



Endangered Species Act

Background

Called the Magna Carta of the environmental movement, the Endangered Species Act (ESA) was signed into law by President Richard Nixon in 1973 to conserve “threatened” and “endangered” species and the ecosystems determined by the Department of Interior (DOI) to be “critical habitat” essential to their continued survival. The ESA explicitly requires that all federal agencies ensure the actions they “authorize, fund or carry out” (e.g., issuance of grazing permits, NPDES clean water permits, or registrations of pesticides) will not jeopardize the continued existence of any listed species or adversely affect critical habitat such that species harm may result. This obligation under Section 7 of ESA must be fulfilled in consultation with the US Fish & Wildlife Service (FWS), in DOI, for all terrestrial and fresh water species, and the National Marine Fisheries Service (NMFS), in the Department of Commerce, for marine and anadromous species. The Services issue “biological opinions” (BiOps) that set the stage for actions required of other agencies to protect listed species. These BiOps can translate to significant restrictions on the actions of agencies, and in turn, affected stakeholders. The Act also prohibits “taking” of any listed species by any individual, unless allowed under an approved “habitat conservation plan” (HCP) or other legal action.

EPA’s registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is an agency action that may require ESA consultation with the Services. Aware of the essential role of pest controls in agriculture, Congress mandated in 1988 that the ESA compliance for EPA’s pesticide regulatory program to occur through a process conducted “*to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators.*”¹ Despite this, neither the Services nor EPA are doing what they should be doing to complete the required ESA consultations in a timely way, sparking numerous citizen lawsuits and court settlements that establish ESA policy in the absence of expert agency decisions. For example, the ESA calls for the Services to complete consultation within 150 days (with some exceptions extending to 205 days for formal consultation), but the Services regularly exceed ESA deadlines by years, and can take up to a **decade** to complete the BiOP on a pesticide registration or reregistration action. Also, rather than cooperate with EPA, the Services routinely reject the consultation data packages provided by EPA, sometimes waiting a year to simply tell EPA of this decision. EPA is not without fault either. EPA has a poor record of documenting that its FIFRA registration actions comply procedurally with ESA. This has led to a slew of ESA law suits alleging EPA has violated ESA and requesting injunctive relief, resulting in court decisions and settlements that delay registration of pesticides and often establish arbitrary buffer zones that are not based on sound science and do not minimize adverse effects on agriculture.

Clearly EPA and the Services have lost control of their ability to set priorities on ESA compliance for FIFRA actions. Their ESA priorities are being set by courts and activist litigants, and substantial portions of these agencies’ pertinent budgets are tied up in carrying out the ESA duties created by court orders. CropLife America believes these long and costly consultation delays illustrate the need for the Obama Administration to revamp and streamline the consultation process for FIFRA actions.

Talking Points:

- ESA consultation delays hurt American agriculture: When ESA consultation is delayed, pesticide

¹ Public Law 100-478, 102 Stat. 2313 (1988); 7 U.S.C. § 136a



users bear the risk that some court will impose buffer zones or other use restrictions that have significant economic impacts and that significantly impair food and fiber production. The delays trigger court rulings and settlements that have imposed unnecessary mitigations and loss of crop protection products or uses, often decreased acres of crop land available for production, and impeded the development and registration of new, more environmentally-friendly pesticides.

- Section 1010 of the Endangered Species Act Amendments of 1988: Congress mandated in 1988 that ESA compliance for EPA’s pesticide regulatory program be designed “to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators.” The Administration needs to minimize ESA restrictions’ impacts on agricultural producers, educate producers on, and include them in the development of, ESA use restrictions for pesticides important to agriculture.
- EPA has responsibility for “may affect” decisions: Only EPA is responsible for making an initial determination as to whether a pesticide registration “may affect listed species or critical habitat.”² The Services play no role whatsoever in that threshold determination. If EPA concludes that a proposed registration will have no effect on a listed species, it is under no obligation to consult with the Services. Congress reviewed these procedures in 1978, and passed ESA Amendments codifying them.
- The Services expect EPA to consult on every pesticide: The Services contend that EPA must consult if the pesticide registration may affect listed species or critical habitat in any possible way, “*whether beneficial, benign, adverse, or of an undetermined character, [this] triggers the formal consultation requirements.*”³ The Services established this interpretation 24 years ago, when most Action Agencies had little or no experience with ESA. Since then, however, EPA and other Agencies have acquired considerable biological and ESA expertise. It is time the Services updated ESA consultation requirements, and better utilize the expertise EPA can provide to the consultation process.

