



*What's the Harm? Examining EPA's New
Approach to ESA Compliance When Making
FIFRA Decisions*

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What's Going On?



- In early 2022, EPA announced that it was developing a new policy to increase its compliance with the ESA when taking actions under FIFRA
- The work plan released later that year outlined a series of “early mitigations” that EPA would develop to reduce pesticide impacts to species listed under the ESA
- If implemented as proposed, this new policy is likely to impact all pesticide users



Overview

- ✓ ESA & FIFRA
- How We Got Here
- New Policy Overview
- Looking Ahead



ESA: The Basics

The ESA was enacted in 1973 for the purpose of conserving threatened and endangered species and the ecosystems on which they depend

The ESA is administered by FWS and NMFS who are responsible for identifying and listing threatened and endangered species, and designating critical habitat

Listed species and designated critical habitat receive ESA protections



ESA: Species Protections

Prohibition on “take”

- The ESA prohibits “take” of listed species
- “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct”
- “Harm” is “an act which actually kills or injures fish or wildlife” including “significant habitat modification or degradation

Duty to consult

- Federal agencies are required to consult with FWS and NMFS to ensure that the actions they carry out will not “jeopardize” listed species, or destroy critical habitat
- “Jeopardy” is an action that is reasonably expected to “reduce appreciably the likelihood of both the survival and recovery of a listed species”



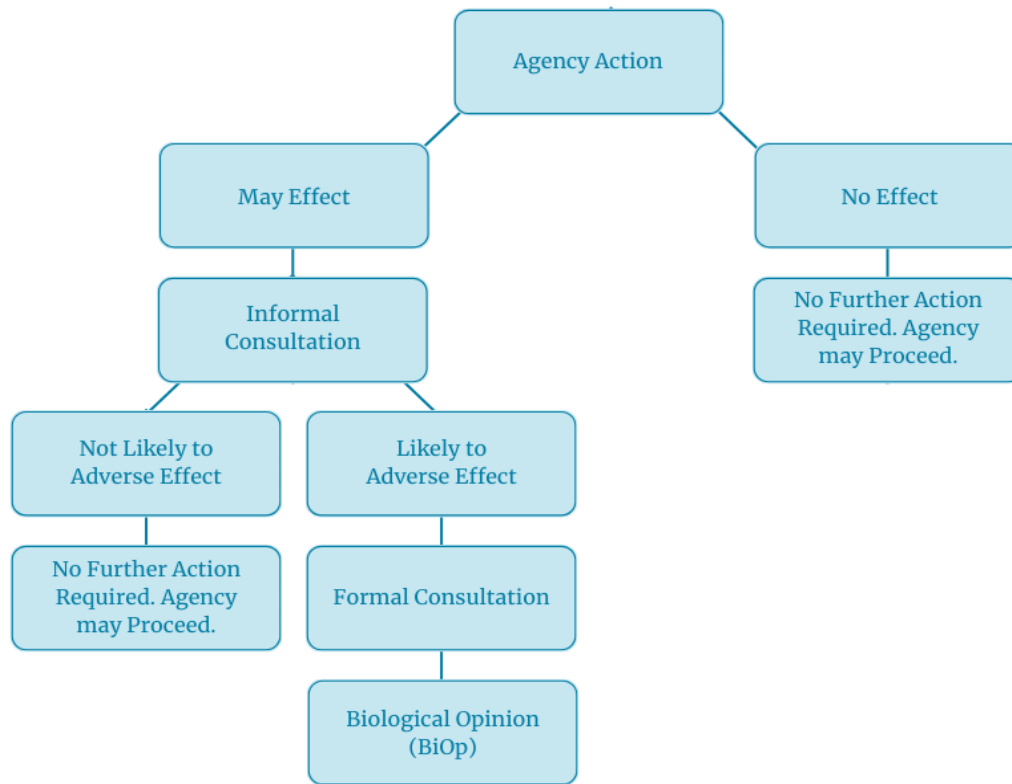
ESA: Section 7 Consultation

- ESA Section 7 requires all federal agencies to ensure that any actions they take will not jeopardize listed species or destroy critical habitat
 - “Action” = any action an agency has “authorized, funded, or carried out”
- Informal consultation is the first step – here, the action agency determines whether its action “may affect” any listed species or critical habitat
 - Low threshold to clear, includes actions that are “not likely to adversely affect” and actions that are “likely to adversely affect”
- If the action agency finds that its action is “likely to adversely affect” listed species or critical habitat, then it should proceed to formal consultation



