



June 8, 2015

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Public Comments Processing
Attn: Docket No. FWS-R5-ES-2015-0015
Mr. Martin Miller
Chief, Endangered Species
U.S. Fish and Wildlife Service, Northeast Regional Office
300 Westgate Center Drive
Hadley, MA 01035

Re: Comments Regarding Endangered and Threatened Wildlife and Plants;
Endangered Species Status for the Big Sandy Crayfish and the Guyandotte River
Crayfish; Docket No. FWS-R5-ES-2015-0015

Dear Mr. Miller:

CropLife America and Responsible Industry for a Sound Environment (RISE) (collectively, CLA) appreciate the opportunity to review and comment on the U.S. Fish and Wildlife Service (FWS)'s proposed rule entitled Endangered Species Status for the Big Sandy Crayfish (*Cambarus callainus*) and the Guyandotte River Crayfish (*Cambarus veteranus*), Docket No. FWS-R5-ES-2015-0015.¹

Established in 1933, CropLife America represents the developers, manufacturers, formulators and distributors of crop protection chemicals and plant science solutions for agriculture and pest management in the United States. CropLife America's member companies produce, sell and distribute virtually all the crop protection and biotechnology products used by American farmers. RISE's member companies develop, manufacturer, formulate and distribute non-agricultural and human health pest control solutions.

CLA represents registrant member companies' interests by, among other things, monitoring legislation, federal agency regulations and actions and litigation that impact the crop protection and pest control industries, and participating in such actions when appropriate. CLA is committed to working with EPA, USDA, FWS, the National Marine Fisheries Service, state wildlife agencies, conservation groups and other stakeholders to encourage responsible use of member products.

¹ Endangered Species Status for the Big Sandy Crayfish and the Guyandotte River Crayfish, 80 Fed. Reg. 18,710 (April 7, 2015).

Overview Of Federal Pesticide Regulation And The ESA

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides for federal regulation of pesticide distribution, sale and use in the United States.² All pesticides distributed or sold in the United States must be registered (licensed) by the United States Environmental Protection Agency (EPA).³ Prior to issuing a registration for use of a pesticide in the United States, EPA must determine, among other things, that the pesticide, when used in accordance with its labeled directions and with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects on humans or the environment.⁴ This determination includes evaluating impacts on non-target species. EPA reviews pesticide registrations every 15 years to ensure continued compliance with this registration standard.⁵ Further, EPA may commence administrative review and cancellation proceedings at any time if EPA determines that a pesticide generally causes unreasonable adverse effects on humans or the environment, or the pesticide, its labeling or other requirements otherwise violate FIFRA.⁶

When EPA registers a new pesticide or reassesses the potential ecological risks of use of a currently registered pesticide, it evaluates extensive direct and indirect toxicity and ecological effects data to determine how the pesticide will move through and break down in the environment.⁷ As part of EPA's ecological review, it evaluates the pesticide's risks to a wide variety of non-target wildlife, and approves directions for use that minimize or eliminate identified risks. Before it will register a pesticide, EPA requires the registrant to submit dozens, if not hundreds, of ecological assessments. After registration EPA can require registrants to submit additional assessments based on new studies performed by the registrant, or studies published in open literature. In sum, EPA rigorously assesses pesticides for their potential effects on all non-target species, including endangered species.

CLA Supports FWS's Finding That Normal Agricultural And Silvicultural Practices, Including Herbicide And Pesticide Use, Would Not Constitute A Violation Of Endangered Species Act (ESA) Section 9

The ESA prescribes five criteria for FWS to consider in the listing, delisting and reclassifying of a species. These criteria are: (1) the present or threatened destruction, modification or curtailment of its habitat or range; (2) overutilization for commercial,

² 7 U.S.C. § 136 et seq.

³ A limited number of substances are exempt from regulation under FIFRA. See 40 C.F.R. § 152.25.

⁴ See 7 U.S.C. § 136a(c)(5); see also 7 U.S.C. § 136(z)(bb).

⁵ 40 C.F.R. § 155.40(a).

⁶ 7 U.S.C. § 136d(b); see also 40 C.F.R. § 154.10.

⁷ See Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs, U.S. Environmental Protection Agency – Endangered and Threatened Species Effects Determinations (Jan. 23, 2004), available at <http://www.epa.gov/oppfead1/endanger/consultation/ecorisk-overview.pdf>; see also Process for Assessing Pesticide Risks to Endangered Species, U.S. Environmental Protection Agency (last updated May 9, 2012), available at <http://www.epa.gov/oppfead1/endanger/litstatus/riskasses.htm>.

recreational, scientific or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence.⁸ When making a listing determination, FWS must base its decision “solely on the basis of the best scientific and commercial data available.”⁹

ESA Section 9 and its implementing regulations prohibit persons from “taking” endangered wildlife within the United States, among other acts.¹⁰ The ESA definition of “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.¹¹ FWS has a policy to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not violate such prohibited acts under ESA section 9.¹² In this proposed rule, FWS has concluded, based on the best scientific and commercial data available, that “[n]ormal agricultural and silvicultural practices, including herbicide and pesticide use, which are carried out in accordance with any existing regulations, permit and label requirements, and best management practices” would not violate ESA section 9.¹³ CLA supports this finding.

