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ARCHIVES DIVISION
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 603
DEPARTMENT OF AGRICULTURE

FILED
01/30/2019 9:15 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Limitations on Pesticide Products Containing Aminocyclopyrachlor

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 02/26/2019 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Sean Fornelli
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 02/15/2019

TIME: 6:00 PM - 7:30 PM

OFFICER: Judith Callens

ADDRESS: Deschutes County Road
Department
61150 SE 27th St.
Bend, OR 97702

DATE: 02/22/2019

TIME: 10:00 AM - 12:00 PM

OFFICER: Judith Callens

ADDRESS: Oregon Department of
Agriculture
635 Capitol St NE
Hearing Room
Salem, OR 97301

NEED FOR THE RULE(S):

There are at least four locations in central Oregon where ponderosa pine, lodgepole pine, and possibly other valuable tree species have been negatively impacted by the herbicide aminocyclopyrachlor. This herbicide was applied to certain rights-of-way (ROW) for weed control. In November 2013, an Oregon Department of Agriculture (ODA) Pesticide Investigator noticed a moderate number of dead and dying trees on Forest Service property in Deschutes County, Oregon, near the ROW. ODA initiated a pesticide use investigation. In early 2015, a second pesticide use investigation was initiated after identifying an additional site, also in Deschutes County. Both investigations confirmed the presence of aminocyclopyrachlor during environmental sampling. Further environmental sampling conducted by ODA in Fall of 2018 also confirmed the presence of aminocyclopyrachlor in dead and dying trees, three to six years post-application. There are currently four locations exhibiting herbicide damage attributed to the use of aminocyclopyrachlor in Oregon. Aminocyclopyrachlor had not been applied for several years in these locations.

The U.S. Department of Agriculture's (USDA) U.S. Forest Service also investigated the dead and damaged trees and prepared a report in 2015. The Forest Service concluded that the tree mortality and dieback was likely caused by application of aminocyclopyrachlor in the ROW. The Forest Service issued an updated report in Spring 2018, in which it reiterated its earlier conclusion that aminocyclopyrachlor was likely the cause of the damage, and found that the

severity of the damage has increased substantially since its 2015 report. The areas previously treated with aminocyclopyrachlor continue to decline, and there are increasing numbers of dead trees. The Forest Service identified 1,454 dead or dying trees along Highway 20 near Sisters. Some of these trees are old-growth ponderosa pines that are 150-300 years old. Because aminocyclopyrachlor is a relatively new herbicide, it is unknown how many trees stressed from past applications of aminocyclopyrachlor will die in the future.

Pesticide products containing aminocyclopyrachlor represent a high risk to desirable trees and shrubs. The pesticide product labels contain language meant to mitigate this risk; however, ODA's investigation into the aminocyclopyrachlor applications that are responsible for the damage and dieback of the trees in central Oregon show that the applications were made in accordance with this label language. This proposed rule is intended to address the risk of further damage to trees and shrubs found along the ROWs of Oregon, and protect desirable trees and shrubs.

Aminocyclopyrachlor is active at very low levels, highly soluble in water, and dissipation of aminocyclopyrachlor in the environment is expected to occur predominantly through runoff and leaching. Therefore, the proposed rule also adds protections for Oregon waterways. In addition, the State of Oregon has an active and ongoing program to aid in the conservation and recovery of greater sage-grouse, which is a sagebrush obligate species (i.e., sagebrush habitat is essential for their survival). Aminocyclopyrachlor is known to negatively impact sagebrush, the primary component of sage-grouse habitat and main food resource for sage-grouse during the winter. This proposed rule also provides protections for important sage-grouse habitat adjacent to sage-grouse leks.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Report, June 12, 2015: Dieback and mortality of ponderosa and lodgepole pines associated with herbicide applications along roads on the Deschutes National Forest, by the USDA Forest Service. Available upon request from the Oregon Department of Agriculture.

Report, Spring 2018 Update: Dieback and mortality of ponderosa pine along Highway 20 associated with herbicide applications near Sisters, Oregon, by the USDA Forest Service. Available upon request from the Oregon Department of Agriculture.

Oregon Department of Agriculture Agricultural Use Investigation, Case Name: Hwy 20/USFS, ODOT: Case No. 150404. Case No. 140163 and Case # 180714. Available upon request from the Oregon Department of Agriculture.

FISCAL AND ECONOMIC IMPACT:

Minimal additional cost will be incurred because there are alternative pesticides registered for use on the identified sites. See Statement of Cost of Compliance for further detail regarding fiscal and economic impact on state agencies, units of local government, and the public.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The enactment of this rule will save the Oregon Department of Agriculture approximately \$50,000.00 - \$75,000.00 dollars a year in pesticide investigations, laboratory analyses and outreach expenses.

