

# The Emergency Pesticide Use Loophole

## Little watched provision allows widespread unlabelled pesticide use

It was the summer of 2002, and the state of Louisiana thought it was time to bring back a banned pesticide to control rice weevil. So the state Department of Agriculture looked to the leadership of the infamous Bob Odom, who in addition to leading the department was indicted in August of 2002 on counts of bribery, felony theft, extortion, malfeasance in office, filing false public records, money laundering and obstruction of justice going back all 22 years of his tenure as Secretary of Agriculture. Mr. Odom naturally turned to a provision in the *Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA), which he claimed gave the state the right to apply a banned pesticide. The emergency exemption program (FIFRA Section 18), allows EPA to permit pesticides not registered for a specific purpose to be used under “emergency circumstances,” such as risk to human health or “significant economic [crop] loss.”

EPA does have veto authority over these decisions, but when Louisiana began applying this deadly pesticide, EPA stood by. The agency allowed farmers in the state of Louisiana, under the FIFRA emergency provision, to begin applying 10,000 acres worth of granular carbofuran for rice weevil control. After 2,500 acres were treated in June and existing

stocks of the highly hazardous chemical ran out, EPA initiated a 5-day public hearing process to decide whether to let the program proceed. The manufacturer, FMC, was gearing up production to meet the first new demand since the cancellation and phase-out were announced in 1991.

The chemical came under fire in the 1980’s after EPA estimated that one to two million birds were killed each year by granular carbofuran use. According to scientists at the U.S. Fish and Wildlife Service, “There are no known conditions under which carbofuran can be used without killing migratory birds. Many of these die-off incidents followed applications of carbofuran that were made with extraordinary care.” The pesticide has also been associated with the death of threatened and endangered species. But this did not stop Louisiana. And, EPA did not flinch.

After the action attracted media attention and numerous environmental and conservation groups weighed in, EPA did veto the additional acreage. It was a good legal move on EPA’s part, since the law states that a pesticide may not be given a specific exemption unless there is “movement toward registration of the proposed use.” Brining back banned formulations was not the intent of the law.

However, the Louisiana incident brought back bad memo-

ries for those who had tracked Section 18 exemptions through its years of abuse in the 1980’s and 1990’s. It is a reminder that this loophole in the law is something that needs constant monitoring and watchdogging.

A quick look at the exemption program’s current record finds that EPA grants, on average, over 80 percent of all Section 18 requests. From March 1998 to March 2002, EPA and states granted over 2000 exemptions, while it denied only 72. This means that in over 2000 cases across the country, pesticides or pesticide uses that have not been subject to full scientific and administrative review, are being applied to a field near you or to a crop that you eat.

Beyond Pesticides believes that this program is an abuse and misuse of authority and represents a disregard for human health and the environment.

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### Background

Section 18 emergency exemptions provide a loophole by which pesticides are used without the scrutiny provided in the registration process. Through declarations of emergencies and crisis, states allow use of pesticides which for several reasons (including lack of a sustainable market due to rapid develop-

ment of resistance, data gaps, or EPA’s concern about certain risks) cannot be registered for additional uses. EPA has said that pesticides with data gaps will not be allowed to expand their use patterns, but this restriction does not apply to emergency exemptions and special local needs registration.

Section 18 of FIFRA provides that, “The Administrator may, at his discretion, exempt any Federal or State agency from any provision of [FIFRA] if he determines that emergency conditions exist which require such exemption.” EPA has interpreted this section as a green light to permit states to exempt pesticides from the normal registration process when it feels emergency conditions exist.

In response to investigations of the Section 18 program, which uncovered widespread abuse, including a 260% increase in emergency exemptions and a 753% increase in crisis exemptions from 1978 to 1982, EPA initiated a negotiated rulemaking process in 1984 to develop new regulations. Allen Spalt, president of the Agricultural Resources Center in Carrboro, NC represented Beyond Pesticides (National Coalition Against the Misuse of Pesticides) on the negotiated rulemaking committee. Regulations developed by consensus were proposed by EPA in 1985, and the final version was published in 1986. Although the new regulations did

not include everything that Beyond Pesticides wanted, they were a substantial improvement.