ESA: Section 7 Consultation

Section 7 Flowchart



ESA: Formal Consultation

Formal consultation involves the creation of a Biological Opinion (“BiOp”) issued by the consulting Service. The BiOp will:

- Detail expected impact to listed species and critical habitat
- Identify “reasonable and prudent alternatives” if the proposed action is likely to result in jeopardy
- Provide levels of “incidental take”
- Provide mandatory “reasonable and prudent measures” to minimize impacts of incidental take
- Identify ways the action agency can conserve species or critical habitat
- Provide an administrative record to establish an environmental baseline for future BiOps

Once the BiOp is issued, consultation is complete

- The agency may decide to adopt the BiOp’s recommendations, move forward without them, reinitiate consultation, or take other steps to reduce harm to species



ESA: Penalties

- The ESA contains both civil and criminal penalties for violations – the severity of penalties changes depending on whether a person “knowingly” violated the ESA
- “Knowing” violations can incur:
 - Civil penalties of up to \$25,000 per violation
 - Criminal penalties of up to 50,000 or up to a year in prison
- All other violations can incur:
 - Civil penalties of up to \$500
- Along with civil and criminal penalties, the ESA also allows citizen suits to enjoin “any person” from alleged ESA violations



FIFRA: The Basics

- Before a pesticide can be sold or used, EPA must register the product under FIFRA
- To register a pesticide, EPA must determine that the product will not have “unreasonable adverse effects on the environment” when used as intended
 - “Unreasonable adverse effects on the environment” = “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide”
 - This standard is a balancing test, very different from the ESA’s yes/no “may affect” standard
- Registering a pesticide under FIFRA is an “agency action”



FIFRA: Agency Actions



- Other FIFRA agency actions include:
 - Modifying a pesticide label by adding a new use
 - Registering a new pesticide active ingredient
 - Reregistering a pesticide
 - Carrying out registration review
- Each action would require ESA consultation



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How Did We Get Here?

For decades, EPA has failed to fully consult over its FIFRA actions

This resulted in a mounting series of lawsuits, typically resulting in outcomes favorable to the plaintiffs

To reduce lawsuits and come into full ESA compliance, EPA is launching a new ESA-FIFRA policy



Previous Attempts

1982: EPA developed the “cluster approach” where it would conduct one Section 7 consultation for a group pesticides

1980s: EPA begins issuing ESA bulletins

1989: EPA launched the Endangered Species Protection Program that develop geographically-specific restrictions for “most vulnerable” species

2005: EPA switched to carrying out Section 7 consultation on an action-by-action approach



Recent Lawsuits

- Over the last several years, there have been numerous lawsuits challenging EPA for failure to engage in section 7 consultation when taking FIFRA actions
- These lawsuits often result in favorable outcomes for the plaintiffs
- Examples:
 - ***Rural Coal. v. EPA*, No. 20-70801 (9th Cir. 2020)** – plaintiffs challenge reapproval of glyphosate without ESA consultation
 - ***Farmworker Ass’n of FL v. EPA*, No. 21-1079 (D.C. Cir. 2021)** – court vacated new use for aldicarb due for lack of ESA consultation
 - ***Ctr. for Food Safety v. Regan*, No. 19-72109 (9th Cir. 2022)** – court found EPA registered sulfoxaflor without ESA consultation, directed EPA to complete consultation
 - ***Ctr. for Food Safety v. EPA*, No. 1:23-cv-01633 (D. D.C. 2023)** – plaintiffs challenge approval of Enlist One and Enlist Duo before ESA consultation complete
- Currently, EPA expects its court-ordered consultation schedule to take it into 2030 and beyond



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New ESA-FIFRA Policy

- Broadly, EPA’s new ESA-FIFRA Policy focuses on “early mitigations”
 - These are new restrictions that will be added to pesticide labels to reduce impacts to listed species and critical habitat
- The goal of introducing early mitigations is to reduce the number of future ESA consultations that result in findings of “jeopardy” or “adverse modification”
- EPA is developing these early mitigations in two ways:
 - Broadly across different groupings of pesticides (herbicides, insecticides, rodenticides, etc.)
 - Tailored to address species that are considered particularly vulnerable to pesticides