FWS has concluded that increased erosion and sedimentation caused by land-disturbing activities is the primary threat to the Big Sandy and Guyandotte River crayfishes.¹⁴ Erosion and sedimentation degrades these crayfishes’ habitat.¹⁵ Normal farming practices requiring pesticide use, such as conservation tillage and reduced tillage farming, reduce harmful soil erosion and runoff, improving downstream water quality.¹⁶ Thus, compared to other land-disturbing activities, normal agriculture practices can limit the extent that soil erosion degrades the downstream habitat of the Big Sandy and Guyandotte River crayfishes.

Despite finding that pesticide use in agricultural and silvicultural settings would not be prohibited by the ESA, this proposed rule states that road runoff, including “pesticides and herbicides” from paved roads near the habitats of the Big Sandy and Guyandotte River crayfishes can degrade these crayfishes’ habitat.¹⁷ FWS makes this statement despite its admission that (1) it is not aware of any studies on the effects of road runoff contaminants to these species; and (2) it does not know how applicable the limited number of studies on other species are to these crayfishes.¹⁸ Thus, FWS has no basis

⁸ 16 U.S.C. § 1533(1)(A)-(E).

⁹ 16 U.S.C. § 1533(b)(1).

¹⁰ 16 U.S.C. § 1532(19).

¹¹ 16 U.S.C. § 1538; 50 C.F.R. § 17.21.

¹² See 59 Fed. Reg. 34,272 (July 1, 1994).

¹³ See 80 Fed. Reg. 18,710, 18,737 (Apr. 7, 2015).

¹⁴ *Id.* at 18,735.

¹⁵ *Id.*

¹⁶ See generally, U.S. Environmental Protection Agency: Soil Preparation, <http://www.epa.gov/agriculture/ag101/cropsoil.html> (last updated April 12, 2013).

¹⁷ 80 Fed. Reg. at 18,728.

¹⁸ *Id.*

to conclude that pesticide and herbicide runoff from paved roads can degrade the Big Sandy and Guyandotte River crayfishes' habitat. As such, FWS should remove this discussion from the final rule.¹⁹

Ongoing Conservation Actions

When making a listing decision for any species, the ESA requires FWS to "tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction."²⁰ Comments filed by the United States Department of Agriculture Kentucky Natural Resources Conservation Services (Kentucky NRCS) indicate that several voluntary Farm Bill programs under the Environmental Quality Incentives Program (EQIP) may provide direct and indirect benefits to the Big Sandy and Guyandotte River crayfishes and their habitats.²¹ According to Kentucky NRCS, many EQIP programs in the range of these species have focused on restoration of wildlife habitat through water quality improvement.²² FWS should consider these conservation efforts as part of its decision-making in its final determination on the Big Sandy and Guyandotte River crayfishes.²³

CLA appreciates the complexity of administering the ESA to best protect listed species and their critical habitats, and thanks FWS for the opportunity to comment on this proposed rule. CLA supports FWS's efforts to conserve the Big Sandy and Guyandotte River crayfishes while recognizing that normal agricultural and silvicultural practices, including responsible pesticide use, are consistent with this goal. Should you have any questions or comments, please feel free to contact me at RLattimore@croplifeamerica.org or (202) 872-3895.

¹⁹ See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (holding that the agency failed to justify its rulemaking with "a discernible path [of reasoning] to which the court may defer"); 16 U.S.C. § 1533(b)(1).

²⁰ 16 U.S.C. § 1533(b)(1)(A).

²¹ See Karen A. Woodrich, United State Department of Agriculture Kentucky Natural Resources Conservation Service, Comment to Endangered Species Status for the Big Sandy Crayfish and the Guyandotte River Crayfish, available at www.regulations.gov/contentStreamer?documentId=FWS-R5-ES-2015-0015-0017&attachmentNumber=1&disposition=attachment&contentType=pdf.

²² *Id.*

²³ If FWS determines that the Big Sandy and Guyandotte River crayfishes merit listing as threatened instead of endangered, as proposed, FWS should promulgate an ESA section 4(d) rule authorizing FIFRA-compliant pesticide use in the crayfishes' critical habitat. If listed as threatened, FWS should authorize FIFRA-compliant pesticide use because, as discussed above, pesticide use is consistent with the crayfishes' overall conservation. The application of pesticides to maintain agricultural fields and rights of way is preferential to other land-disturbing maintenance activities for the Big Sandy and Guyandotte River crayfishes' conservation.

Mr. Martin Miller

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Regards,

A handwritten signature in black ink that reads "Rachel G. Lattimore". The signature is written in a cursive style with a large initial 'R' and a distinct 'L'.

Rachel G. Lattimore, Esq.
Senior Vice President, General Counsel & Secretary
CropLife America