



The Endangered Species Act Consultations for Pesticides: A Dysfunctional Process

The Issue

The Environmental Protection Agency (EPA) and the Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) have dramatically different views on approaches to assessing and managing potential risks to fish, wildlife and plant species from use of pesticides. These agencies disagree on fundamental legal and science policy matters related to their respective obligations under the Endangered Species Act (ESA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Consequently, there has been an inability to develop a workable process for consultation under ESA. The overly precautionary regulation favored by the Services threatens public health, agricultural productivity and global competitiveness, and will place a burden on our economy with no commensurate benefit to threatened and endangered species.

Background

Before pesticide registrations or amendments to existing pesticide registrations can be granted, EPA is required under FIFRA to ensure that the proposed use does not cause “any unreasonable adverse effects on the environment (including fish, wildlife and ‘non-target’ plants), taking into account the economic, social and environmental costs and benefits of the use of any pesticide.”

FIFRA requires applicants for pesticide registration actions (i.e., registrants) to submit a robust and comprehensive battery of scientific studies to EPA to enable the Agency to make a thorough evaluation of potential environmental impacts. EPA also considers other available data and has the authority to require additional data from pesticide registrants to ensure decisions are scientifically sound. EPA’s Office of Pesticide Programs (OPP) is uniquely staffed to critically evaluate the voluminous amount of available data on potential pesticide effects.

ESA provides for an additional level of scrutiny by requiring federal agencies such as EPA to consult with the Services on “agency actions” (such as a pesticide registration) that could impact threatened or endangered species or their critical habitats. As part of the consultation process, the Services are required to issue a “biological opinion” (BiOp) that includes recommendations of measures or restrictions to “agency actions” that would alleviate any concern regarding the impact an action might have on a listed species.

In the last decade, EPA has been sued on “procedural” grounds by nongovernmental organizations (NGOs) citing EPA’s failure to adequately “consult” with the Services on hundreds of product registrations that have the potential to expose specific endangered species throughout the nation. These lawsuits are used by activists as a means to force reductions in pesticide usage and obtain legal fees from the government. Several of the lawsuits filed have resulted in court-ordered “interim” restrictions on the use of critical pesticides. In January 2011, the Center for Biological Diversity filed a suit against EPA involving more than 380 pesticides and 214 threatened or endangered species. This lawsuit had the potential to affect agriculture and



pest control activities in 49 states, and, it is unlikely that the proposed restrictions would have any benefit in actually protecting or promoting the recovery of endangered species. The U.S.

District Court of Northern California granted motions brought by both CLA and the EPA to dismiss the lawsuit in April 2013, with the option for plaintiffs to file an amended complaint. Plaintiffs have since filed an amended complaint that addresses a smaller yet significant number of claims.

Despite EPA's efforts to meet obligations under FIFRA and the ESA, the Services have managed to complete a handful of consultations since 2002. The BiOps produced have been grossly flawed. The Services have chosen to ignore pertinent data and often rely on studies that are not as robust as other available data. As a result, EPA has not found the Services' recommendations sufficiently sound to compel registrants to adopt them, and the impasse has led to further lawsuits. Activist organizations have filed suit against EPA to compel the agency to implement unwarranted pesticide restrictions.

In 2011, EPA Administrator Lisa Jackson and the Secretaries of the U.S. Department of Agriculture, Department of Interior and Department of Commerce asked the National Research Council (NRC) of the National Academy of Sciences (NAS) to provide guidance on six key scientific issues at the heart of the disagreements between the Services and EPA regarding the ecological risk evaluation of pesticides.¹ The panel's final report was released on April 30, 2013. EPA and the Services have responded to the recommendations of the NAS report and plan to improve their procedures and better coordinate their activities. CropLife America (CLA) and member companies support steps to implement the report's recommendations; however, this action does not stop the litigation feeding frenzy, nor will it stop activist judges from imposing unwarranted pesticide restrictions to correct "procedural" deficits relating to a dysfunctional consultation process.

For more information, please contact Kellie Bray, senior director, government affairs: kbray@croplifeamerica.org or 202-872-3899.

¹ Letter from EPA Administrator Lisa Jackson to Ralph J. Cicerone, Ph.D., President, National Academy of Sciences, March 10, 2011.