
Report to Congress
On
Implementing IWG Recommendations on Improving the
Consultation Process Required Under Section 7 of the Endangered
Species Act for Pesticide Registration and Registration Review

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U.S. Department of Commerce, U.S. Department of Agriculture,
and Council on Environmental Quality

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Purpose of the Report

This report provides Congress with the progress made by the Interagency Working Group (IWG) in implementing recommendations to improve the consultation process required under Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536, for pesticide registration and registration review. The IWG, which comprises the U.S. Environmental Protection Agency (EPA), the U.S. Department of Agriculture (USDA), the U.S. Department of Commerce (DOC), the U.S. Department of the Interior (DOI), and the Council on Environmental Quality (CEQ) (collectively, “the covered agencies”), presents this report to (1) describe the progress of the IWG in implementing these recommendations, (2) describe the extent to which implementation improved the consultation process, and (3) provide additional recommendations for improvements to the ESA consultation process for pesticides. This report reflects the perspectives of each covered agency at the time of this report’s preparation.

Background

The ESA is intended to protect and promote the recovery of species that are in danger of becoming extinct. The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, collectively known as the Services, administer the ESA. The ESA requires that all federal agencies, including EPA, make sure that any action they authorize, fund, or carry out will not jeopardize the existence of listed species or “destroy or adversely modify” any designated critical habitat for that species.

Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is responsible for reviewing information and data to determine whether a pesticide product can be registered for a particular use. As part of that determination, EPA determines if species listed under the ESA or their designated critical habitat may be affected by use of the product. The role EPA has in implementing the ESA ensures that the use of pesticides is not likely to jeopardize listed species or destroy or adversely modify their critical habitat.

There are more than 1,000 recognized active ingredients incorporated into a much larger number of formulated pesticide products currently registered by EPA. The goal of EPA's Endangered Species Protection Program is to carry out EPA’s responsibilities under FIFRA in compliance with the ESA, without placing unnecessary burden on agriculture and other pesticide users.

Section 10115 of the Agriculture Improvement Act of 2018 (2018 Farm Bill) (Pub. L. 115-334) and Section 3(c)(11) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, 7 U.S.C. § 136a(c)(11) established the IWG to provide recommendations regarding, and to implement a strategy for improving, the consultation process required under Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) for pesticide registration and registration review. The statute further requires the Administrator of the EPA to provide a report to Congress on the progress of the IWG in developing these recommendations. Congress required this report to be delivered to the U.S. House of Representatives Committee on Agriculture and the U.S. Senate Committee on Agriculture, Nutrition, and Forestry no later than 180 days after

submission of the previous report, which occurred on July 14, 2021. This is the fourth progress report submitted to Congress since enactment of the statute.

The first report from the IWG was submitted to Congress on December 20, 2019 and identified several proposals to improve the FIFRA-ESA consultation process for pesticide registration and registration review, plans for implementation of those proposals, and areas of consensus and continuing topics of disagreement and debate.¹ The December 2019 report also provided detailed background information, which is not repeated in this report. The second report from the IWG was submitted to Congress on June 20, 2020 and provided an update on the progress of the IWG in developing recommendations to improve the consultation process required under Section 7 of the ESA that were included in the first report.² The third report was submitted to Congress on July 14, 2021 and provided an update on the progress of the IWG in implementing the recommendations included in the previous reports and the impact of the recommendations to the consultation process.³ The covered agencies intend that this fourth report and subsequent reports describe implementation of the IWG's recommendations, their impacts on the consultation process, and additional recommendations for improving the consultation process for pesticides.

All agencies involved in the FIFRA-ESA consultations recognize the continued need for improved efficiency in the process and are committed to working together to improve the ESA Section 7 consultation process. The covered agencies intend to expeditiously adopt improvements that endure across administrations and fully implement the ESA to address their obligations under the 2018 Farm Bill as well as per Executive Order 13990⁴ directing the federal government to limit exposure to dangerous chemicals and pesticides. The IWG under the Biden-Harris Administration held its initial meeting in October 2021 shortly before this fourth report to Congress was being developed. Therefore, this report does not reflect the full suite of initiatives and direction that the covered agencies are currently exploring under new leadership to improve the pesticide consultation process. As those initiatives become further developed, they will be described, and progress will be reported, in future reports.

