protect workers on nearby establishments and other people/bystanders.”¹ 84 Fed. Reg. at 58,669. Limiting the AEZ without new evidence—a mere five years after establishing the AEZ in the first place, and with no explanation of why EPA’s assessment of those facts in 2015 was

¹ As in the quoted passage here, the Proposed Rule also includes numerous references to what EPA has already “concluded” or “determined” regarding the proper scope of the AEZ. 84 Fed. Reg. at 58,669 (EPA conclusion regarding the costs of including off-establishment areas in the AEZ); *see also id.* (“EPA has determined that the current WPS provision extending the AEZ boundary beyond the agricultural establishment is confusing and unnecessary”); *id.* at 58,671 (“EPA concludes these proposed revisions will maintain essentially the same level of protection”). Agency action is arbitrary and capricious under the APA if the decision-maker prejudices important matters underlying the decision. *See, e.g., Air Transport Ass’n of Am., Inc. v. Nat’l Mediation Bd.*, 663 F.3d 476, 486–88 (D.C. Cir. 2011). An agency decision-maker prejudices important matters when he acts with a closed mind rather than engaging in “fair and honest consideration” of the matters at hand. *Tummino v. Torti*, 603 F. Supp. 2d 519, 542 (E.D.N.Y. 2009). EPA’s many references to what it has already concluded or determined—at the beginning of the rulemaking process, rather than the end—raises concerns of improper closed-mind decision-making, particularly in light of the absence of new information supporting the agency’s conclusions, as is discussed in Part III.B of this comment.

incorrect—would be arbitrary and capricious. *See Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc); *see also Fox Television*, 556 U.S. at 515–16; *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 103(2d Cir. 2006).

The Proposed Rule does cite information that purportedly demonstrates that the AEZ as established in 2015 is unworkable or difficult to administer. As evidence of the unworkability of the AEZ, the agency relies exclusively on feedback solicited and received in 2016 and 2017 through three venues: (1) through training and outreach to state pesticide regulatory agencies; (2) as part of EPA’s “Regulatory Reform Agenda” efforts in 2017, *see* 84 Fed. Reg. at 58,668; *see also Evaluation of Existing Regulations*, 82 Fed. Reg. 17,793 (Apr. 13, 2017); and (3) through two meetings of the Pesticide Program Dialogue Committee (“PPDC”) in 2017. But a review of that evidence suggests that EPA’s reliance on it to support the proposed policy change is irrational.

First, feedback from EPA’s training and outreach to state agencies in 2016 cannot form a rational basis for the proposal because EPA’s own Inspector General has concluded that the agency’s training efforts to prepare the regulated community for compliance with the 2015 Worker Protection Standard were woefully deficient. A 2018 evaluation by the EPA Office of Inspector General found that “essential” training and implementation materials—including the *WPS Inspection Manual* and *How to Comply* manual—were not available through 2016. *See* EPA, Office of Inspector General, *EPA Needs to Evaluate the Impact of the Revised Agricultural Worker Protection Standard on Pesticide Exposure Incidents*, Report No. 18-P-0080 (Feb. 15, 2018) (“OIG Report”). As a result, “many state officials said they were not given the time, tools or resources to successfully implement the revised WPS” by January 2, 2017, the compliance date for certain revisions. *See* OIG Report at 7.

Second, with regard to information received in response to the agency’s “Regulatory Reform” solicitations in the spring of 2017, the provisions of the AEZ that the agency now proposes to modify were not even in effect at the time. The “suspend application” provisions of the AEZ had a compliance date of January 1, 2018. *See* 80 Fed. Reg. at 67,496, 67,568. And in response to a petition from the National Association of State Departments of Agriculture in 2017, EPA had separately extended the implementation deadline for all other WPS changes that would otherwise have taken effect. *See* Letter from Wendy Cleland-Hammett, EPA Office of Chem. Safety & Pollution Prevention to Barbara P. Glenn, Chief Exec. Officer, Nat’l Ass’n of State Dep’ts of Agric. (May 11, 2017).² It would be nonsensical to rely on comments submitted in 2017 to support the proposition that the AEZ requirements are too hard to work with, when key requirements had not even come into effect, and other provisions were stayed by an extension of the implementation deadlines. “Suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.” *NRDC v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (citing *State Farm*, 463 U.S. at 43); *cf.*

² In December 2017 (*after* the feedback the agency says it relied on in formulating this proposal), EPA rescinded its plan to delay compliance dates and announced that compliance dates of the 2015 Rule remain in effect except for the requirements that the worker and handler pesticide safety training material include the expanded content at 40 C.F.R. §§ 170.401(c)(3) and 170.501(c)(3). *See* 82 Fed. Reg. 60,576, 60,576 (Dec. 21, 2017).

Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575 (2019) (invalidating agency action where “the evidence tells a story that does not match the explanation the Secretary gave for his decision”).

Finally, the Proposed Rule cites the PPDC’s discussions of the AEZ as evidence of the unworkability of those provisions. As the Proposed Rule notes, PPDC members discussed the WPS requirements for the AEZ in a public meeting with EPA on November 2, 2017. *See* 84 Fed. Reg. at 58,668. The Proposed Rule fails to disclose, however, that at that meeting, PPDC members—which EPA characterizes as broadly representative of agency stakeholders—expressed broad *support* for the AEZ. *See* Transcript of EPA Pesticide Program Dialogue Committee Meeting (Nov. 2, 2017), <https://www.epa.gov/sites/production/files/2018-01/documents/november-2-2017-ppdc-meeting-transcript.pdf>. PPDC members also supported the issuance of additional guidance by EPA to address some particular scenarios often encountered during pesticide applications; Richard Keigwin, Director of EPA’s Office of Pesticide Programs, summarized the November 2, 2017 meeting with respect to the AEZ by noting that “what we largely talked about was the need to develop some additional and enhanced guidance around certain scenarios.”³ *See id.* at 123–24. The PPDC members did *not* support regulatory revisions to the AEZ, let alone those now proposed by EPA, in either their May or November 2017 meetings. Citing discussions at the PPDC meetings as evidence of the unworkability of the AEZ is counterfactual, and agency action that relies on a mischaracterization of the actual record evidence is arbitrary. *New York v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 5781789, *40-44 (S.D.N.Y. Nov. 6, 2019); *see also City of Kansas City v. Dep’t of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (“Agency action based on a factual premise that is flatly contradicted by the agency’s own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard.”).

Given the insufficient evidentiary support for EPA’s proposed changes to the AEZ and EPA’s mischaracterization of the record evidence before it, the Proposed Rule would likely violate the APA if finalized. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

C. The States’ experience with the 2015 Rule demonstrates that AEZ provisions are enforceable and manageable.

In the Proposed Rule, EPA takes the position that it is “next to impossible for a State trying to ensure compliance” to meet the existing AEZ requirements. 84 Fed. Reg. at 58,669. The States’ experience, however, demonstrates that this concern is unfounded.

For example, California accounts for more than 13 percent of the nation’s agricultural value, growing a third of the country’s vegetables and two-thirds of the country’s fruits and nuts. Cal. Dep’t of Food & Agric., *California Agricultural Production Statistics*, <https://www.cdfa.ca>.

³ EPA issued updated guidance on the AEZ requirements in February 2018. *See* U.S. Env’tl. Protection Agency, *Worker Protection Standard Application Exclusion Zone Requirements: Updated Question and Answers* (Feb. 15, 2018), <https://www.epa.gov/sites/production/files/2018-02/documents/aez-qa-fact-sheet-final.pdf>.

gov/statistics. California is home to 77,100 unique farms and ranches, spanning 25.3 million acres of farmland. In January 2017, California amended its existing worker safety regulations to align with the 2015 Rule, creating state AEZ provisions, Cal. Code Regs. tit. 3, § 6762, that are equivalent to federal AEZ provisions. And since California's AEZ provisions became effective, the state has not only been able to enforce the regulations, but has also continued to see its agricultural cash receipts grow. *See Agricultural Production Statistics.*

California's AEZ provisions supplement existing state regulations that protect farmworkers, their families, and rural communities from the public health and environmental impacts of pesticide exposure. Just like the 2015 Rule, the California AEZ provisions focus on the area and mechanism of application, as well as the droplet size, Cal. Code Regs. tit. 3, § 6762. Other California regulations supplement the AEZ provisions by prohibiting off-target drift, Cal. Food & Agric. Code § 12972; and by preventing harm to persons, animals, and property, Cal. Code Regs. tit. 3, § 6614. Together, these regulations provide the local enforcement agencies—the county agricultural commissioners—with a variety of tools to protect human health and the environment.

