



## **BEYOND PESTICIDES**

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RE: **1018-AI95** Counterpart Endangered Species Act Section 7  
Consultation Regulations

Thank you for providing the opportunity to comment on the National Marine Fisheries Service and Fish and Wildlife Service (collectively the “Services”) Proposed “counterpart regulations” (here after referred to as CR) under the *Endangered Species Act* (ESA). These comments are submitted on behalf of Beyond Pesticides and its national membership; New Jersey Environmental Federation, NJ; Evergreen The Tree Treasurers of Charlotte County, Inc., FL; and Stop Pesticides Campaign, MN. Beyond Pesticides is a membership-based organization committed to pesticide safety and the adoption of alternative pest management strategies that reduce or eliminate a dependency on toxic chemicals. To that end, we would like to use this opportunity to voice our strong OPPOSITION to the proposal.

### **EPA HAS NOT DEMONSTRATED GOOD FAITH ATTEMPTS TOWARD FULFILLING CURRENT REGULATIONS**

Under the *Endangered Species Act*, EPA must ensure that its registration of a pesticide is not likely to jeopardize the continued existence of species listed as endangered and threatened or adversely modify habitat critical to those species' survival. In addition to the obligation to ensure that its actions are not likely to jeopardize listed species, the agency must consult, as appropriate, with the Services if a pesticide's use may affect listed species or designated critical habitat of the species.

Over the past 10 years, EPA has failed to fulfill the consultation mandate under ESA Section 7(a) on a number of pesticides it has registered or re-registered, despite repeated formal requests from the U.S. Fish and Wild Service (FWS). On June 17, 2002, FWS Director Steve

Williams sent a letter to the agency requesting cancellation or consultation on the pesticide fenthion that is known to have killed an endangered species (Piping Plover) in Florida and for which there are several alternatives.<sup>1</sup> EPA has failed to consult or make changes in the registration or labeling of fenthion, to comply with Director Williams' request. This, and similar requests for consultation by FWS on diazinon, chlorpyrifos, chlorfenapyr, and other pesticides have been ignored by EPA.

EPA's initial allowance of granular carbofuran under Section 18 (emergency exemption) in Louisiana (before the public outcry)<sup>2</sup> coupled with its preliminary assessment of and inaction on diazinon alone illustrate the ineptitude of EPA to take serious action to protect endangered species.<sup>3</sup> The recently highlighted cases where EPA should have consulted with the Services to protect salmon and steelhead fish in the Pacific Northwest and endangered sea turtles in the Chesapeake Bay (both specifically citing effects of atrazine as well as other pesticides), add further weight of evidence that EPA is flouting its responsibility under ESA and should not be the sole agency in charge of assessing pesticide risks to endangered species.<sup>4</sup> Lastly, the agency has registered Plant-Incorporated Protectants (PIPs) despite serious data gaps and general unknowns on the impacts of such products on endangered species. Even when evidence of harm exists, such as EPA's acknowledgement that pollen from genetically engineered B.t. plants may be killing monarch caterpillars, the agency fails to enact prompt action.<sup>5</sup> These violations do not imply a need for regulatory change to forego consultation with expert agencies but rather a need for full participation with existing regulations.

The proposals put forth in the CR circumvent the experts of the Services whose mission and expertise is rooted in the complexities of this issue. The Services provide a much needed form of checks and balances on the agency that needs even further strengthening, not removal. EPA's backlog of pesticides requiring consultation is due to years of non-compliance with the ESA. EPA should not be allowed to sidestep the ESA because its lack of compliance has made a

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<sup>1</sup> See <http://www.epa.gov/oppsrrd1/op/fenthion/birdkills.pdf>

<sup>2</sup> Despite the cancellation and phase-out were announced in 1991 due to unreasonable risks to wildlife, EPA allowed farmers in the state of Louisiana, under the FIFRA emergency provision, to begin applying 10,000 acres worth of granular carbofuran for rice weevil control in 2002. After 2,500 acres were treated in June, EPA initiated a 5-day public comment process and was met with fierce opposition from protectors of birds and other wildlife.