Unfortunately, the reduction in the number of emergency exemptions issued immediately before the new regulations was followed by a gradual increase after 1985. Meanwhile, the threat of cancellations due to 1988 amendments to FIFIRA led to additional abuses of Section 18. The 1986 rules, intended to stem further abuses of the system slowed the increase but did not stop it. Between fiscal years 1985 and 1990 EPA documented a 108 percent increase in the number of exemptions, while state-granted exemptions rocketed up 158 percent. The problem proved to be more than just an increase in the number of exemptions. In congressional testimony, Beyond Pesticides Executive Director Jay Feldman said, "As of 1990, EPA and the states have granted emergency exemptions for chronic, routine problems." By definition, a chronic and routine problem does not qualify as an emergency. As the 1990's continued, so did these trends. Today, the EPA grants an average of over 80 percent of all Section 18 requests.

Due to this continued misuse of authority and disregard for human health and the environment, Beyond Pesticides is continuing the fight to keep EPA and states honest and working for our safety. Here is how to get involved:

## Challenging emergency exemptions

There are four types of emergency exemption: specific exemptions, quarantine exemptions, public health exemptions, and crisis exemptions. Specific, quarantine, and public health exemptions follow similar rules and must be approved by EPA. Crisis exemptions can be issued unilaterally by the state, which must notify EPA, and are limited to 15 days unless extended by an application for a specific, quarantine, or public health exemption. Beyond Pesticides' efforts have concentrated on the most common uses of Section 18—specific and crisis exemptions.

## How to learn about your state's emergency exemption

In some states it is easier to learn about impending Section 18 exemptions than others. In North Carolina, Allen Spalt learns about them by attending meetings of the state pesticide review board. In Kansas, Green Party activists Terry Shistar has learned about them from the "Economic Insect Survey Reports," but now has been assured that she will be notified by the state agency. Northwest Coalition for Alternatives to Pesticides (NCAP) requested a list of applications for past years under Oregon's open records act. Ideally, environmentalists should be able to convince the state agency that they should be part of the decision-making process on emergency exemptions.

A declaration of crises can be obtained from the state agency under the state's open records act or from EPA's registration division. It should not require a federal *Freedom of Information Act* (FOIA) request because, as part of a 1993 settlement agreement

(*NCAMP v. Browner*, U.S. District Court, Civ. Action No. 93-0087-LJO, 1993) filed by Beyond Pesticides, "EPA [is required to] establish a public docket for all emergency exemptions." Similarly, a copy of the application for a specific exemption can be obtained from the state agency or EPA. Since crisis exemption are often extended with a specific exemption request or are issued when a state has not received a timely response from EPA on the specific exemption, ask whether a specific exemption application has been submitted in the case of a crisis. EPA has recently started posting Section 18 requests on its website (<http://www.epa.gov/opprd001/section18/>), which provides a general look at how many and for what purpose requests are made in each state. Unfortunately, the listings are not up-to-date and are only posted after they have been granted or denied.

### Critiquing an application

The two most important questions to be addressed in reviewing an application are:

- Does an emergency situation exist?
- Is the pesticide chosen appropriate?

Most of the information needed for a critique is contained in the specific exemption application. However, it is also very useful to know how many times the state has issued an emergency exemption for the use. This information can be found at the EPA Section 18 website. The basic definition of an emergency is an "urgent, non-routine" situation. The most successful challenges have been on emergency exemptions that have been repeated for several years because these clearly fail to meet the "non-routine" requirement.

### Is it an emergency situation?

To determine if a request meets the definition of an emergency look closely at these issues within the application: Are there other registered products, are there alternative methods, is it a new pest, will there be significant financial loss?

**Other registered products.** Remarkably, many claimed emergencies fail to meet these simple requirements. Emergency exemptions may not be used to provide an additional tool, or even a more effective pesticide. If there are other registered products available for the use, the state must show that they are not efficacious. If they are not effective, they should not be registered for the use.

**Alternative methods.** The state must show that there are no alternative practices available. Although it is helpful in criticizing the application to be familiar with methods used by organic growers to deal with the pest or with literature on biocontrol, it is usually sufficient to point out the failure of the state to evaluate alternatives.

