



March 20, 2019

*By email to:* [asonnen@oda.state.or.us](mailto:asonnen@oda.state.or.us)

Ms. Andrea Sonnen  
Pesticides Program  
Oregon Department of Agriculture  
635 Capitol Street NE  
Salem, OR 97301

**Re: Oregon Department Of Agriculture (ODA) Pesticides Programs;  
Permanent Administrative Rulemaking; Products Containing  
Aminocyclopyrachlor (ACP); OAR 603-057-0392 – Request For  
Postponement Under ORS 183.335(4)**

Dear Ms. Sonnen:

The Crop Science Division of Bayer (Bayer) writes today to invoke ORS 183.335(4) requiring the Oregon Department of Agriculture (ODA) to postpone the date of its Proposed Permanent Administrative Rulemaking Regarding Products Containing Aminocyclopyrachlor (ACP) (OAR 603-057-0392) upon a timely request by an interested person. This request is timely as the earliest date on which the rule could become effective is March 25. As the current registrant of ACP products in Oregon, Bayer is an interested person under ORS 183.335(4).

Bayer requests that ODA postpone the effective date for the full 90 days allowed by law. This will provide Bayer, and other members of the public should they desire, sufficient time to obtain, review and address public agency records regarding the use of ACP products, to provide further scientific and technical assessments supporting no additional restrictions to those already contained on the government-approved label or a more tailored rule, and to outline an alternative that would address the potential for misapplication in particularly sensitive areas of the State as an alternative to the approach currently proposed by ODA, which is in effect a ban.

A 90-day postponement under ORS 183.335(4) is necessary to ensure that interested parties, including Bayer, have a sufficient opportunity to obtain public records (including those requested from ODA), to review those records, and to provide additional facts, data, and analysis to ODA. A full 90-day postponement is also necessary to ensure that ODA will undertake a full and fair consideration of whether a rule is needed and, if so, to propose a rule that is tailored to

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managing the risk of herbicide exposure to desirable trees without unfairly singling out one product line for unjustified and unequal restrictions.

Bayer anticipates that if ODA takes into account the full record, including additional facts and data that it and others may provide during the 90-day postponement, ODA will withdraw the proposed permanent rule or, at a minimum, re-propose it for public comment with a significantly revised scope. However, to preserve its rights, Bayer is invoking ORS 183.335(4) in case ODA intends to move forward on the previously announced schedule.

To briefly recap the procedural history:

- ODA filed the original notice of its proposed permanent rule on January 30, 2019, and stated that ODA intended to make the rule effective on March 25, 2019.
- The proposed permanent rule significantly expanded, without a reasoned explanation, a temporary rule regulating ACP, which had been adopted in 2018 without an opportunity for public comment.
- In connection with its proposed permanent rule, ODA held public hearings on February 15, 2019 and February 22, 2019, and accepted public comments until February 26, 2019.
- The rule was opposed in the public hearings by a broad range of public and private stakeholders who believe it is unnecessary and, at a minimum, overbroad and unfairly singles out a particular compound for different treatment than the alternatives.
- To date, ODA has not made recordings and transcripts of the hearing, copies of written comments, and other relevant records available to the public.

Bayer timely submitted public records requests on February 18, 2019 for records relevant to the proposed rule, including records from ODA, the U.S. Forest Service, Oregon Department of Transportation, Jefferson County, and Deschutes County pertaining to historic interagency recommendations and decisions to use ACP products. Bayer has received partial responses to these requests from some of these agencies, and understands that ODA is working to respond to its request, although it has not yet received the requested ODA records.

A 90-day postponement as provided by law, will provide necessary time to obtain and review ODA records, and the records of other relevant agencies, to allow the transparency that the public deserves and a meaningful opportunity to address



fundamental questions about the validity of ODA's proposal. These include:

- Questions about potential inaccuracies in ODA's underlying February 28, 2014 and September 1, 2015 incident investigations;
- Questions about the conclusion reached in ODA's 2014 investigation that future occurrences were not expected, and whether ODA's conclusion and expectations were communicated to ACP product applicators at that time;
- Questions and possible misunderstandings about the scope of, and adherence to, ACP product label use restrictions, precautions, and requirements;
- Questions about the scientific and technical underpinnings that ODA is relying upon in support of the currently proposed rule;
- Questions about the historic decisions by Federal, State, and County officials to recommend ACP for use in areas adjacent to desirable trees, notwithstanding existing product label restrictions;
- Questions about the necessity and fairness of singling out ACP products for a statewide ban, particularly given ACP's history of safe use in many roadside, railroad, and utility integrated vegetation management (IVM) spray applications across Oregon since 2015 and nationwide; and
- Questions about the impacts of ODA's action and whether they are consistent with Oregon and federal law.

ODA is required to fully consider all written and oral submissions before determining whether and, if so, how to proceed with a final rule. ORS 183.335(3)(a). A full 90-day postponement of the proposed permanent rule is needed to provide the public a meaningful opportunity to obtain, review, and respond to a complete set of government records. It is also necessary to provide Bayer with sufficient time to provide additional facts, data, and arguments regarding technical, scientific, legal, and policy implications related to ODA's current proposed rule and for ODA to fully and fairly evaluate and respond to that information in determining how it will proceed with regard to the currently proposed rule.

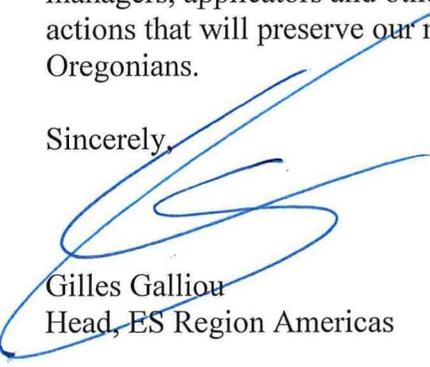
Thank you in advance for acknowledging ODA's receipt of this letter and confirming the new earliest date that the subject proposed rulemaking could go into effect.

Ms. Andrea Sonnen  
March 20, 2019  
Page 4



Bayer remains committed to continuing to work with regulators, vegetation managers, applicators and other stakeholders in the State of Oregon to implement actions that will preserve our natural resources and meet the needs of all Oregonians.

Sincerely,



Gilles Galliou  
Head, ES Region Americas

cc: Lisa Charpiloz Hanson (ODA Deputy Director)  
Stephanie Page (ODA Director of Natural Resources Program Area)  
Dale Mitchell (ODA Pesticides Program Manager)  
Rose Kachadoorian (ODA Pesticides Program Manager)  
Sheri Roberson (Division Counsel, Bayer)  
Elizabeth Howard (Schwabe Williamson & Wyatt)