

**Maryland General Assembly
Department of Legislative Services**

**Emergency/Proposed Regulations
Department of Agriculture
(DLS Control No. 20-019)**

Overview and Legal and Fiscal Impact

This regulation generally prohibits a person from using insecticides containing chlorpyrifos or seeds that have been treated with chlorpyrifos. The regulation also provides for an exemption from the general prohibition, and requires the Secretary of Agriculture to establish a committee that will determine alternatives to using insecticides that contain chlorpyrifos or seeds that have been treated with chlorpyrifos.

The regulation presents no legal issue of concern.

Special fund expenditures increase minimally and special fund revenues decrease minimally. Small businesses may be meaningfully affected.

Regulation of COMAR Affected

Department of Agriculture:

Pesticide Use Control: Use and Sale of Pesticides, Certification of Pesticide Applicators and Pest Control Consultants, and Licensing of Pesticide Businesses:
COMAR 15.05.01.02

Legal Analysis

Background

To be sold, distributed, or used in Maryland, a pesticide must be registered by both the Department of Agriculture and the U.S. Environmental Protection Agency (EPA). Numerous products containing chlorpyrifos are registered by EPA and the department. According to EPA, chlorpyrifos is used primarily to control foliage and soil-borne insect pests on a variety of food and feed crops. EPA is required, under federal law, to establish maximum limits (or “tolerances”) for the amount of pesticide residue that can safely remain on food and feed commodities (unless a pesticide is exempted from the tolerance requirement) and, accordingly, there are chlorpyrifos tolerances established in federal regulations for various food and feed commodities.

In March 2017, EPA denied a petition originally filed in 2007 that requested that the food tolerances for chlorpyrifos be revoked (which would not allow any residue to remain on food or feed commodities) and all chlorpyrifos pesticide product registrations be canceled. The petition argued that continuation of the registrations and tolerances exposed the public to unsafe levels of

chlorpyrifos. EPA proposed, in November 2015, to revoke the tolerances for chlorpyrifos because it could not determine that they were safe and sought comment on additional data related to the proposal in November 2016. EPA, however, indicated in its 2017 denial of the 2007 petition that, after reviewing comments submitted in response to the 2015 proposal and 2016 request for additional comments, the agency concluded that further scientific evaluation was needed.

EPA has since issued a final order, in July 2019, denying objections (to the 2017 denial of the 2007 petition) filed by public interest groups and the states of California, Maine, Maryland, Massachusetts, New York, Vermont, and Washington. In ongoing litigation in the 9th Circuit U.S. Court of Appeals (*LULAC v. Wheeler*), public interest groups and a number of states, including Maryland, have asked the court to set aside EPA's decisions to deny the 2007 petition and the subsequent objections, and to compel EPA to revoke the tolerances for chlorpyrifos. Opening briefs on that request were filed by the public interest groups and states in December 2019, and EPA's answering brief was due February 28, 2020.

Additionally, two bills on prohibiting the use of chlorpyrifos have been introduced in the General Assembly during the 2020 legislative session. As introduced, [Senate Bill 300](#) and [House Bill 229](#) of 2020 prohibit a person from using chlorpyrifos in the State, including insecticides that contain chlorpyrifos and seeds that have been treated with chlorpyrifos. As amended, [Senate Bill 300](#), among other things (1) prohibits a person from conducting an aerial application of chlorpyrifos; (2) generally prohibits the use of insecticides that contain chlorpyrifos or seeds that have been treated with chlorpyrifos; (3) authorizes the use of insecticides containing chlorpyrifos or snap bean seeds that have been treated with chlorpyrifos for specified purposes on or before June 30, 2021; and (4) authorizes the department to allow a person to use insecticides containing chlorpyrifos or snap bean seeds that have been treated with chlorpyrifos for specified purposes between July 1, 2021 and December 31, 2021, inclusive.

