

NMFS Chlorpyrifos BiOp Vacated by Fourth Circuit Court

Proposed Salmon-Related Restrictions Deemed “Arbitrary and Capricious”

In February 2013, the U.S. Fourth Circuit Court of Appeals vacated a federal agency’s call for new salmon-related restrictions on chlorpyrifos and two other pesticides under the Endangered Species Act, deeming the restrictions “arbitrary and capricious” and “not the product of reasoned decisionmaking.”

This decision strengthens public policy by reinforcing statutory requirements for use of the best available information in regulatory decision-making. In doing so, it also prepares the way for better and more defensible regulatory assessments and in time better protection for endangered species.

History of a Controversy

- In 2008, in an effort to fulfill some of its responsibilities under the Endangered Species Act (ESA), the National Marine Fisheries Service (NMFS) published an interim “biological opinion” (BiOp) concluding that three insecticides (chlorpyrifos among them) posed a risk to the survival of certain species of salmonids (including salmon) in the western U.S. The BiOp called upon the U.S. Environmental Protection Agency (EPA) to impose extensive, unwarranted restrictions on these products.
- Registrants of the products objected that (among other issues) NMFS’s conclusions were based on outdated product uses and also disregarded extensive, readily available water monitoring data in favor of theoretical models when real-world sampling failed to support conclusions that use of these products placed salmon at risk.
- EPA and several state regulatory authorities offered similar critiques of the NMFS BiOp. While NMFS ultimately revised its assessment, it continued to stand by its original conclusions about risk to salmon, supporting its position with theoretical data and product applications that were no longer allowed by label directions.
- Based upon this BiOp, NMFS recommended spray buffers of 100 to 1,000 feet between application sites and water bodies. The buffers were recommended even for pesticide applications adjacent to dry ditches if those ditches held water sometime during the year and if the water in those ditches might contain a salmonid or drain into salmonid habitat. In affected areas, these restrictions amounted essentially to a prohibition of product use.
- In 2010 and even though it expressed some misgivings, EPA stated publicly that it intended to implement the NMFS recommendations. In response, registrants for the affected products filed suit, requesting that the flawed BiOp be set aside. In February 2013, the Fourth Circuit vacated the BiOp as “arbitrary and capricious,” noting that it “relied on a selection of data, tests, and standards that did not always appear to be logical, obvious or even rational.”
- In response to the ruling, CropLife America, which had filed an amicus brief in favor of the registrants, issued a press statement that reads, in part, “modern agricultural technologies in fact assist with the preservation of endangered species”. The CropLife press statement also notes that the Court’s ruling reinforced the need for “informed, comprehensive,” science-based decision-making to help “ensure the protection of endangered species and all wildlife.”

An Underlying Problem

- Recent events surrounding the NMFS BiOp underline an inherent problem with the ESA itself and how its requirements dovetail in practice with requirements for pesticide regulation under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The ESA requires EPA to evaluate every pesticide registration decision for potential impact to endangered species and, if such impact cannot be ruled out, EPA must “consult” with NMFS or the U.S. Fish and Wildlife Service to ensure that the outcome incorporates appropriate best practices or restrictions. However, significant differences among these federal agencies in regulatory standards, scientific methodologies, staff capabilities and overall philosophies have thus far prevented effective consultations from taking place. Congress failed to identify how inter-agency differences of opinion in these consultations should be resolved. Consequently, decades have now elapsed since the ESA was enacted without an effective pesticide consultation process ever being achieved. This has resulted in ongoing litigation by special interest groups in which regulatory processes for the protection of salmon have been subjected to continual churn, without consensus among agencies. All the while, farmers’ access to the crop protection products they need for sustainable operations frequently has been placed at risk.

What Comes Next

- Existing product labels for chlorpyrifos (and the other two pesticides affected by the BiOp) will now remain in effect, and other steps likely will be taken to address ESA statutory requirements.
- At the request of the U.S. government, the National Research Council (NRC) of the U.S. National Academy of Science convened an expert panel to offer recommendations on how the significant discrepancies in scientific approach between EPA and NMFS might be resolved. The panel met throughout 2012 and a final report is anticipated in the next several weeks. The guidance provided by the NRC panel likely will shape the future of EPA-NMFS ESA consultations. But no easy answers are anticipated. Instead, the panel report is likely to recommend what may be a lengthy process of research and process changes to resolve the many areas of scientific disagreement which currently exist.

About Chlorpyrifos

- Chlorpyrifos is one of the most widely used insect control products worldwide and is currently registered for use in about 100 nations, including the U.S., Canada, the United Kingdom, Spain, France, Italy, Japan, Australia and New Zealand.
- Labeled uses of chlorpyrifos rest on four decades of experience in use, health surveillance of manufacturing workers and applicators and more than 3,600 studies and reports examining the product in terms of human health and the environment. No pest control product has been more thoroughly tested.
- Many growers rely upon chlorpyrifos in order to maintain established integrated pest management programs, and no alternative control methods to chlorpyrifos are currently available for control of specific pests on many different crops.
- Dow AgroSciences recognizes the importance of chlorpyrifos to many of its customers, and we will continue to support registrations of chlorpyrifos products to address regulatory needs with high quality data and state-of-the-art research.