Recommendations to Improve the ESA Consultation Process

As described in the 2019 and 2020 reports, the IWG directed agency staff to work together to develop recommendations to improve the FIFRA-ESA consultation process. The IWG recommendations included in the December 2019 report, developed by cross-agency staff, were:

¹ This report is available at <https://www.epa.gov/sites/production/files/2020-01/documents/esa-report-12.20.19.pdf>.

² This report is available at <https://www.epa.gov/sites/production/files/2020-06/documents/second-esa-progress-reportfinal.pdf>.

³ This report is available at https://www.epa.gov/system/files/documents/2021-09/esa_pesticides_report-to-congress_final_0.pdf.

⁴ Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

1. Incorporate the recent revisions to the implementing regulations associated with the ESA consultation process into the consultation process for pesticides.⁵
2. Continue the ongoing work to improve the accuracy of the data and efficiency of the analyses that support pesticide consultations.
3. Continue consulting with representatives of interested industry stakeholders and nongovernmental organizations (NGOs).

The progress summarized in this report demonstrates the covered agencies' commitment to improve the consultation process, conserve and protect threatened and endangered species and their designated critical habitats, and continue a robust dialogue with stakeholders to ensure transparency throughout the consultation process.

Progress on Implementing the Recommendations

Continuing to Improve the Accuracy of the Data and Efficiency of the Analysis that Support Pesticide Consultations

Progress on Development of Biological Evaluations and Biological Options

In June 2021, the National Marine Fisheries Service (NMFS) completed two biological opinions (BiOps) on four pesticides: bromoxynil, prometryn, 1,3-dichloropropene (1,3-D), and metolachlor. These four chemicals represent the last active ingredients for which biological opinions were required under a NMFS 2008 settlement agreement with the Northwest Center for Alternatives to Pesticides. Per the settlement, these BiOps evaluate the impact of these pesticides on 26 ESA-listed species of Pacific salmon and steelhead in Washington, Oregon, and California. In the case of these final four active ingredients, NMFS concluded that the proposed action was not likely to either jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of critical habitat. In developing these BiOps, NMFS coordinated with EPA and the pesticide applicants on risk reduction measures to minimize the incidental take of individuals of these ESA-listed species.

NMFS is currently developing draft BiOps on five pesticides: carbaryl, methomyl, chlorpyrifos, malathion, and diazinon. Consultation on carbaryl and methomyl was initiated when EPA finalized the Biological Evaluations (BEs) for those chemicals in March 2021. As noted in the June 2021 report, on July 19, 2019, EPA re-initiated formal consultation with NMFS on their December 2017 BiOp covering chlorpyrifos, diazinon, and malathion. As part of the re-initiation, EPA and NMFS created an applicant engagement plan outlining various opportunities for stakeholder engagement. In September 2021, NMFS and EPA held several meetings with pesticide applicants in accordance with their applicant engagement plan. The agencies met with diazinon applicants on September 3, 2021, malathion applicants on September 13, 2021, and chlorpyrifos applicants on September 16, 2021. Three additional meetings were held in November 2021 with EPA, USDA, and pesticide applicants to discuss potential risk mitigation options.

⁵ These ESA Section 7 interagency consultation regulations were revised in 2019. See 84 FR 44976 (Aug. 27, 2019). On June 4, 2021, FWS and NMFS announced that the Services intend to propose further revisions to these regulations.

In April 2021, the U.S. Fish and Wildlife Service (FWS) transmitted the draft BiOp on EPA's registration of malathion; the BiOp covers 1,600 threatened, endangered, proposed, and candidate species and 760 designated and proposed critical habitats. FWS worked collaboratively with EPA and the malathion applicants to refine analyses where applicable and develop (1) conservation measures tailored to the needs of the species and their critical habitats to avoid jeopardizing species and destroying or adversely modifying critical habitat and (2) reasonable and prudent measures (RPMs) to minimize incidental take of listed animals. FWS finalized and transmitted the final BiOp to EPA on February 28, 2022.