Summary of Regulation

The regulation generally prohibits the use of insecticides containing chlorpyrifos or the planting of seeds that have been treated with chlorpyrifos. More specifically, the regulation, among other things:

- prohibits the aerial application of an insecticide containing chlorpyrifos;
- generally prohibits a person from using an insecticide containing chlorpyrifos or seeds that have been treated with chlorpyrifos after December 31, 2020;
- authorizes a person to use, until June 30, 2021, snap bean seeds treated with chlorpyrifos and, for treating the trunks and lower limbs of fruit trees, insecticides containing chlorpyrifos;
- authorizes the Secretary to, between January 1, 2021 and December 31, 2021, authorize the use of an insecticide that contains chlorpyrifos or seeds that have been treated with

chlorpyrifos for a specified period of time if the Secretary makes a certain determination;
and

- requires the Secretary to establish a committee that will determine alternatives to using chlorpyrifos or seeds that have been treated with chlorpyrifos.

Legal Issues

The regulation presents no legal issues of concern.

The Joint Committee on Executive, Legislative, and Administrative Review may also wish to note that the Department of Agriculture indicates that the regulation is more restrictive or stringent than a corresponding federal standard applicable to this subject area under the federal Insecticide, Fungicide, and Rodenticide Act.

Statutory Authority and Legislative Intent

The department cites §§ 2-103, 5-104, 5-105, 5-106, 5-204, 5-207, and 5-210.2 of the Agriculture Article and Section 11 of Chapter 598 of 2018 as statutory authority for the regulation. More specifically, § 2-103 grants the Secretary broad authority to adopt regulations to carry out the provisions of law under the jurisdiction of the department. Section 5-204 requires the Secretary, among other things, to adopt regulations governing the storage, sale, distribution, exchange, use, and disposal of any pesticide and its container. The remaining cited authority is not relevant to this regulation.

The relevant cited authority is correct and complete. The regulation complies with the legislative intent of the law.

Emergency Status

The department requests emergency status beginning March 16, 2020 and expiring August 1, 2020. This emergency period is within the normal time frames approved by the Joint Committee on Administrative, Executive, and Legislative Review. The department indicates the emergency status is necessary to respond to recommendations from several agribusiness associations in the State that the department adopt regulations to phase out the use of products containing chlorpyrifos within a certain period of time. The department also states that, in addition, Corteva Agriscience, a principal manufacturer of chlorpyrifos and one of the registrants in the State, recently announced its strategic decision to exit the manufacture and sales business of chlorpyrifos products. Lastly, the department indicates the emergency status is necessary to prohibit the aerial application of insecticides containing chlorpyrifos before the 2020 growing season.

Technical Corrections and Special Notes

In response to suggestions from the Department of Legislative Services, staff for the department agrees to make the following changes to the regulations:

- in Regulation .02E(2)(a), clarifying the cross-reference, correcting a typographical error, clarifying that a person may not use seeds that have been treated with chlorpyrifos, and removing the phrase “for any use” as unnecessary and for clarity; and
- in Regulation .02E(2)(b), clarifying that snap bean seeds treated with chlorpyrifos may be used until June 30, 2021.

Fiscal Analysis

Special fund expenditures increase minimally and special fund revenues decrease minimally. Small businesses may be meaningfully affected.

Agency Estimate of Projected Fiscal Impact

The department advises that the regulation results in a minimal increase in special fund expenditures to provide additional education and assistance to farmers, certified crop advisors, and pesticide applicators related to integrated pest management, including information on safer alternatives to chlorpyrifos. The department also anticipates a minimal loss in special fund fee revenue from registration of products containing chlorpyrifos as the products are phased out. The Department of Legislative Services concurs.

Impact on Budget

There is no material impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

In the economic impact analysis included with the regulation, the department classifies the regulation as having minimal or no economic impact on small businesses in the State. The department, however, also indicates that a certain segment of agricultural businesses, such as nurseries, orchards, and Christmas tree farms, may be negatively affected by the inability to use insecticides containing chlorpyrifos to control foliage and soil-borne insect pests. That inability may result in yield or quality losses or increased costs for alternatives. The department has indicated, independent of the economic impact analysis included with the regulation, that the impact on nurseries, orchards, and Christmas tree farms may be meaningful. The Department of Legislative Services concurs that the regulation may have a meaningful impact on small businesses.

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