FAQs

- **What is the purpose of ESA consultation between EPA and the Services?**
The only legitimate role for consultation is to provide the Service’s opinion to EPA on whether its proposed pesticide registration satisfies ESA’s consulting requirements that the registration is not likely to jeopardize the continued existence of a listed species or to adversely modify critical habitat.
- **In light of court reversals of previous attempts, what ESA flexibility do the Services have?**
The Services have considerable room to revamp and streamline the consultation process. A definition of “consultation” is not provided in the ESA, and Section 7 is completely silent on both the mechanics and details of the “consultation” it requires. Nor has Congress spoken to the precise question at issue. In 2004, the Services implemented *ESA/FIFRA Counterpart Regulations* in consultation with EPA, designed to streamline the assessment and consultation process that EPA and the Services use to identify potential effects on endangered species. Subsequent lawsuits set aside portions of the counterpart provisions, but didn’t limit the Services

² 50 C.F.R. § 402.14.

³ Preamble. 51 Fed. Reg. 19949 (June 3, 1986).



authority to streamline and update consultation. CropLife America encourages the Services and EPA to consider and adopt an updated version of those rules, after developing an adequate administrative record, and provided in 2009 specific recommendations for this.

- **What role should pesticide registrants play in the consultation process?**
When issuing a BiOp, EPA and the Services should incorporate input from resources with first hand experience and knowledge, consider economic impact to local agricultural economies and communities, rely on the best available scientific data and create a realistically achievable timeline for compliance for all new restrictions and changes. Pesticide registrants can provide these data, and should have an opportunity to provide expert input to the process.
- **Why has the availability of adequate resources become so critical to ESA consultation?**
When the law was enacted in 1973, there were only 109 species listed for protection. Today, there are more than 1800 plant and animal species listed as threatened or endangered in the United States, and more than 40 million acres of critical habitat in HCPs – many on private property. When the Government Accountability Office (GAO) in 2004⁴ evaluated why the Services were late on more than 40% of its Pacific Northwest consultations, the principle reasons given by the Services were that they do not have enough resources to handle their consultation workloads, staffing level problems are exacerbated by high turnover of biologists, and biologists at the Services are sometimes unfamiliar with EPA programs and activities. A lack of knowledge of agricultural and integrated pest management practices; of labeled uses, directions, and requirements; and of EPA risk assessment methods, models, and data requirements and quality are often evident in the opinions rendered by the Services.
- **Why should the Services promulgate updated ESA/FIFRA Counterpart Regulations?**
Under FIFRA, EPA makes decisions to allow new or continued use of a pesticide only after carefully examining extensive ecological risk assessment data on the potential risks that use of a pesticide may pose to non-target fish, wildlife, and plant species. An ESA consultation on a pesticide registration also must consider many different pesticide use patterns and determine whether wildlife species in many different locations throughout the country may be affected by such use. In addition, the number of requests by EPA to initiate consultation on pesticide actions is expected to increase substantially in future years. The large number of consultations and their complexity is expected to require a significant level of resources, requiring careful use of resources by both EPA and the Services. CropLife America believes these factors provided strong reasons for the Services to establish an updated counterpart rule for EPA FIFRA actions.
- **What could be the effect of CBD's nationwide lawsuit?**
Recently the Center for Biological Diversity announced it will sue EPA for failure to properly consult with the Services on the registrations of nearly 400 pesticides, claiming that as many as 887 listed species may be affected, including the Florida panther, Coho salmon, and California condor. In its defense, EPA can correctly claim that it was its prerogative to make "may affect" determinations independent of the Services, and that consultation on the identified pesticides were likely unnecessary. Severe interruptions in pesticide use and unwarranted future restrictions could result should EPA lose or settle this case.

⁴ *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 14 (GAO-04-93 March 2004).

