



# CTAG

Certification & Training Assessment Group — National Partnerships for Safe & Effective Pesticide Management through Education, Training & Competency Assessment

---

## CTAG Fact Sheet

### Federal Agency Certification Plans July 2010

#### Introduction

The Certification and Training Assessment Group (CTAG) strives to facilitate improvement in the national pesticide applicator certification and training (C&T) program by sharing information and resources that will help to support and strengthen federal, state and tribal C&T programs. In recent years, several concerns have been raised by certification program stakeholders regarding the certification of federal employees by federal agencies under a “federal agency certification plan” (FACP). Most concerns focused on the following issues: EPA’s regulatory requirements for FACPs; the nature of regulatory controls over federal agency certifications; whether federal agencies must comply with state and tribal pesticide use laws and regulations; the authority of states and tribes over federal agency certifications; and the current status of FACPs and the certifications issued under such FACPs.

CTAG developed this fact sheet for interested C&T program stakeholders to provide general information about FACPs and how they operate in conjunction with state and tribal C&T programs. This fact sheet also provides information for states and tribes on how they should address potential issues with FACPs or the misapplication of a restricted use pesticide (RUP) by a federal employee certified under an FACP, and it provides information on who to contact at EPA if you have additional questions.

#### Questions & Answers

**Q1:** What is a federal agency certification plan (FACP)?

**A1:** An FACP is a document submitted to the EPA that describes how a federal agency intends to carry out a pesticide applicator certification program to certify its own agency employees to purchase, use and/or supervise the use of RUPs.

**Q2:** What is the purpose of an FACP?

**A2:** FACPs are approved by EPA so federal agencies that need to apply RUPs in the performance of their official duties can certify their own agency employees to apply RUPs without the need to seek separate certification in each state, tribe or territory

where they need to carry out their federal responsibilities. FACPs are designed to minimize the resource burden on federal agencies whose responsibilities require them to apply RUPs in multiple states and/or jurisdictions.

**Q3:** Are there applicable provisions in the 40 CFR Part 171 regulation that pertain to the requirements for submission, approval and maintenance of FACPs?

**A3:** No. There are no provisions in the current 40 CFR Part 171 regulation that are applicable to FACPs. The only related provisions in Part 171 are found in section 171.9, but they are only applicable to a “Government Agency Plan” (GAP).

**Q4:** Why do federal agencies need FACPs if the Part 171 regulation provides for a federal government-wide certification plan (i.e., a GAP)?

**A4:** Although the Part 171 regulation contains provisions for a federal government-wide certification plan or GAP, a GAP was never implemented by the federal government because of logistical problems with the development of the envisioned government-wide plan. Since the federal government never developed a GAP, the GAP provisions in the current Part 171 regulation are obsolete. The EPA issued an Agency policy to allow FACPs in order to provide a viable alternative to the obsolete GAP provisions.

**Q5:** Are there any applicable requirements governing submission, approval and maintenance of FACPs?

**A5:** Yes. In order for an FACP to be approved, the FACP must meet EPA’s federal minimum standards for approval of such programs. Although the requirements applicable to the submission, approval and maintenance of FACPs have not been codified in 40 CFR Part 171, the Agency issued policy applicable to the requirements for submission and approval of FACPs in an August 19, 1977, Federal Register notice (42 FR 41907). This is still the applicable Agency policy governing the requirements for submission, approval and maintenance of FACPs.

**Q6:** Do FACPs have to meet the same requirements as state and tribal certification plans?

**A6:** Yes. It is the Agency’s policy that the requirements for the submission, approval and maintenance of FACPs should be equal to or more stringent than the requirements for submission, approval and maintenance of state and tribal certification plans, except where such requirements are not applicable to FACPs.

**Q7:** What is EPA’s authority to impose new requirements on existing FACPs since there are no applicable regulations in place?

**A7:** EPA has the discretion to impose additional requirements on FACP and federal agencies who want to certify their employees. EPA would need to impose such requirements through rulemaking.

**Q8:** Do all federal agencies have an FACP approved by EPA?

**A8:** No. Only federal agencies that need to apply RUPs and choose to operate their own applicator certification program have an approved FACP on file with the EPA.

