

August 19, 2021

## **NEW EPA RULE BANS USE OF PESTICIDE CHLORPYRIFOS ON FOOD**

To Our Clients and Friends:

On August 18, 2021, EPA released a final rule revoking tolerances for chlorpyrifos residues on food.<sup>[1]</sup> EPA took this action to “stop the use of the pesticide chlorpyrifos on all food to better protect human health, particularly that of children and farmworkers.”<sup>[2]</sup> The agency will also issue a Notice of Intent to Cancel under the Federal Insecticide, Fungicide, and Rodenticide Act to cancel registered food uses of the chemical associated with the revoked tolerances.

Chlorpyrifos is an “insecticide, acaricide and miticide used primarily to control foliage and soil-borne pests,” in a large variety of agricultural crops, including soybeans, fruit and nut trees, and other row crops.<sup>[3]</sup> EPA sets “tolerances,” which represent “the maximum amount of a pesticide allowed to remain in or on a food.”<sup>[4]</sup> Under the Federal Food, Drug, and Cosmetic Act (FFDCA), EPA “shall modify or revoke a tolerance if the Administrator determines it is not safe.”<sup>[5]</sup>

Yesterday’s revocation follows a recent order from the U.S. Court of Appeals for the Ninth Circuit instructing EPA to issue a final rule in response to a 2007 petition filed by the Pesticide Action Network North America and Natural Resources Defense Council requesting that EPA revoke all chlorpyrifos tolerances on the grounds that they were unsafe.<sup>[6]</sup> EPA previously responded to and denied the original petition and subsequent objections to its denial. A coalition of farmworker, environmental, health, and other interest groups then challenged the denials in court.<sup>[7]</sup> In April 2021, a split panel of the Ninth Circuit ruled that EPA’s failure either to make the requisite safety findings under the FFDCA or issue a final rule revoking chlorpyrifos tolerances was “in derogation of the statutory mandate to ban pesticides that have not been proven safe,” and ordered the agency to grant the 2007 petition, issue a final rule either revoking the tolerances or modifying them with a supporting safety determination, and cancel or modify the associated food-use registrations of chlorpyrifos.<sup>[8]</sup>

In response, EPA has granted the 2007 petition and issued a final rule that revokes all chlorpyrifos tolerances listed in 40 CFR 180.342.<sup>[9]</sup> In issuing this rule, EPA noted that, based on currently available information, it “cannot make a safety finding to support leaving the current tolerances” in place.<sup>[10]</sup> The final rule becomes effective 60 days after publication in the Federal Register, and the revocation of tolerances becomes effective six months thereafter.

EPA indicated it followed the Ninth Circuit’s instruction by issuing the rule under section 408(d)(4)(A)(i) of the FFDCA, which allows issuance of a final rule “without further notice and without further period for public comment.”<sup>[11]</sup> EPA indicated its intent to review comments on the previously issued proposed interim decision, draft revised human health risk assessment, and draft ecological risk assessment for chlorpyrifos.<sup>[12]</sup> The Agency also intends to review registrations for the remaining non-food uses of the chemical.<sup>[13]</sup>

# GIBSON DUNN

Prior to EPA’s action, certain states including Hawaii, New York, and Oregon had restricted the sale or use of the pesticide.[14] California prohibited the sale, possession, and use of chlorpyrifos for nearly all uses by the end of 2020.[15]

---

[1] U.S. EPA, Pre-Publication Notice of Final Rule re Chlorpyrifos (Aug. 18, 2021), [https://www.epa.gov/system/files/documents/2021-08/pre-pub-5993-04-ocspp-fr\\_2021-08-18.pdf](https://www.epa.gov/system/files/documents/2021-08/pre-pub-5993-04-ocspp-fr_2021-08-18.pdf).

[2] U.S. EPA, News Releases from Headquarters, EPA Takes Action to Address Risk from Chlorpyrifos and Protect Children’s Health (Aug. 18, 2021), <https://www.epa.gov/newsreleases/epa-takes-action-address-risk-chlorpyrifos-and-protect-childrens-health>.

[3] <https://www.epa.gov/ingredients-used-pesticide-products/chlorpyrifos>.

[4] U.S. EPA, Regulation of Pesticide Residues on Food, <https://www.epa.gov/pesticide-tolerances>.

[5] See 21 U.S.C. § 346a(b)(2)(a)(i) (EPA “may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerances is safe.”).

[6] Pre-Publication Notice of Final Rule re Chlorpyrifos at 6–7; *League of United Latin Am. Citizens v. Regan*, 996 F.3d 673 (9th Cir. 2021).

[7] Pre-Publication Notice of Final Rule re Chlorpyrifos at 7.

[8] *League of United Latin Am. Citizens*, 996 F.3d at 667, 703–04.

[9] Pre-Publication Notice of Final Rule re Chlorpyrifos at 8.

[10] *Id.*

[11] *League of United Latin Am. Citizens*, 996 F.3d at 702; 21 U.S.C. § 346a(d)(4)(A)(1).

[12] U.S. EPA, EPA Takes Action to Address Risk from Chlorpyrifos and Protect Children’s Health.

[13] *Id.*

[14] See Haw. S.B.3095 (Relating to Environmental Protection) (2018); N.Y. Dep’t of Environ. Conservation, Chlorpyrifos Pesticide Registration Cancellations and Adopted Regulation, <https://www.dec.ny.gov/chemical/122311.html>; O.A.R. 603-057-0545 (Permanent Chlorpyrifos Rule) (Dec. 15, 2020), available here.

[15] Cal. Dep’t of Pesticide Regulation, Chlorpyrifos Cancellation <https://www.cdpr.ca.gov/docs/chlorpyrifos/index.htm>.



*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental Litigation and Mass Tort practice group, or the following authors:*

*Abbey Hudson – Los Angeles (+1 213-229-7954, [ahudson@gibsondunn.com](mailto:ahudson@gibsondunn.com))*

*David Fotouhi – Washington, D.C. (+1 202-955-8502, [dfotouhi@gibsondunn.com](mailto:dfotouhi@gibsondunn.com))*

*Joseph D. Edmonds – Orange County (+1 949-451-4053, [jedmonds@gibsondunn.com](mailto:jedmonds@gibsondunn.com))*

*Jessica M. Pearigen – Orange County (+1 949-451-3819, [jpearigen@gibsondunn.com](mailto:jpearigen@gibsondunn.com))*

*Please also feel free to contact the following practice group leaders:*

***Environmental Litigation and Mass Tort Group:***

*Stacie B. Fletcher – Washington, D.C. (+1 202-887-3627, [sfletcher@gibsondunn.com](mailto:sfletcher@gibsondunn.com))*

*Daniel W. Nelson – Washington, D.C. (+1 202-887-3687, [dnelson@gibsondunn.com](mailto:dnelson@gibsondunn.com))*

© 2021 Gibson, Dunn & Crutcher LLP

*Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.*