



BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OPP-2014-0301; FRL-9911-68]**

**Request for Public Comment on Proposed Stipulated Injunction Involving Five Pesticides and Pacific Salmonid Species Listed as Threatened or Endangered Under the Endangered Species Act; Notice of Availability**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA is requesting comments on a proposed stipulated injunction that, among other things, would reinstitute streamside no-spray buffer zones to protect endangered or threatened Pacific salmon and steelhead in California, Oregon, and Washington. The stipulated injunction would settle litigation brought against EPA by the Northwest Center for Alternatives to Pesticides (NCAP) and others in U.S. District Court in Washington State. These buffers were originally established by the same court in prior litigation brought against EPA by the Washington Toxics Coalition (WTC) and others. Like the original buffer zones, the limitations in this proposed stipulated injunction would be part of a court order but would not be enforceable as labeling requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The no-spray buffer zones will apply to the pesticides carbaryl, chlorpyrifos, diazinon, malathion, and methomyl. These buffers would remain in place until EPA implements any necessary protections for Pacific salmon and steelhead based on reinitiated consultations with the National Marine

Fisheries Service (NMFS). EPA is reevaluating these pesticides in connection with its current FIFRA registration review process and the proposed stipulated injunction would reinstitute the buffers in the interim. EPA will evaluate all comments received during the 30-day public comment period to determine whether all or part of the proposed stipulated injunction warrants reconsideration or revision.

**DATES:** Comments must be received on or before [*insert date 30 days after date of publication in the Federal Register*].

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2014-0301, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Anita Pease, Environmental Fate and Effects Division (7507P), Office of Pesticide Programs, Environmental Protection

Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-7695; email address: *pease.anita@epa.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of particular interest to the parties in the *NCAP v. EPA* litigation, environmental organizations, professional and recreational fishing interests, other public interest groups, State regulatory partners, other interested Federal agencies, and pesticide registrants and pesticide users. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](http://regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:
- i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
  - ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
  - iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
  - iv. Describe any assumptions and provide any technical information and/or data that you used.
  - v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
  - vi. Provide specific examples to illustrate your concerns and suggest alternatives.
  - vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
  - viii. Make sure to submit your comments by the comment period deadline identified.

*C. How Can I Get Copies of this Document and Other Related Information?*

A copy of the proposed stipulated injunction is available in the docket under docket ID number EPA-HQ-OPP-2014-0301.

**II. Background**

*A. What Action is the Agency Taking?*

EPA is requesting comments on a proposed stipulated injunction that, among other things, would reinstitute streamside no-spray buffer zones to protect endangered and threatened Pacific salmon and steelhead in California, Oregon, and Washington. The stipulated injunction would settle litigation brought against EPA by NCAP and others in U.S. District Court in Washington State. Like the original buffer zones, the limitations in this proposed stipulated injunction would be part of a court order but would not be enforceable as labeling requirements under FIFRA. To view the interactive map displaying the areas where the buffer zones apply, go to <http://www.epa.gov/espp/litstatus/wtc/uselimitation.htm>. The no-spray buffer zones will apply to the pesticides carbaryl, chlorpyrifos, diazinon, malathion, and methomyl. These buffer zones would remain in place until EPA implements any necessary protections for Pacific salmon and steelhead based on reinitiated consultations with NMFS. EPA is reevaluating these pesticides in connection with its current FIFRA registration review process and the proposed stipulated injunction would reinstate the buffers in the interim.

The no-spray buffers in the proposed stipulated injunction extend 300 feet from salmon supporting waters for aerial applications of the 5 pesticides and 60 feet for ground applications. These same buffers are currently in place for 1, 3-dichloropropene (1, 3-D or telone), bromoxynil, diflubenzuron, fenbutatin oxide, prometryn, propargite, and racemic metolachlor that are still subject to the original injunction issued in 2004 in *WTC, et al. v. EPA*. The buffers for those 7 pesticides will remain in place until the completion of EPA's current Endangered Species Act (ESA) consultations with NMFS.

