

## Proposed counterpart rules illegal, environmentalists charge; Endangered Species

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Environmental groups have asked the Departments of the Interior and Commerce to withdraw proposed counterpart regulations regarding EPA evaluations of potential pesticide risks to endangered species. The groups say the rules may lead to more, not less, litigation.

In comments to U.S. Fish and Wildlife Service, which is overseen by DOI, and the National Oceanic and Atmospheric Administration, which is overseen by DOC, the Natural Resources Defense Council, Earthjustice, Defenders of Wildlife, the Rachel Carson Council, Washington Toxics Coalition, [the Center for Biological Diversity](#) and others said there is no statutory basis for the proposal.

FWS and NOAA have been collecting comments on their proposal since it was released Jan. 30 (see PTCN, Feb. 2, Page 1). The comment period closed April 16. However, because comments were accepted in two separate dockets and so many were received by the agencies, they have not yet been organized for public review.

The proposal amends controversial regulations that require EPA to consult with the federal agencies when evaluating the risk a pesticide may

pose to a listed or endangered species or habitat. Under current rules, EPA must initiate formal consultations with FWS and NOAA when it determines that a pesticide may affect a listed species or critical habitat. It must initiate informal consultations when it makes a “not likely to adversely affect (NLAA)” determination. The amendments would:

- \* Allow EPA to draft both the effects determination and biological opinion, which is currently written by the services following a consultation. The services would then review and modify or approve the documents

- \* Eliminate the need for EPA to initiate informal consultations and obtain written concurrence from the agencies for NLAA determinations.

The services and EPA have also drafted an alternative consultation agreement that outlines how FWS and NOAA would oversee EPA’s effects determinations.

The services have said the proposed changes would increase the efficiency and effectiveness of the consultations process and allow them to better focus their resources.

However, environmental groups have assailed the proposal, claiming it will weaken statutory protections of endangered species. Moreover, they say, by giving EPA greater authority

for making determinations, the services are giving control of the process to an agency that has ignored ESA requirements for years.

Pesticide manufacturers and growers groups supported the changes, saying they will end programmatic inefficiencies and a wave of litigation that has overwhelmed the agency and held up pesticide reviews. Their comments focused on specific clarifications and revisions they believe are needed in the proposal, not broad changes.

The Association of American Pesticide Control Officials said in its two-page comments that it supports the proposal. However, the group asked the services to ensure that state regulators are actively involved in the evaluation and consultation process.

### **Enviro concerns**

According to the law firm Earthjustice, which is representing several environmental groups in the high-profile Washington Toxics v. EPA lawsuit, “in the proposal rules, the Bush administration is giving serious consideration to several unlawful and unwarranted changes to regulations implementing one of the bedrock provisions of this country’s most importation wildlife protection laws,” the ESA-mandated consultation process.

According to the group, the proposed rules clearly violate ESA Sec. 7, which expressly requires that federal agencies ensure their actions will avoid jeopardizing threatened and endangered species in consultation with Interior and Commerce.

“The proposed rules illegally attempt to circumvent this requirement by removing the expert agencies—the services—from the consultation process,” Earthjustice said.

Other environmental groups pointed out that EPA has repeatedly violated ESA Sec. 7 by failing to consult with the services and by failing to take steps to protect listed species and their habitats. They cited a variety of examples in which, they believe, EPA determined a pesticide may cause harm to a listed or endangered species but did nothing to mitigate that risk. For example, though FWS recommended that EPA initiate consultation prior to reregistering atrazine, it wasn’t until EPA was sued for failing to consult over the chemical’s effects on salmon that it initiated consultation, they said. Even then, consultation was limited solely to the chemical’s effects on salmon, not all endangered species, they added.

The groups claim there is no justification for the proposal within ESA and that the proposal “fundamentally seeks to codify EPA’s ongoing violation of Sec. 7.”

They also point out that counterpart regulations are only allowed under ESA if they “fine-tune” the general consultation framework and still afford the same protection to listed and endangered species required by ESA.

“Under no stretch of the imagination can this proposal be considered a simple fine-tuning of the existing Sec. 7 regulatory framework,” wrote a coalition of 29 environmental groups

led by Defenders of Wildlife. “The proposal, among other things, effectively eliminates Sec. 7 scrutiny by the services on potentially hundreds of pesticide regulation actions that may affect listed species or critical habitat. Also, by allowing EPA to assume the lead role in making effects determinations during formal consultations, the proposal in no way retains the overall degree of protection afforded listed species required by the ESA and its implementing regulations.”