Release of Final Atrazine, Simazine, and Glyphosate Biological Evaluations (BEs)

In November 2021, EPA finalized nationwide BEs on atrazine, simazine, and glyphosate.⁶ These BEs were the second set that utilized the Revised Method⁷ and were the first set of herbicides that EPA assessed using that method. The Revised Method, released in March 2020, is intended to produce both a sustainable and scientifically sound risk assessment process to prepare pesticide BEs and to identify species that may be affected by the subject pesticide. As such, EPA used advanced exposure modeling techniques to estimate exposures to plants in various environments such as wetlands. EPA made Likely to Adversely Affect determinations for a number of listed species and their designated habitats; therefore, EPA requested formal consultation with the Services on these species and habitats. Because these were the first herbicides that utilized the Revised Method, EPA made what it considers to be several methodological advancements including utilization of improved plant assessment exposure models and more robust toxicological endpoints. EPA believes that these methodological advancements will result in a more informed and realistic risk assessments to endangered species and a more informed consultation process.

Release of Draft Neonicotinoid Biological Evaluations

In August 2021, EPA released draft BEs⁸ for public comment on the registration review of clothianidin, imidacloprid, and thiamethoxam, which are part of a group of insecticides known as the neonicotinoids. These BEs were the third set that utilized the Revised Method. At the time of this report, EPA is compiling and reviewing the public comments to determine how they might impact the final BEs, which are currently scheduled to be completed in 2022. EPA has also begun the process of proposing mitigation measures for neonicotinoids under FIFRA through the registration review program, and additional mitigation measures may be developed through

⁶ In November 2020, EPA released draft BEs for public comment on the registration review of atrazine, simazine, propazine, and glyphosate. In January 2021, the only propazine applicant requested to voluntarily cancel its remaining product registrations. On June 8, 2021, EPA issued a [final cancellation order](#) for propazine, which terminated the last propazine products registered in the United States, therefore EPA did not complete a BE for propazine.

⁷ <https://www.epa.gov/endangered-species/revised-method-national-level-listed-species-biological-evaluations-conventional>

⁸ <https://www.epa.gov/pesticides/epa-releases-draft-biological-evaluations-three-neonicotinoids-public-comment#:~:text=For%20Release%3A%20August%2026%2C%202021,for%20public%20review%20and%20comment.>

consultation with the Services, if necessary. EPA is interested in finding ways, through discussions with stakeholders, to implement mitigations measures that further protect endangered and threatened species earlier in the FIFRA-ESA consultation process.

Continuing Stakeholder Engagement Efforts in 2021 and Beyond

Pursuant to the 2018 Farm Bill, the covered agencies are required to consult with and take into consideration the views of stakeholders in carrying out the IWG's activities. The agencies are committed to continued outreach to stakeholders including state and local governments, tribes (including tribal consultation or other outreach efforts), farmers, industry, and conservation organizations.⁹

The covered agencies continue to meet at the staff, management, and leadership levels to improve the pesticide consultation process. EPA and the Services have also actively sought stakeholder feedback on key activities, examples of which were summarized in the previous reports. EPA continues to discuss the ESA consultation process for ESA-listed species as well as specific pesticide consultations, as appropriate, with interested stakeholders. Examples of stakeholder engagement since June 2021 are summarized below:

- EPA met with several applicants, consultants, and other groups to discuss how offsets and other compensatory mitigation measures could be utilized in pesticide consultations to augment traditional avoidance and minimization measures.
- EPA began to hold quarterly meetings with environmental groups and the regulated community to discuss a variety of issues and hear perspectives related to pesticide consultation and the consultation process. The kick-off meetings were held in October 2021 and included members from more than 20 stakeholder groups across both meetings.
- USDA and EPA participated in two Town Hall meetings with applicants and grower groups to discuss the methodology and public comment process for the clothianidin, imidacloprid, and thiamethoxam BEs. A diverse group of stakeholders attended the meetings, including soy, citrus, turf, tree nut, cotton, sugar beets, and numerous other growers as well as academic researchers.
- Consistent with the applicant engagement procedures, FWS, EPA, and USDA met regularly with the malathion registration technical applicant to develop conservation measures tailored to the needs of the species and their critical habitats to avoid

