

## **EPA Reinstates No-Spray Buffer Zones in California, Oregon and Washington to Protect Salmon as a Result of Final Settlement Agreement for Northwest Center for Alternatives to Pesticides v. EPA**

As part of a stipulated injunction settling a lawsuit brought by pesticide opponent groups in U.S. District Court in Washington State, EPA has announced they are reinstating interim buffer zones for the use of five pesticides, including chlorpyrifos, in three states (California, Oregon and Washington) until EPA and the National Marine Fisheries Service (NMFS) conclude their consultation under the Endangered Species Act (ESA) related to potential effects of the pesticides on salmon and salmon habitat

- ESA-mandated procedures for ensuring the protection of threatened and endangered salmon and related species in connection with pesticide registrations by EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) have been a matter of ongoing litigation for over a decade.
- It is important to note that the reinstated buffer zones, like the original interim buffer zones, are *not enforceable* under FIFRA. According to EPA's Office of Pesticide Programs, "The reinstated buffers are part of the final court order; however, they will not be included as labeling requirements under Federal Insecticide, Fungicide, and Rodenticide Act.

### **What sort of interim buffer zones is EPA proposing?**

EPA is proposing interim no-spray buffer zones from "salmon supporting waters" of 300 feet for aerial application of the five pesticides and 60 feet for ground application.

### **Why is EPA doing this?**

Courts have concluded that EPA is required by the ESA to consult with NMFS on pesticide approvals to establish reasonable and prudent measures for protection of threatened and endangered salmon species in California, Oregon and Washington. Unfortunately, because these two agencies have very different perspectives on how to assess risk and other issues, only a handful of agreements have been reached on measures to protect any endangered species from the use of any pesticide throughout ESA's 40-year history.

Pesticide opponents filed suit more than a decade ago demanding that EPA and NMFS follow the procedures laid out in the ESA and regulations to ensure that adequate protections are in place for these species in the Pacific Northwest and California. The court imposed "interim measures" to protect endangered salmon until legal requirements for consensus between the two agencies were met. EPA is proposing a reinstatement of these interim measures (which expired in 2008 as to chlorpyrifos) as a means of resolving ongoing pesticide opponent litigation.

### **What is the history of these interim measures?**

- In 2004, a federal district court ordered similar buffer zones (300 feet for aerial application, 60 feet for ground application) in a lawsuit brought by pesticide opponents seeking an end to delays in implementation of the ESA by EPA and NMFS.

- In 2008, under a schedule mandated by the court, NMFS published two biological opinions (BiOps) that called for EPA to take certain actions in connection with the registrations of the five affected pesticides in order to ensure salmon protection. The publication of these BiOps voided the interim measures imposed four years earlier.
- In 2013, however, the BiOp that addressed chlorpyrifos and two other molecules was set aside by a federal appeals court as arbitrary and capricious. The court's holding was based on a number of findings, among them that NMFS had not used real-world data or provided convincing documentation for its opinion that salmon species were at risk. The second BiOp was not challenged by the registrants of the two products it addressed.
- The current lawsuit was brought by environmental activists to require EPA to implement the two BiOps. (The first BiOp was vacated while this lawsuit was pending.) With this recent proposal, EPA now appears to be prepared to accept the reinstatement of the 2004 court-ordered interim measures until NMFS publishes a new BiOp to replace the BiOp vacated in 2013 and EPA implements both BiOps.

**Are these buffer zone restrictions now in effect?**

No. EPA is currently proposing to reinstate the interim measures as a means of resolving pesticide opponent litigation. These restrictions will not be final until the parties to the lawsuit have agreed to them and they are ratified by the court. At this time, it is not known whether or when the proposed settlement will be finalized.

**Will these restrictions (if ratified) result in chlorpyrifos label changes?**

Not in the near term. These restrictions will not directly result in changes to the product label. Pesticide product labeling is governed by EPA-administered, legislative mandates under FIFRA.

EPA has announced its intention to work with NMFS and the Fish and Wildlife Service over the next few years on national consultations related to all threatened and endangered species that may be affected by the use of the five pesticides. These consultations will take place as the active ingredients proceed through EPA's registration review process. The BiOp that was set aside in 2013 will be replaced with one generated in connection with this national consultation. Label amendments may result in new enforceable restrictions on chlorpyrifos uses after December 31, 2017. Once this process has been completed, the interim measures will no longer be in effect.