

**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**

**U.S. Environmental Protection Agency, U.S. Department of Interior, 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 an accounting of 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 (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) describe any additional recommendations for improvement to the process. 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 report is the third 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 19, 2021 (30 months after the date of enactment of the Agriculture Improvement Act of 2018).

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.<sup>1</sup> 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.<sup>2</sup>

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

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

This third report describes progress on implementing recommendations described in the first two reports and the impact of the recommendations on the consultation process.

## **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 ESA consultation process. The IWG final recommendations included 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.<sup>3</sup>
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 on implementing these recommendations demonstrates the agencies' commitment to improving the consultation process, conserving and protecting threatened and 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**

### **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 previously mapped the ranges of ESA-listed species within NMFS' jurisdiction and provided them to EPA. NMFS is currently reviewing the spatial data and making updates and refinements as appropriate. The U.S. Fish and Wildlife Service (FWS) is also continuing to revise 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,

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<sup>3</sup> 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.

repeatable, and based on the best available data and methods.<sup>4</sup> As of April 15, 2021, FWS finalized 620 refined range maps, which are publicly available,<sup>5</sup> and is in the process of developing an additional 127 maps. EPA downloaded the most recent species ranges for use in its upcoming biological evaluations (BEs), which will enhance the accuracy and credibility of its effects determinations. In addition to benefiting EPA BEs, improved range maps enhance the accuracy of all consultations for these species.

### ***Progress on U.S. Fish and Wildlife Service and National Marine Fisheries Service Biological Opinions***

In February 2021, the National Marine Fisheries Service (NMFS) completed two draft biological opinions (BiOps) on four pesticides, bromoxynil, prometryn, 1,3-dichloropropene (1,3-D), and metolachlor. These four chemicals represent the last active ingredients covered under a NMFS 2008 settlement agreement with the Northwest Center for Alternatives to Pesticides. Per the 2008 settlement, these draft BiOps evaluate the impact of these pesticides on 26 ESA-listed species of Pacific salmon and steelhead in Washington, Oregon, and California. The methods used to assess risk and determine appropriate mitigation for these four pesticides were similar to those used in the December 2017 BiOp on chlorpyrifos, diazinon, and malathion (2017 BiOp). In the case of these final four active ingredients, NMFS preliminarily concluded that the proposed action was not likely to either jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. In developing these draft BiOps, NMFS coordinated with EPA and the pesticide registrants (applicants) on risk reduction measures to minimize the incidental take of individuals of these listed species. As described in previous reports, these BiOps included enhanced consideration of pesticide usage data. During the development of these BiOps, EPA and NMFS met on several occasions to exchange scientific and regulatory information to incorporate into these BiOps. This close collaboration resulted in stronger BiOps that are expected to facilitate their implementation. The draft BiOps were posted on EPA's docket for a 60-day public comment period, which closed on April 20, 2021. Comments are currently being reviewed and incorporated. These BiOps are expected to be finalized by June 30, 2021.

On April 13, 2021, FWS transmitted the draft BiOp on EPA's registration of malathion covering 1,600 threatened, endangered, proposed, and candidate species and 760 designated and proposed critical habitats. In developing a final Opinion, FWS will continue to work with EPA and malathion registrants to refine analyses where applicable and develop technologically and economically feasible reasonable and prudent alternatives tailored to the needs of the species and

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<sup>4</sup> 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](https://ecos.fws.gov/docs/SR_SOP/SDM_SOP_Final_14Nov2019.pdf).

<sup>5</sup> U.S. Fish & Wildlife Service, ECOS Environmental Conservation Online System, available at <https://ecos.fws.gov/ecp/>.

critical habitat to avoid jeopardizing species and destroying or adversely modifying critical habitat. The public comment period is scheduled to close on June 19, 2021. Completion of the final Opinion is anticipated early next year.

### ***Release of Finalized Methomyl and Carbaryl Biological Evaluations***

On March 31, 2021, EPA finalized nationwide BEs on methomyl and carbaryl. EPA made Likely to Adversely Affect (LAA) determinations for a number of listed species and their designated critical habitats; therefore, it initiated formal consultation with the Services on these species and habitats. These BEs were the first to be conducted using the Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides.<sup>6</sup> EPA finalized the Revised Method after incorporating valuable input from the Services, USDA, and the public, as described in the 2020 IWG Report to Congress. Some significant elements of the Revised Method include: (1) incorporation of usage information to inform EPA's effects determinations and the extent to which a pesticide is actually applied to a particular commodity; (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 framework for informing confidence in the effects determinations. These final BEs include analyses based on the application directions included on pesticide labels as well as analyses based on common practices and alternative exposure and toxicity assumptions.

### ***Release of Draft Atrazine, Simazine, Propazine, and Glyphosate BEs***

In November 2020, EPA released draft BEs for public comment on the registration review of atrazine, simazine, propazine, and glyphosate. These BEs were the second set that utilized the Revised Method and were the first set of herbicides that EPA assessed using that 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 later in 2021.

### ***Re-initiated Consultation on First Three Pilot Chemicals***

As noted in the June 2020 report, on July 19, 2019, EPA re-initiated formal consultation with NMFS on their December 2017 BiOp covering chlorpyrifos, diazinon, and malathion. EPA re-initiated consultation due to additional information becoming available that EPA believed demonstrated the extent of the effects of the action (*i.e.*, registration review) may be different than what was previously considered. As part of the re-initiation, and following an EPA/NMFS applicant engagement plan, pesticide registrants were provided the opportunity to submit additional information relevant to the consultation and to inform the agencies of pending

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<sup>6</sup> 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>.

revisions to product labeling relevant to defining the action. NMFS is in the process of reviewing this information.

