

Progress Report to Congress

on

Improving the Consultation Process Required Under Section 7 of the Endangered Species Act for Pesticide Registration and Registration Review

U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Department of Agriculture, and Council on Environmental Quality

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Purpose of the Report

This report provides Congress with an accounting of the progress made by the interagency working group (IWG) in developing 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 (the covered agencies), presents this report to (1) describe the progress of the IWG in developing these recommendations and (2) identify areas of new consensus as well as continuing topics of discussion and consideration among the covered agencies. This report reflects perspectives of each covered agency at the time of this report's preparation. The covered agencies continue to collaborate with one another to improve the pesticide consultation process.

Background

This progress report is the second report from the IWG as required by 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). 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 June 20, 2020 (18 months after the date of enactment of the 2018 Farm Bill).

The first report from the IWG was submitted to Congress on December 20, 2019 and identified several proposals to improve the 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 report also provided detailed background information, which is not repeated in this report.

Proposals to Improve the ESA Consultation Process

The IWG directed agency staff to work together to develop recommendations to improve the ESA consultation process. The IWG final recommendations in the December 2019 report, developed by cross-agency staff, were:

1. Incorporate the recent revisions to the implementing regulations associated with the ESA consultation process into the consultation process for pesticides.
2. Continue the ongoing work that the agencies have started to improve the accuracy of the data and efficiency of the analyses that support pesticide consultations.

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

3. Continue consulting with representatives of interested industry stakeholders and nongovernmental organizations (NGOs).

The progress summarized in this report around these proposals demonstrates the agencies' commitment to improving the consultation process, conserving and protecting endangered species and their designated critical habitats, and continuing robust dialogue with all stakeholders to ensure transparency throughout the consultation process.

Progress on Implementing the Recommendations

Incorporating Recent Revisions to the Implementing Regulations Associated with the ESA Consultation Process

On August 12, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the Services) finalized revisions to the implementing regulations governing interagency cooperation under section 7 of the ESA at 50 C.F.R. Part 402. These revisions will help EPA and the Services address the numerous and complex issues associated with pesticide consultations, and the Services are incorporating these revisions into the pesticide consultation process. For example, the Services are using the revised definition of “effects of the action” as they prepare biological opinions (BiOps) for bromoxynil/prometryn, telone (1,3-dichloropropene)/metolachlor, and malathion. As another example, the Services used the revised regulations as the basis for providing valuable input to the EPA as the Agency developed and finalized its Revised Method (see discussion below).

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

Improving the Accuracy of Species Ranges

The Services continue to refine the range maps for ESA-listed species to produce reliable and authoritative data that will support endangered species consultations. NMFS mapped the ranges of ESA-listed species within NMFS' jurisdiction and provided them to EPA. FWS is continuing to develop revised range maps for ESA-listed species within FWS' jurisdiction and making them publicly available. To accomplish this task, FWS is using the process it developed for refining listed species range maps in a way that is transparent, repeatable, and based on the best available data and methods.² As of April 20, 2020, FWS finalized about 35 maps, which are publicly available,³ and is in the process of developing an additional 30 maps. In addition, the FIFRA

² U.S. Fish & Wildlife Service, Standard Operating Procedure “USFWS Refined Range Maps for Threatened and Endangered Species”, (September 2019), available at https://ecos.fws.gov/docs/SR_SOP/SDM_SOP_Final_14Nov2019.pdf.

³ U.S. Fish & Wildlife Service, ECOS Environmental Conservation Online System, available at <https://ecos.fws.gov/ecp/>.

Endangered Species Task Force (FESTF) recently assisted FWS in revising species range maps for approximately 500 species in Hawaii. Revised range maps will benefit not only national pesticide consultations, but many other pesticide and non-pesticide consultations as well.

Improving the Accuracy of the Data and the Efficiency of Biological Evaluations (BEs)

In 2019, EPA proposed updates to the method used to evaluate the impacts pesticides could have on endangered species to better protect and promote the recovery of species while ensuring timely pesticide registration review decisions and public transparency.⁴ The Services and USDA provided valuable comments and input on the Draft Revised Method to be used for conventional pesticides. EPA also sought public comments on this Draft Revised Method from May to August 2019 (45-day public comment period, extended for an additional 45 days), held a public meeting on June 10, 2019, and formally consulted with federally recognized Tribes in October 2019. EPA evaluated public input and met with the Services and USDA for two full-day meetings to discuss the comments from the public and receive input from the agencies. EPA issued the Revised Method in March 2020.⁵ The first application of the Revised Method was to BEs conducted on methomyl and carbaryl, which were also released as drafts for public comment in March 2020.