In the short time since the California AEZ provisions took effect, California has enforced the provisions in at least two instances. On August 16, 2017, fieldworkers pruning tomato plants were exposed to pesticides being applied to melons less than 100 feet from where they were working. The fieldworkers suffered adverse health effects and two of them were taken to the hospital by ambulance. Similarly, on June 5, 2019, employees working with kiwi vines needed to seek medical treatment after exposure to pesticide application at a different site, less than 100 feet away. In both cases, the county agricultural commissioners issued administrative civil penalties based on violations of California AEZ provisions.

Under state law, California's Department of Pesticide Regulation has adopted regulations coextensive with the AEZ provisions. In implementing these regulations, the department has not encountered the challenges EPA has invoked as the reason for the Proposed Rule. Simply put, the regulations—which mirror the federal AEZ provisions—have not been difficult to enforce, confusing, or unnecessary. California's experience shows that the AEZ requirements are effective and can be implemented. Indeed, they are already being applied to protect workers from exposure to harmful levels of pesticides, benefitting the workers, their families, and the state itself.

D. EPA failed to comply with its obligations under Executive Order 12898 to address environmental justice in minority populations and low-income populations.

Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), 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. The Proposed Rule does not meaningfully address its environmental justice impacts. Instead, it relies on an unsupported conclusion that the Proposed Rule “would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.” 84 Fed. Reg. at 58,673. By failing to take a “hard look” at environmental justice issues in its review, the agency's analysis likely would fail to satisfy the APA's arbitrary-and-capricious

standard. See *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

Courts will defer to an agency's "choice among reasonable analytical methodologies," but that analysis must be "reasonable and adequately explained." *Id.* (quoting *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004)). Here, EPA has not chosen among analytical methodologies, but instead has failed entirely to identify any method or analysis as all. The agency offered no explanation for the finding that the Proposed Rule would not disproportionately impact minority and low-income populations.

Review of the relevant factors establishes that the Proposed Rule would, in fact, disproportionately harm populations squarely within the purview of Executive Order 12898. Farmworkers, the primary beneficiaries of the 2015 Rule, 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*, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>; see also Letter from the Nat'l Env'tl. Justice Advisory Council to EPA Acting Adm'r Andrew Wheeler (Dec. 18, 2018), https://www.epa.gov/sites/production/files/2019-03/documents/nejac_letter_on_worker_protection_standards.pdf. As of 2017, the majority of farm laborers are people of color (68%), most of whom are Hispanic of Mexican origin (57%). *Id.* Farm laborers in 2018 made an average of \$13.25 per hour, slightly more than half of the average nonfarm wage. *Id.* Among these minority farmworkers, occupational pesticide-related illness is already underreported. Joanne Bonnar Prado, et al., *Acute Pesticide-Related Illness Among Farmworkers: Barriers To Reporting To Public Health Authorities*, 22 J. Agromedicine 395 (2017).

In 2014, EPA recognized that the existing "do not contact" and off-target drift provisions were failing to prevent pesticide exposure. Through engagement in a robust and thorough process, the agency created the 2015 Rule "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. The Proposed Rule does not explain how the risk of unreasonable adverse effects on vulnerable groups has somehow lessened in just the past few years.

The proposal to weaken the protections established by the existing AEZ will expose a greater number of farmworkers to pesticides, with accompanying adverse health effects. In accordance with Executive Order 12898, the agency is required to identify and address those effects. The failure to provide a reasonable and adequate explanation in the Proposed Rule would render EPA's proposed changes to the worker protection standard arbitrary and capricious if finalized.

IV. Conclusion.

The agency's proposed revisions to the AEZ are inconsistent with its obligations to protect human health and the environment. If finalized as proposed, these revisions would likely

violate federal law. The States accordingly urge EPA to withdraw the Proposed Rule and retain the important protections implemented through the 2015 Rule.

Sincerely,

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