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. NMFS reviewed the information EPA provided and determined it will work with the EPA and registrants, if appropriate, on revisions to the final BiOp for chlorpyrifos, diazinon, and malathion by June 2022.

As part of this re-initiated consultation, EPA committed to providing materials to inform the public and pesticide applicators about endangered species and critical habitats. This includes information on possible risk reduction measures, such as best management practices, that the public and pesticide applicators can employ to reduce pesticide exposures and impacts to listed species. In response, EPA published educational materials on its website in September 2020 that provide resources and information to pesticide users and applicators interested in reducing exposure of non-target plants and animals to pesticides, with a focus on listed species.<sup>7</sup>

### **Continuing Stakeholder Engagement Efforts in 2021 and Beyond**

Pursuant to the Agriculture Improvement Act of 2018, the covered agencies are required to increase opportunities for meaningful stakeholder feedback on the IWG's activities. The agencies are committed to continued outreach to stakeholders.<sup>8</sup>

The covered agencies continue to meet at the staff, management, and leadership levels to continue 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 first two reports. Since those reports came out, EPA continues to discuss general risk assessment methodologies for ESA-listed species with interested stakeholders as they continue to improve the risk assessment methodology and consultation process. Staff from EPA, USDA, and the Services have also met with several additional stakeholders to share information and to gain additional perspectives to continue to inform and improve the consultation process. Examples since the June 2020 report are summarized below:

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<sup>7</sup> <https://www.epa.gov/endangered-species/tips-reducing-pesticide-impacts-threatened-and-endangered-species>

<sup>8</sup> 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](http://www.regulations.gov)).



- Per its standard process for drafting BiOps, NMFS led meetings with applicants to discuss and receive feedback on draft reasonable and prudent measures for two draft BiOps covering four pesticides; bromoxynil/prometryn and 1,3-D/metolachlor.
- NMFS released drafts of two BiOps to EPA for posting on EPA’s docket for a 60-day public review: Bromoxynil/prometryn and 1,3-D/metolachlor. EPA posts BiOps on its website for public comment, categorizes the comments, and sends them to the Services for consideration per the interagency stakeholder engagement process.
- EPA hosted an interagency meeting with representatives from EPA, USDA, FWS, and NMFS to discuss technical aspects of the draft BEs that were currently being conducted by EPA on atrazine, simazine, propazine, and glyphosate. As part of the consultation process for pesticides and as is consistent with the interagency stakeholder engagement process, EPA solicited public comment on the draft BEs of the herbicides atrazine, simazine, propazine, and glyphosate for 60 days in November 2020. The public comment period was extended for 45 additional days and closed in February 2021. Those comments are currently being evaluated and will be incorporated as appropriate into the final BEs, which are scheduled to be completed in late 2021.
- FWS released a draft nationwide malathion BiOp to EPA for public comment. The public comment period is scheduled to close on June 19, 2021.
- EPA posted the final nationwide BEs for methomyl and carbaryl and transmitted them to the Services to initiate formal consultation on species where EPA made LAA determinations.
- EPA met with the FIFRA Endangered Species Task Force (FESTF) to discuss the BE methodology, in particular as it relates to the data management aspect for pesticide consultations. FESTF is comprised of pesticide registrants. They provided comments on draft BEs and requested a meeting with EPA and the Services. EPA also met with pesticide registrants to discuss their proposals for conducting and refining BEs and ideas for improving the consultation process.
- EPA and 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 (WA, OR, CA, AK). The states also discussed their endangered species conservation programs.
- Creekbank Associates, a group of independent consultants, met with EPA, FWS, NMFS, and USDA to inform the agencies about the work they are doing on behalf of pesticide registrants on species conservation efforts. EPA also met with CropLife America to discuss additional public outreach opportunities, BE methods, and possible improvements to the consultation process.
- EPA met with the Center for Biological Diversity’s Board of Directors to discuss numerous topics including ESA obligations, current consultation schedule, and an overview of the ESA consultation process.

## **Additional Recommendations for Improvements to the Process**

As mandated by the Agriculture Improvement Act of 2018, this report describes additional recommendations for improvements to the consultation process. There are more than 1000 recognized active ingredients incorporated into a much larger number of formulated pesticide products currently registered by EPA under the authorities provided by FIFRA. The overarching goal of ESA is to conserve and protect endangered and threatened species and their habitats. Consultations under section 7(a)(2) support this goal by ensuring federal actions neither jeopardize listed species nor destroy or modify designated critical habitats.

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 improving the ESA section 7 consultation process. EPA also continues to explore how to put protections in place for vulnerable ESA-listed species earlier in the consultation process. To that end, EPA intends to work with its stakeholders to identify mitigations for vulnerable species in the short term. Progress on these efforts will be described as appropriate in future reports.

## **Conclusion**

The progress and implementation of the IWG's recommendations summarized in this report demonstrate the agencies' commitment to continued improvements to the consultation process, conservation and protection of endangered species and their designated critical habitats, as well as continued robust dialogue across all stakeholders to ensure transparency throughout the consultation process.