Draft Herbicide Strategy

Outlines “early mitigations” that EPA expects to include on all herbicide labels

Early mitigations fall into two main categories – reducing pesticide spray drift, and reducing pesticide runoff/erosion

Mitigation measures EPA finds are necessary across the entire pesticide use area will be included in the product’s general label

Mitigation measures only necessary in specific geographic areas will be posted to EPA’s website Bulletins Live! Two



Draft Herbicide Strategy: Mitigations

Spray Drift Mitigations

- Additional buffer requirements in the form of windbreaks, hedgerows, hooded sprayers, and application rate reduction depending on level of risk

Runoff/Erosion Mitigations

- A “mitigation menu” of limitations – applicators choose which methods are right for them to achieve the necessary number of “points”
- Includes: weather-based restrictions; methods of application; in-field management activities to reduce runoff; management adjacent to sprayed fields; activities to increase water retention



Vulnerable Species Pilot Program

Introduces early mitigation measures targeted at “vulnerable species” which EPA has identified as being at the greatest risk of pesticide exposure

Areas where mitigation measures are required are called Pesticide Use Limitation Areas or PULAs

Mitigations would apply broadly to conventional pesticide active ingredients and fall into two broad categories – avoidance and minimization

Avoidance mitigation (or avoidance PULAs) refers to areas where pesticide applications would be prohibited

Minimization mitigations (or minimization PULAs) focus on reducing spray drift, and runoff/erosion

Because VSPP mitigations are geographically specific, they will be posted to Bulletins Live! Two



VSPP: Mitigations

Spray Drift Mitigations

- Spray drift buffers
- Prohibition of application methods or droplet sizes

Runoff/Erosion Mitigations

- No applications when soil is saturated
- No applications when rain is in the forecast
- Requirement of land use practices designed to reduce runoff or erosion



VSPP: November 2023 Updates

- In November 2023, EPA released a brief update to the VSPP primarily to address comments received on the draft version of the program and outline next steps
- Primary takeaways from the update include:
 - EPA is planning to improve species maps for species included in the VSPP to better identify geographic areas where VSPP mitigation measures will apply
 - EPA will clarify potential exemptions to the VSPP, revisit how vulnerable species are identified and selected, and develop a consistent approach to the strategies used to reduce pesticide exposure
- EPA plans to provide further updates by fall 2024



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Next Steps

A final draft of the Herbicide Strategy is due by August 30, 2024

EPA plans to issue a draft Insecticide Strategy by July 30, 2024

EPA intends to continue developing bulletins for the original 27 species included in the VSPP while expanding the program to include more species

Currently unclear when these mitigation measures will begin appearing on pesticide labels



Corporate Transparency Act of 2021:



Upcoming
webinar



Additional
details

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- Why:
 - Regulations implementing the Corporate Transparency Act of 2021; goal: prevent money laundering/tax evasion
 - Written/implemented by United States Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN")
- What:
 - Corps/LLCs/LLP/LP/other businesses formed with the Sec of State must file a timely/accurate report with FinCEN*
 - *Unless excluded. No exclusion for ag/small businesses
 - Report will include:
 - Company identifying details
 - Personal identifying details of all "beneficial owners"
 - Beneficial owners include:
 - Indiv who own/control at least 25% of reporting company OR
 - Indiv who directly/indirectly exercises substantial control over a reporting company
 - President/CEO/CFO/manager/general counsel etc
- When:
 - *Companies created before 1/1/24*: Before 1/1/25
 - *Companies created during 2024*: 90 days after formation
 - Also must report "company applicants"
 - *Companies created after 1/1/25*: 30 days after formation
 - *Update subsequent changes*: 30 days after change
- Potential consequences for non-compliance (false info or failure to report):
 - < \$500 for each day in violation, max \$10k
 - < 2 years imprisonment

Final Thoughts

Various practical and legal questions remain:

Does the new ESA-FIFRA policy satisfy EPA's section 7 consultation duties?

Does the policy meet FIFRA's "unreasonable adverse effects" standard?

What happens to conflicting state law?

Are currently available listed species maps sufficient?

Who is liable for policy violations?

Are farmers more vulnerable to ESA lawsuits?



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