**Q9:** Which federal agencies have an approved FACP on file with the EPA?

**A9:** The federal agencies listed below have approved FACP on file with the EPA (if only certain agencies, bureaus or offices are authorized under the approved FACP that is noted in parenthesis).

- Department of Defense.
- USDA (APHIS/PPQ and Forestry only).
- Department of Energy (Bonneville Power Administration only).
- Department of Interior (plan originally approved in 1982 covered Bureau of Land Management (BLM) employees only; however, the DoI plan was later amended and approved in 1985 to add National Park Service (NPS) and Bureau of Indian Affairs (BIA) employees).

**Q10:** In the absence of an approved FACP, how is a federal agency supposed to get their employees certified if they need to apply RUPs to carry out their official duties?

**A10:** In the absence of an approved FACP for their agency, federal employees who need to apply RUPs as part of their official duties must get certified by the appropriate state, tribe or territory where they are going to be applying RUPs.

**Q11:** Do federal agencies that have an approved FACP have to get their employees certified under their approved FACP?

**A11:** No. Federal employees have the option of getting certified under their agency's FACP or they can get certified by the appropriate state or tribal program(s) with jurisdiction for the areas the federal employees intend to make RUP applications.

**Q12:** Do FACP have to be approved or accepted, or somehow recognized by a state, tribe or territory in order for federal agency employees to legally apply RUPs or for the FACP to be considered valid in that state, tribe or territory?

**A12:** No.

**Q13:** What activities does an FACP certification authorize federal employees to do?

**A13:** Federal employees certified under an approved FACP are considered to be certified as commercial applicators, and such certification authorizes them to purchase, use/apply and supervise the use of any RUPs covered by their category or categories of certification – but only in connection with their official duties and consistent with their agency’s responsibilities. Federal employees certified under an approved FACP are authorized to apply RUPs in all states, tribes and territories in the United States as long as the certifications are issued in accordance with their approved plan, such RUP applications are only made in connection with their official duties to carry out federal agency responsibilities, and the federal agency has not been notified of additional, substantive pollution control standards that must be complied with in order to make RUP applications in a given state, tribe or territory.

**Q14:** Are federal agencies authorized to certify contractors under their approved FACP so that contractors can make RUP applications for that federal agency?

**A14:** No. Certifications under an approved FACP may only be issued to federal employees for making RUP applications in connection with the performance of their official duties. Contractors who apply RUPs for federal agencies do not qualify for certification under an FACP. Contractors applying RUPs for the Federal government must get certified by the appropriate state, tribe or territory in which they are going to be applying RUPs, following the appropriate state, tribal or territory certification procedures.

**Q15:** What conditions are placed on FACP and the certified applicators operating under an FACP certification?

**A15:** The Agency’s policy requires federal agencies choosing to operate certification programs to meet or exceed all the applicable standards in 40 CFR applicable to state and tribal plans/programs. Additionally, per Executive Order (E.O.) 12088, federal agencies are expected to comply with “substantive” state/tribal pollution control standards that have been established pursuant to federal statutes.

**Q16:** Regarding the scope and applicability of E.O. 12088, does this mean federal agencies have to comply with “substantive” state and tribal pesticide laws and regulations enacted to implement FIFRA?

**A16:** Yes. E.O. 12088 applies to substantive state and tribal pollution control standards that have been enacted to implement FIFRA. Therefore, when applying RUPs in a state or area of Indian country, federal agencies and federal agency employees certified under an approved FACP, must comply with the applicable, substantive state/tribal laws and regulations affecting pesticide use.

**Q17:** If federal agencies and facilities must comply with substantive pollution control standards established pursuant to FIFRA, does that mean that all state and tribal pesticide laws and regulations (e.g., recordkeeping, reporting and permit requirements, state or tribal-specific RUP designations, fees and licensing requirements, etc.) are considered substantive pollution control standards that must be complied with?