**New Pests.** Occasionally, an emergency exemption will be requested to control a new pest, but that does not always mean the emergency is justified. For example, products registered for "aphids" were available for control of the newly intro-

duced Russian wheat aphid, and it was necessary to show they were not effective. (Some were.) If an emergency exemption is issued for control of a new pest, the product should be making “reasonable progress toward registration”—a complete application for registration under Section 3 of FIFRA must be submitted within three years.

**Significant economic loss.** Most emergency exemptions are claimed to be needed to avoid a significant economic loss. The judgment of a significant economic loss should be backed up by data showing that the expected net profitability under emergency conditions is outside the range of profitability of the preceding five years. This requirement is the crux of an emergency—it is what makes the condition urgent and non-routine. It is generally very easy to criticize applications on this requirement because states almost never present the appropriate data.

A significant economic loss may be within the normal range of fluctuations of net income if the loss would affect the long-term financial viability of the operation. The preamble to the draft regulations supported by the negotiating rulemaking committee gives the following example: “...an enterprise may face a situation where, due to circumstances beyond its control (e.g., bad weather), it must have a remarkable good upcoming crop year in order to remain financially viable. While, without an exemption to control an emergency pest situation, it can expect a crop yield and/or income within the historical range, this will not be sufficient to make up for the previous crop failures. Only with the use of an emergency exemption to solve the pest problem, can the enterprise maintain an expected, above-average yield and/or income to a point where the long-term financial viability of the enterprise is assured.”

This type of significant economic loss should not be used repeatedly to justify exemptions—otherwise, it suggests that the enterprise never was viable.

### **Appropriate choice of pesticide**

There are several reasons that the state’s choice of a pesticide may be inappropriate: repeated exemptions without progress towards registration, known risk factors, and unknown risk factors.

**Repeated emergency exemptions.** Reasonable progress towards registration should be made, and therefore emergency exemptions beyond three years should very rarely be justified. (An emergency condition should not exist for year after year unless a new pest or a threat to public health or environment is involved.) The three years should include uses in other states as well. For example, Supracide was used under emergency exemption in Texas for a few years (and then abandoned due to resistance) before it began to be used under an emergency exemption in Kansas. This gave the registrant plenty of time to complete the registration.

**Known risk factors.** The state must make a judgment that the use does not pose unreasonable adverse effects to the environment. Since the same chemicals seem to appear in different states at the same time, cooperation with others working on emergency exemptions will be very helpful in this respect. Beyond Pesticides used this argument in July 2002 to help derail the request from the Louisiana Department of Agriculture to use granular carbofuran on rice. This pesticide was cancelled for that use due to its acute avian toxicity and a history of massive bird kills.

**Unknown risk factors.** Since a major use of Section 18 is the expansion of uses of pesticides with data gaps, these gaps should be noted in comments. EPA should not allow Section 18 to be used as a backdoor for chemicals that cannot meet registration requirements. Beyond Pesticides can help determine what data gaps exist.

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### **Crisis exemptions**

The declaration of a crisis may be accomplished by a letter sent to EPA from a state agency, and may be sent as much as 24 hours after the crisis begins. However, a crisis is limited to 15 days unless an application for a specific, public health, or quarantine exemption is submitted.

The crisis letter does not need to contain all of the justification for the emergency situation, but may contain enough to indicate that an emergency does not exist. For example, a crisis has included “weeds in wheat” in Kansas, for which many pesticides are available.

If additional information is available (for example, through a specific exemption request), review (even after the crisis has expired) can be very useful. Authority to issue crisis exemptions can be revoked from agencies that abuse it.

### **Conclusion**

Section 18 emergency requests are not always an abuse of power, but anytime a situation allows the circumvention of scientific rigger, administrative scrutiny, and public health and safety concerns special attention must be paid. Beyond Pesticides and our many partner organizations work diligently to monitor EPA and other agencies to ensure that public safety and the health of the environment comes first, but more public involvement is required. *Please take the time to watch your state agencies and prevent any future abuses. Contact Beyond Pesticides for assistance.*

*Terry Shistar, Beyond Pesticides board member, living in Lawrence, KS, Jay Feldman, Beyond Pesticides executive director, and Jessica Lunsford, Beyond Pesticides staff associate contributed to this article. The original piece was written by Terry Shistar.*