<sup>3</sup> The preliminary risk assessment for diazinon reported that the endangered species level of concern are exceeded for wildlife, aquatic life and terrestrial plants in semi-aquatic areas for all currently registered uses and application rates of diazinon.

<sup>4</sup> <http://www.pesticide.org/counterpartflyer.pdf>

<sup>5</sup> Carol Kaesuk Yoon, E.P.A. Announces New Rules On Genetically Altered Corn, *The New York Times*, Jan. 17, 2000, A14. Scientific studies suggest that widespread planting of B.t. crops raises serious questions about impacts to monarch butterflies. Losey, J., L. Raynor, and M. Carter. 1999. Transgenic pollen harms monarch larvae. *Nature* 399: 214; Hansen, L. and J. Obrycki. 1999. Non-target effects of Bt Corn Pollen on the Monarch Butterfly (Lepidoptera: Danaide). Abstract of a poster presented at the North Central Branch meeting of the Entomological Society of America, March 29, 1999. <http://www.pme.iastate.edu/info/monarch.htm>. Hansen Jesse, L. C. and J.J. Obrycki. 2000. Field deposition of Bt transgenic corn pollen lethal effects on the monarch butterfly. *Oecologia Online First*, DOI 10.1007/s004420000502. Wraight, C.L., A.R. Zangerl, M.J. Carroll, and MR. Berenbaum. 2000. Absence of toxicity of *Bacillus thuringiensis* pollen to black swallowtails under field conditions. *Proc. Natl. Acad. Sci. USA*

bad situation worse. EPA must start by performing its duties mandated under the law, not changing the law.

### **THE SERVICES, NOT EPA, POSSESS THE REQUIRED EXPERTISE NEEDED FOR EFFECTS DECISIONS**

EPA has tremendous expertise in the science of toxicity, but very little in ecology, and species and systems interaction. Direct effects of pesticides can be determined with toxicological laboratory tests, but indirect effects must be derived from complex interactions between a species, their environment and their behavior. Sub-lethal effects such as behavior modifications, sensory deprivation, and immune suppression may affect the long-term viability of species survival and must be observed in the field as well as tested for in the laboratory. Pesticides can also affect the survival of a species even if there are no direct toxicological impacts on the species themselves. Species' food source, habitat, predators, and other ecological interactions can be affected by pesticides and have detrimental results. These are the very effects that may be overlooked in a general "not likely to adversely effect" decision made by an agency whose expertise is rooted in laboratory science.

Without the ability of the Services to edit and comment on these decisions, key information will be overlooked and the statutory mandate of the Services will go unfulfilled. The Services offer not only expertise in endangered species habitat but also the benefit of invaluable field observation and networks. Rules should not be rewritten for those that do not follow them. EPA must first and foremost improve its record of complying with the ESA.

### **SHIFTING THE FINANCIAL BURDEN FROM THE SERVICES TO EPA WILL NOT ENHANCE ESA COMPLIANCE**

Understaffing and a lack of fiscal commitment has always hampered work on endangered species, and shifting the financial burden of the Section 7 consultation process will not solve this problem. EPA is consistently under funded. Adding an additional financial responsibility of maintaining the level of expertise and commitment needed to carry out these proposed changes would risk both endangered species and other EPA programs. Creating this new program will only further delay necessary action on endangered species and put additional financial burdens on existing programs. We do support the provisions EPA is currently making to better handle re-registration issues concerning endangered species. These planned changes are imperative and long overdue, however they cannot begin to compare to the expertise and focus the Services are able to provide to endangered species.

### **REGULATIONS GOVERNING EPA PESTICIDE PROGRAMS AND "COUNTERPART" REGULATION ALTERNATIVES RUN CONTRARY TO THE ESA**

The individual statutes governing the endangered species biological program in the Services and the pesticide program in the EPA are at odds both morally and legally. ESA is the only federal regulation with the sole purpose of protecting species on the brink of extinction. To allow an agency governed by the *Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA), a risk benefit statute, to carry out the mandate of ESA, a statute prohibited from using economic

data when making listing decisions, presents a clear conflict. As stated in the Federal Register notice “The second [goal] is to avoid placing unnecessary burden on pesticide users and agriculture.” This statutory bias will hamper the effectiveness and protective ability of the Act and the Services to protect endangered species.