The environmental groups also said the scientific methods EPA uses to address ecological issues are insufficient. They claim EPA’s assessments:

- \* Don’t adequately assess exposure, particularly because they ignore inhalation and dermal exposures along with exposures from pesticide drift, other means of chemical transport and urban pesticide use

- \* Don’t adequately assess affects because they ignore sublethal and cumulative effects and inert ingredients

- \* Don’t adequately address harm to habitat or potential pesticide misuse

- \* Rely on inadequate surrogate species.

“Ironically, by significantly reducing the services’ Sec. 7 review of pesticide regulation, this proposal could very well increase litigation against EPA under the ESA and, therefore, actually increase delays—the very thing this proposal is ostensibly designed to reduce,” Defenders of Wildlife wrote. “As the expert agencies charged with administering the ESA, the services are entitled to deference by the courts on matters concerning endangered and threatened species, whereas the EPA is not. The services’ involvement in the regulatory process, therefore,

may convince a prospective litigant that the agency has adequately addressed impacts to listed species and to forgo litigation. The very same determination by the agency with no concurrence by the services, however, simply does not carry the same scientific or legal weight.

“In fact, by eliminating the services’ review of most pesticide-related actions, conservationists may feel compelled to bring more legal challenges to ensure appropriate protection for endangered and threatened species,” they said.

### **Manufacturers, growers groups respond**

In stark contrast to the legal challenges presented by environmentalists, the American Farm Bureau Federation, CropLife America and Responsible Industry for a Sound Environment, which represents urban pesticide manufacturers, voiced support for the proposal.

The groups described the current process as redundant and inefficient.

“For pesticide users, registrants and regulators, the pesticide registration and review process is in complete chaos,” the AFBF wrote. “At least six lawsuits have been filed or noticed for filing which, together, implicate the entire FIFRA program and all 1,255 domestic species listed as endangered or threatened under ESA.”

While some may claim the proposed rules would give EPA control over endangered species reviews, AFBF believes the services will retain full authority because they must approve the agency’s risk assessment methods and will still be able to change or reject an EPA determination.

AFBF also said more informed decisions will be made since EPA can

use its authorities to demand more data from registrants for endangered species reviews, something the services can't do.

All three groups said there is statutory support for the changes. They pointed out that in the ESA amendments of 1988, Congress established a goal of developing a FIFRA program that complied with the ESA in a manner that would allow growers to continue to produce agricultural products and that would minimize the impacts of ESA compliance on the agricultural community and other pesticide users.

CropLife and RISE, which filed comments together, said separate consultation rules are warranted for FIFRA actions because such actions are fundamentally different from other federal actions subject to the ESA. While most federal activities involve a single site or type of activity, FIFRA actions may affect countless sites across the country and involve a wide variety of uses and products, they said.

The groups believe Congress recognized this by enacting two statutory provisions that expressly address the relationship between ESA and the regulation of pesticides, though no special provisions have been added to address other specific types of federal actions and the ESA.

All three groups focused their comments on their concerns over specific aspects of the proposal. Most notably, all three asked that the alternative consultation agreement be made available for public notice and comment.

CropLife and RISE also asked the services to clarify which types of information will be considered the "best scientific and commercial data available" under the proposed rules. The groups warned that data from the open literature and FIFRA 6(a)(2)

adverse incident submissions shouldn't be used because it's not subject to data quality rules.

They asked the services to give categorical exemptions from ESA rules to certain actions, such as fast-track label amendments and "me-too" registrations. They asked for more details on emergency exemptions and the types of events or new information that would cause the services to reinitiate consultation.

CropLife and RISE also noted that effects determinations made by EPA don't have incidental-take protection, which is generally afforded to biological opinions released by the services. Such protection would give EPA and registrants certain immunity if a pesticide did harm an endangered animal or habitat. They argued that if the services conducted a programmatic consultation of EPA's evaluation program and issued a biological opinion on the agency's program, then all of the agency's "no effect" and NLAA determinations would be covered by the incidental-take statement from the programmatic consultation.

The trade associations also proposed the services a tiered plan for prioritizing compounds for endangered species assessments. Compounds already being reviewed by EPA should be examined first, they said, and effects reviews would be initiated for other products during reregistration and special review.

For compounds that have already undergone reregistration, the groups suggested EPA use existing documents to determine which compounds exceed a level of concern for endangered species. Then, using the Information Management System developed by the industry's FIFRA Endangered

Species Task Force, those compounds would be further reviewed to determine if overlaps exist between where a chemical is used and where a listed or endangered species lives. The more overlaps, the sooner a compound would be reviewed. Pesticides that exceed LOCs for more than one category of endangered species would be examined first.