EPA will evaluate all comments received during the 30-day public comment period to determine whether all or part of the proposed stipulated injunction warrants reconsideration or revision.

*B. What is the Agency's Authority for Taking this Action?*

On November 29, 2010, NCAP and other environmental groups and fishing interests filed a lawsuit in the Federal District Court for the Western District of Washington alleging that EPA failed to comply with ESA sections 7 and 9 (16 U.S.C. 1536 and 1538) with regard to the effects of 6 EPA-registered pesticides (carbaryl, carbofuran, chlorpyrifos, diazinon, malathion, and methomyl) on 28 Pacific salmonid species that are listed as endangered or threatened under ESA (*NCAP, et al., v. EPA*, C10-01919 (W.D. Wash.)). Subsequent to the filing of the case, all carbofuran end-use product registrations were cancelled, effectively leaving only 5 pesticides at issue in the litigation. On February 21, 2013, in *Dow Agrosciences LLC v. NMFS*, 707 F.3d 462 (4<sup>th</sup> Cir. 2013), the U.S. Court of Appeals for the 4<sup>th</sup> Circuit vacated the NMFS biological opinion addressing chlorpyrifos, diazinon, and malathion. Following that ruling, the plaintiffs in the *NCAP v. EPA* litigation supplemented their original complaint to assert that in the absence of a valid biological opinion, EPA had failed to complete consultation on those 3 pesticides. In the fall of 2013, the intervenors, CropLife America and other pesticide industry and pesticide user groups, filed a motion to dismiss both that claim and a claim that EPA's registration of the pesticides was in violation of the "take" provisions of ESA section 9. On January 28, 2014, Judge Zilly denied intervenors' motion to dismiss these claims. Subsequent to that ruling, the parties filed a stipulated motion to stay the *NCAP v. EPA* litigation to allow the parties to discuss the potential for

settlement. EPA and the plaintiffs have reached a proposed agreement that would reinstitute the no-spray buffers originally established in the *WTC v. EPA* litigation, as explained in Unit II.A., during the period that EPA develops new biological evaluations for salmonid species (which will be completed in connection with the development of EPA's national FIFRA registration reviews for these pesticides). These buffer zones would remain in place until EPA implements any necessary protections for Pacific salmon and steelhead based on reinitiated consultations with NMFS. The agreement is embodied in the proposed stipulated injunction that is being made available for review and comment through this notice. In separate litigation, *NCAP v. NMFS*, C07-1791 (W.D. Wash.), NMFS has agreed to complete any consultation EPA reinitiates on chlorpyrifos, diazinon, and malathion by December 2017, and any consultation EPA reinitiates on carbaryl and methomyl by December 2018. These dates are intended to correspond with EPA's FIFRA registration review schedule for these pesticides.

The stipulated injunction would also require EPA to provide notice of the reinstatement of the no-spray buffers zones to numerous groups, including certified applicators, State and local governments, Federal agencies, user groups, extension services, and land grant universities in affected portions of California, Oregon, and Washington. It also requires EPA to provide certain information to the public and pesticide users through the EPA website, including maps that highlight the stream reaches where the buffer zones apply.

With this document, EPA is opening a 30-day comment period on the proposed stipulated injunction. EPA will review any comments received during the 30-day public comment period to determine whether all or part of the proposed stipulated injunction

warrants reconsideration or revision. If EPA determines that any part of the proposed stipulated injunction merits reconsideration or revision, EPA will contact the plaintiffs concerning this matter and the proposed stipulated injunction will not be submitted to the Court until EPA and plaintiffs reach agreement on any such changes. If EPA determines that the proposed stipulated injunction does not need to be reconsidered or revised, the proposed stipulated injunction will be submitted to the Court and shall become effective upon ratification by the Court. Once the stipulated injunction is ratified by the Court, EPA will post on its website at <http://www.epa.gov/pesticides> a notice indicating the stipulated injunction has been so entered.

**List of Subjects**

Environmental protection, Endangered species.

Dated: June 2, 2014.

Jack Housenger,

*Director, Office of Pesticide Programs.*

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