The Revised Method incorporates input from the Services, USDA, and other stakeholders. Some significant elements of how the Revised Method will be applied to reviewing conventional pesticides are: (1) incorporation of usage information to inform EPA's effects determinations; (2) incorporation of probabilistic approaches to determine the likelihood that an ESA-listed species will be adversely affected by a pesticide, given the variability in the range of potential exposures to and toxicological responses of ESA-listed species; and (3) incorporation of a weight-of-evidence framework for informing effects determinations.

Re-initiating Consultation on First Three Pilot Chemicals

On July 19, 2019, EPA re-initiated formal consultation with NMFS on their December 2017 BiOp on chlorpyrifos, diazinon, and malathion. EPA re-initiated consultation because additional information became available that the Agency believes shows the extent of the effects of the action (*i.e.*, registration review) may be different than what was previously considered. One reason for reinitiating consultation on the NMFS 2017 BiOp was to allow NMFS to consider public comments submitted on the 2017 BiOp. In total, NMFS received 19,154 submissions, the majority of which were associated with a mass mailer campaign. EPA compiled and summarized 61 substantive comments and delivered them to NMFS on August 20, 2019. NMFS subsequently reviewed those comments based on 11 topics: usage data, Reasonable and Prudent Alternatives (RPAs) and Reasonable and Prudent Measures (RPMs), spatial layers, effects data, modeling,

⁴ Draft Revised Method for National Level Endangered Species Risk Assessment Process Biological Evaluations of Pesticides, EPA-HQ-OPP-2019-0185-0002, 84 Fed. Reg. 22120 (May 16, 2019), available at <https://www.epa.gov/sites/production/files/2019-05/documents/epa-revised-interim-esa-methodology.pdf>.

⁵ U.S. Environmental Protection Agency, Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides, available at <https://www.epa.gov/endangered-species/revised-method-national-level-listed-species-biological-evaluations-conventional>.

analytical procedures, mixtures, environmental baseline, monitoring data, transparency/conservativeness, and consultation procedures.

EPA also provided additional usage data it believes may be relevant to the consultation. In its transmittal of this information to NMFS, EPA also referenced usage data and information that had been recently submitted by the registrants of pesticide products containing chlorpyrifos, malathion, and diazinon. Reviewing information EPA provided to NMFS on the 2017 BiOp, NMFS determined that it is appropriate to revise the chlorpyrifos, malathion, and diazinon BiOp. Based on the need to meet the 2020 and 2021 court-ordered deadlines for the metolachlor/1,3-dichloropropene and bromoxynil/prometryn BiOps, NMFS will issue a revised final BiOp for chlorpyrifos, diazinon, and malathion by June 2022.

Continuing Stakeholder Engagement Efforts in 2020 and Beyond

Pursuant to the 2018 Farm Bill, the covered agencies are required to increase opportunities for meaningful stakeholder feedback on the working group's activities. Stakeholder feedback is a vital part of sound regulations, and the agencies are committed to continued outreach to stakeholders.⁶

EPA and the Services have actively sought stakeholder feedback on a number of key activities, examples of which were summarized in the first report. Since that report, EPA and the Services have continued to engage stakeholders in the pesticide consultation process. In addition, the covered agencies have also continued to meet at the staff, management, and leadership levels to continue to improve the pesticide consultation process. Several stakeholder engagement efforts are described below.

For example, in February 2020, NMFS met with representatives from pesticide registrants regarding documents that they had submitted through legal counsel to NMFS (via EPA) regarding re-initiation of the 2017 BiOp on chlorpyrifos, diazinon, and malathion. NMFS reviewed the documents based on three categories: 1) usage data; 2) methods for applying usage data; and 3) alternative risk assessment approaches.

On March 17, 2020, EPA solicited public comment for 45 days on the draft methomyl and carbaryl BEs, which were conducted using the Revised Method for national-level listed species BEs for conventional pesticides (85 FR 15168). On April 16, 2020, EPA hosted a public webinar to present the draft BEs for carbaryl and methomyl and answer questions from the public, with the goal of improving the overall quality of comments from stakeholders during the public comment period. The webinar was attended by 265 participants including stakeholders from

⁶ 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 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).

commodity and grower groups, pesticide registrants, federal and state government agencies, environmental non-governmental organizations, and researchers. On April 27, 2020 after considering a number of requests to extend the comment period received from various stakeholders, EPA extended the comment period by 45 days through July 2, 2020 (85 FR 23352). After considering comments received during the public comment period, EPA is planning to issue the final BEs in early 2021 along with a response to the public comments document. EPA will continue to thoroughly consider feedback received through the public comment period, stakeholder input, and additional interagency discussion before finalizing these BEs and initiating consultation with the Services. Likewise, EPA will make available the Services' draft BiOps for public comments to ensure that the BEs and BiOps reflect the best scientific and commercial data available. EPA and NMFS also propose to seek public comment on the upcoming draft BiOps (*i.e.*, bromoxynil/prometryn, telone (1,3-dichloropropene)/metolachlor) as consistent with the enhanced stakeholder input process previously cited.