⁹ Public input opportunities for the pesticide consultation process are outlined in a 2013 publication "Enhancing Stakeholder Input in the Pesticide Registration Review and ESA Consultation Processes and Development of Economically and Technologically Feasible Reasonable and Prudent Alternatives." This paper was developed jointly by EPA, the Services, and USDA, in response to stakeholder feedback, and was finalized in March 2013 after taking public comment on the draft (see docket EPA-HQ-OPP-2012-0442 at www.regulations.gov).

jeopardizing species and destroying or adversely modifying critical habitat, and RPMs for the 2022 final malathion Biological Opinion.

- NMFS presented updates on ESA activities and an overview of the consultation process at an annual pesticides and water quality meeting with EPA Region 10 states (Washington, Oregon, Idaho, Alaska). The states also discussed their endangered species conservation programs.
- NMFS and EPA held several meetings with pesticide applicants in accordance with the applicant engagement plan. The agencies met with diazinon applicants on September 3, 2021, malathion applicants on September 13, 2021, and chlorpyrifos applicants on September 16, 2021. NMFS held additional meetings with EPA, USDA, and pesticide applicants in November 2021 to discuss potential risk mitigation options.
- On August 31, 2021 representatives from EPA, FWS, NMFS, USDA; the private sector, including growers and pesticide applicants; and environmental advocacy organizations participated in a workshop organized by CropLife America and Defenders of Wildlife. The focus of the meeting was improving protection of threatened and endangered species under the ESA and FIFRA. As a result of this workshop, the federal agencies are developing a pilot project to demonstrate ESA mitigation opportunities.

At the October 2021 IWG meeting, the covered agencies proposed to convene the IWG's first-ever stakeholder engagement event in January 2022. The event would provide all stakeholders the opportunity to share their thoughts on ESA-FIFRA issues to the entire IWG.

Identifying New Opportunities for Improvement

As previously noted, the IWG is prioritizing actions that focus on improving processes that contribute to tangible and enduring benefits for species conservation and for stakeholders. To guide future work of the IWG, the covered agencies have identified the following initial priorities and approaches during the October 2021 IWG meeting:

- Focus on improvements that deliver real-world benefits for species conservation, public health, and food production. Examples include:
 - Use pilot projects to begin identifying and implementing relevant mitigation measures as part of upcoming pesticide consultations and to demonstrate process improvements.
 - Adopt measures early in the pesticide consultation process to avoid, minimize, and compensate for the effects of pesticide use on ESA-listed species and their critical habitats.
 - Ensure that mitigation measures are effective and practical to implement.
- Consider opportunities to engage with stakeholders as an interagency body to complement the stakeholder activities of each agency. Communicate the IWG's work to stakeholders in a transparent and predictable manner.

Consistent with this direction, EPA has begun to prioritize strategies to identify and implement ESA protections earlier in pesticide registration, registration review, and the consultation process to work with applicants to ensure appropriate measures are in place to protect affected species and habitat as new products are registered to the greatest extent feasible. EPA also met with several representatives within the regulated community to explore how the full suite of ESA mitigation options, including offsets, can be incorporated into the pesticide registration process. These efforts are in the early stages of development, and EPA intends to include appropriate outreach, stakeholder input, and coordination with the Services and USDA as these efforts are further developed.

Conclusion

The progress and implementation of the IWG's recommendations summarized in this report demonstrate the covered agencies' commitment to continued improvements to the FIFRA-ESA consultation process, conservation and protection of endangered and threatened species and their designated critical habitats, as well as continued robust dialogue with all stakeholders to ensure transparency throughout the consultation process. Future reports to Congress will discuss additional progress made by the IWG and other agencies.