**A17:** No. Not all state and tribal pesticide laws and regulations are considered “substantive” pollution control standards that fall under the scope of E.O. 12088. In general, most “procedural” requirements such as those for fees, permits, licensing, etc., would not be considered substantive pollution control standards. Examples of substantive pollution control standards that fall under the scope of E.O. 12088 would include such things as state or tribal-specific well or application setback restrictions to protect vulnerable water bodies or drinking water resources, endangered species protection measures, pesticide containment requirements, and other similar measures.

**Q18:** How are states and tribes supposed to enforce the requirements imposed upon federal agencies by E.O. 12088?

**A18:** Executive orders are not enforceable and do not create legal rights. They direct federal agencies to do things. In this case, E.O. 12088 directs federal agencies to comply with substantive state and tribal pollution control standards and to cooperate with states, tribes and local government agencies in prevention, control, and abatement of environmental pollution. The Department of Justice has stated that federal facilities must comply with environmental laws, and E.O. 12088 creates a duty for federal facilities to comply with applicable pollution control standards established pursuant to FIFRA. However, because E.O. 12088 does not clearly define “pollution control standards,” it is unclear which pesticide laws and regulations may be considered pollution control standards covered by E.O. 12088. As a result, the courts, federal agencies, and affected government regulatory agencies are left to determine the applicability of environmental pollution control requirements to federal facilities on a case-by-case basis. E.O. 12088 does not provide states or tribes with the authority to compel federal agencies or facilities to comply with their pesticide laws and regulations. Instead, E.O. 12088 sets up a broad general framework that requires federal agencies to cooperate with states, tribes and local government agencies to come into compliance with applicable pollution control standards.

Once notified of a violation of an applicable pollution control standard, the affected federal agency should consult with the notifying agency and develop a compliance plan to achieve and maintain compliance with the applicable pollution control standard. This should include an implementation schedule for coming into compliance as soon as practicable. In the event there is a dispute over the alleged violation, EPA is responsible for dispute resolution between the federal agency/facility and the state or local government agency. EPA is supposed to mediate such conflicts and work with the affected parties to resolve the dispute. In determining whether a given pollution control requirement is substantive or procedural, EPA is responsible for arbitrating any differences of opinion between the affected federal agency and the state or tribe over the question of whether the state or tribal requirement is substantive or procedural. If

EPA cannot resolve the conflict, the Administrator of EPA shall request the Director of the Office of Management and Budget to undertake a dispute resolution process to resolve the conflict.

**Q19:** With respect to E.O. 12088 and the directive for federal agencies to comply with applicable state pollution control standards, are federal agencies exempted from these requirements in an emergency situation (e.g., pest quarantines or something like that)?

**A19:** No. E.O. 12088 states that exemptions from compliance with the applicable pollution control standards may only be granted in certain situations where the President makes a finding that the exemption is necessary, and in the interest of national security or in the paramount interest of the United States. Thus, it appears unlikely that exemptions from compliance with state standards would be authorized for applications under an approved FACP under routine pest quarantine situations. However, such an exemption could be granted with an express finding and declaration from the President or an authorized official.

**Q20:** Can states/tribes refuse to accept federal certifications just based on state/tribal prerogative?

**A20:** No. Unless a state/tribe has notified the affected federal agency that it is not accepting their FACP certification by asserting that the requirements for state/tribal certification require demonstration of competency that goes beyond the competency standards assured through certification under the approved FACP (such that the additional requirements for certification constitute a substantive pollution control standard that federal agencies must comply with), then states/tribes cannot refuse to accept FACP certifications. Even if a state/tribe asserts that their additional requirements for certification constitute a substantive pollution control standard that federal agencies must comply with, such assertions are still subject to dispute and decisions will be determined on a case-by-case basis (see question #18 above).

**Q21:** Who should I contact if I have additional questions about FACPs?

**A21:** If you have additional questions about FACPs, please contact Richard Pont in the EPA's Certification and Worker Protection Branch using the contact information below.

Richard Pont  
U.S. EPA/Office of Pesticide Programs (7506P)  
Certification and Worker Protection Branch  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
phone: (703) 305-6448  
fax: (703) 308-2962  
email: [pont.richard@epa.gov](mailto:pont.richard@epa.gov)