Units of local government and members of the public (i.e., the licensed Commercial Pesticide Operators and Commercial Pesticide Applicators described in the following paragraph) that apply pesticides containing aminocyclopyrachlor could be economically affected by this rule. According to information gathered by the Department, 15 Oregon counties have used pesticides containing aminocyclopyrachlor. In most situations, local governments and the public will incur minimal, if any, extra cost due to this rule because other pesticides are available for use in the areas and circumstances addressed by this rule. Most alternative pesticides do not have the same level of persistence as the pesticides containing aminocyclopyrachlor. Existing stocks of aminocyclopyrachlor may still be legally used on other sites indicated on pesticide labels; only applications to the specifically identified areas will be prohibited by enactment of this rule.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small business and types of businesses and industries with small businesses subject to the rule:

This rule will potentially impact approximately 110 licensed Commercial Pesticide Operators and 465 licensed Commercial Pesticide Applicators by prohibiting application of aminocyclopyrachlor, under certain conditions, to specific identified sites in this rule.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

There are no additional requirements mandated by this rule.

c. Equipment, supplies, labor and increased administration required for compliance:

There are no additional requirements mandated by this rule.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Department worked with small business owners, among other interested parties, to develop this rule. Small business owners were represented in the two stakeholder meetings that the Department convened to aid in the development of this rule.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

In developing this rule and the temporary rule that preceded it, the Department worked extensively with stakeholders including League of Oregon Cities, Association of Oregon Counties, Oregon Vegetation Management Association, Oregon Department of Transportation, United States Forest Service, Oregon Department of Environmental Quality, Oregonians for Food and Shelter, Oregon Forest Industries Council, Oregon State University, Oregon County Weed Association, Beyond Toxics, and Citizen Advocate Dan Harshbarger.

ADOPT: 603-057-0392

RULE SUMMARY: This rule prohibits the application of any product containing aminocyclopyrachlor on certain defined rights-of-way; natural areas; restoration areas; marshes, swamps, bogs, and wetlands unless all conditions in an exception are met. This rule prohibits the application of any product containing aminocyclopyrachlor by any type of aerial application method. This rule prohibits the application of any product containing aminocyclopyrachlor in areas where the roots of desirable trees or shrubs may extend; on the inner or outer banks of ditches or canals; or in certain proximity to greater sage-grouse (*Centrocercus urophasianus*) leks (mating areas).

CHANGES TO RULE:

603-057-0392

Limitations on Pesticide Products Containing Aminocyclopyrachlor

(1) In addition to the other prohibitions stated in this rule, it is prohibited to apply any product containing aminocyclopyrachlor on any of the following sites:

(a) Rights of way;

(b) Natural areas, such as wildlife management areas, wildlife openings and wildlife habitats;

(c) Restoration areas, marshes, swamps, bogs and wetlands; or

(d) Inner or outer banks of ditches or canals.

(2) An exception to the prohibitions in subsections (1)(a) - (1)(c) of this rule is if all of the following conditions are met:

(a) Use is limited to a spot treatment. For purposes of this rule, the combined spot treatments can not exceed more than five percent of an acre, and no individual treatment area may exceed nine square feet;

(b) Use is limited to one application per 365 days; and

(c) Use is to control state- or county-listed noxious weeds.

(3) In addition to the other prohibitions stated in this rule, it is prohibited to apply any product containing aminocyclopyrachlor in any area where the roots of desirable trees or shrubs may extend.

(4) In addition to the other prohibitions stated in this rule, it is prohibited to apply any product containing aminocyclopyrachlor by any type of aerial application method.

(5)(a) In addition to the other prohibitions stated in this rule, it is prohibited to broadcast apply any product containing aminocyclopyrachlor in any of the following areas:

(i) Sage-grouse core areas;

(ii) Sage-grouse low density areas; or

(iii) Sage-grouse general habitat within 3.1 miles of a lek.

(b) For purposes of this section, "core areas," "low density" areas, and "general habitat" are defined in OAR 635-140-0002 and designated in maps maintained by the Oregon Department of Fish and Wildlife.

(6) In addition to the other prohibitions stated in this rule, it is prohibited to:

(a) Allow or provide grass clippings or other materials that have been treated with or otherwise exposed to aminocyclopyrachlor for use in compost, mulch, animal bedding, or any other materials that may come into contact with sensitive plants;

(b) Mill wood from trees that are dead or dying due to aminocyclopyrachlor exposure; or

(c) Allow or provide sawdust or other by-products from trees that are dead or dying due to aminocyclopyrachlor exposure to be used in compost, mulch, animal bedding, or any other materials that may come into contact with sensitive plants.

(7) For purposes of this rule, "rights of way" means the following areas involved in common transport:

(a) City, county, state and federal roads and highways;

(b) Railroads and airports;

(c) Electric utilities (transformer stations and substations, switching stations, transmission lines and distribution lines);

(d) Pipelines;

(e) Banks of public bargeways and areas around locks and dams; and¶

(f) Bicycle, bridle, snowmobile and other public recreational paths.¶

(8) Failure to comply with sections (1), (2), (3), (4), (5) or (6) above may result in one or more of the following actions:¶

(a) Revocation, suspension or refusal to issue or renew the license or certification of an applicant, licensee or certificate holder;¶

(b) Imposition of a civil penalty; or¶

(c) Any other enforcement action authorized under any law.

Statutory/Other Authority: ORS 561.020, 634.306, 634.322, 634.900

Statutes/Other Implemented: ORS 634