FWS has continued to work cooperatively with malathion registrants to share data and methodology for evaluating potential effects to listed species as it prepares its malathion BiOp. As part of the continuing development of this BiOp, the American Mosquito Control Association provided information to FWS on mosquito control practices and mosquito adulticide use in Hawaii and the Pacific Islands to help inform the malathion BiOp. FWS continues to prioritize completion of a draft malathion BiOp and anticipates submitting it to the EPA this summer.

FWS continues to be responsive to requests for technical assistance from registrants and other stakeholders about proactive conservation measures designed to support pesticide consultations. For example, on March 26, 2020, FWS met with CropLife America and discussed ways their organizations can work together to support pesticide consultations.

Beginning in the fall of 2019, the FESTF assisted FWS' consultation efforts by using the most recent FWS documents (e.g., Recovery plans, 5-year review, and species status assessments) to help FWS update their Status of the Species accounts for all listed, proposed, and candidate species. This work was completed in March 2020. FWS is also planning additional collaboration and outreach efforts in 2020 including, but not limited to, organizing information gathering sessions with Syngenta, Bayer, and CropLife America and presenting at the Fall 2020 American Chemical Society with FESTF and Syngenta on "Pesticides from Bench to Market: Safeguarding Sensitive Species."

FWS, NMFS, EPA, and USDA are also supporting the Minor Crop Farmer Alliance as they plan a 2020 workshop that will collaborate with industry and commodity organizations. The purpose of the workshop will be to discuss the utilization of grower information in ESA risk assessment and mitigation development. A case study involving carbaryl is underway and will be a focus of the workshop.

Areas of New Consensus and Continuing Topics of Discussion and Consideration

As mandated by the 2018 Farm Bill, this report identifies areas of new consensus and continuing topics of discussion and consideration. The covered agencies are committed to working together to improve the ESA consultation process.

Areas of New Consensus - The Release of the Revised Method for Conducting BEs

As described above, EPA released the Draft Revised Method, which helps EPA better differentiate species that are at risk of pesticide exposure by incorporating additional data, such as usage data, and analyses, including probabilistic and weight-of-evidence criteria. The Services and USDA provided comments on the Draft Revised Method. Since the last report to Congress was prepared, EPA evaluated public input on the Draft Revised Method, met with the Services and USDA, and revised the draft document. The covered agencies met in February 2020 and discussed the Revised Method as applied to the first two BEs on methomyl and carbaryl. EPA, USDA, and the Services discussed the Revised Method during the interagency meetings prior to EPA's release of the final Revised Method, with the understanding that the methomyl and carbaryl BEs would provide additional insight into application of the Revised Method.

As described above, EPA and NMFS have been following a deliberative process regarding the re-initiated consultation on diazinon, chlorpyrifos, and malathion. Since the last report to Congress, NMFS has completed its review of the information provided by EPA and has determined that revisions to the 2017 BiOp are appropriate. Based on a court-mandated timeline, NMFS will issue a revised BiOp in June 2022.

Continuing Topics of Discussion and Consideration

Several topics remain under discussion among the agencies. For example, since EPA applied the Revised Method for the first time with the draft methomyl and carbaryl BEs, the agencies will continue to discuss various aspects of the Revised Method as applied to the draft methomyl and carbaryl BEs and upcoming BEs. Specifically, the next set of upcoming BEs include herbicides, which will require additional methodology considerations. Additionally, the agencies continue to discuss potential improvements to the consultation process, including analytical methods for completing BiOps.

Conclusion

The IWG was formally institutionalized in December of 2018. This is the second report from the IWG which details the covered agencies' progress in further developing the proposals described in the December 2019 report. In addition, the IWG is required to submit regularly scheduled

implementation reports to Congress that describe: (1) the implementation of recommendations described in this report; (2) the extent to which that implementation improved the consultation process; and (3) any additional recommendations for improvements to the process.

The progress summarized in this report demonstrates the agencies' commitment to improving the consultation process, conserving and protecting endangered species and their designated critical habitats, and continuing robust dialogue with all stakeholders to ensure transparency throughout the consultation process.