## **COUNTERPART ALTERNATIVES WEAKEN ENDANGERED SPECIES PROTECTION**

The alternatives for addressing EPA’s Section 7 consultation obligations with regard to its registration and regulation of pesticides are both inconsistent with the plain language and intent of ESA, and will weaken protections for endangered and threatened species. Specifically, the changes suggested present the following concerns:

1. The CR suggest changes to the consultation process that would allow EPA to satisfy its Section 7 obligations without consulting with the Services, or alternatively, without obtaining the Service’s written concurrence that its actions are “not likely to adversely affect” endangered species. Both of these alternatives – the “no consultation” approach and the “no written concurrence” approach – are inconsistent with Section 7 and will undermine, rather than improve, protections for listed species.
2. The CR suggest allowing EPA, rather than the Services, to determine whether the registration and use of a pesticide is likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. Specifically, EPA would be authorized to complete the “effects” analysis forming the basis of any biological opinion issued in connection with the registration of any pesticide. Further, the Services would be required to accept EPA’s analysis unless they determined, based on some burden of proof, that EPA’s analysis was inadequate.
3. The CR would legitimize and institutionalize EPA’s historical and ongoing violations of ESA. In light of EPA’s abysmal track-record complying with its ESA obligations, it is simply foolish to provide this agency with more authority to address the harmful impacts of pesticides on endangered and threatened species.
4. The CR suggest allowing EPA and the Services to conduct programmatic consultations for particular groups of pesticides. This proposal would allow EPA to satisfy its Section 7 obligations through broad consultations on pesticides with common characteristics, and would also allow EPA to approve, without any consultation, the registration of pesticide products similar to previously approved products.

## **ANY PLAN TO ASSESS THE DANGERS OF PESTICIDES TO ENDANGERED SPECIES WITHOUT INCLUDING EFFECTS OF INERTS AND WHOLE PRODUCT FORMULATIONS ARE INADEQUATE**

All effects determinations must be based on the whole product not just the active ingredient(s). It is well known that many inerts have innate toxicity and effect species in ways independent of or in conjunction with the active ingredients. Decisions made based on a family

of pesticides would not take the actions of these other chemicals into account. It is prudent to build upon information known about similar pesticides, but each pesticides product must be tested in regards to the specific use and species in question.

EPA considers almost 80 percent, of the 2,500 EPA listed inerts, to be "Inerts of Unknown Toxicity" because of a lack of information, although several in this category are internationally recognized carcinogens. A large number of inerts belong to classes of chemicals that have been linked to serious ecological health or environmental impacts. Glycol ethers, zylenes and other highly toxic solvents are among the inerts commonly used in pesticides. The EPA plan of assessing pesticides by active ingredient and not by formulation does not adequately protect sensitive endangered populations.

Although we commend EPA for finally beginning to address the problem and backlog of inerts, it will be some time before the agency gets ahead and can protect endangered species from the impacts of inerts specifically.

### **GRANTING AUTHORITY TO EPA TO INDEPENDENTLY MAKE “NO EFFECT” DECISIONS UNDERMINES THE AUTHORITY OF THE SERVICES IN ASSESSING FEDERAL ACTIONS BY OTHER GOVERNMENT AGENCIES**

Allowing EPA to promulgate the “counterpart” regulations sets a dangerous precedent for government agencies when complying with ESA. To promulgate this rule is to legitimize EPA’s long-standing illegal activities and could potentially set precedents for other governmental agencies to engage in similar activities. The past and present activities of EPA show an inability to abide by the rule of law concerning ESA This alone should preclude any action that reduces the oversight of ANY EPA action concerning endangered species.

Furthermore, these counterpart regulations could fragment efforts to protect endangered species. Information coordination is essential when tracking population levels, habitat range, and other important data about endangered and threatened species. All information must be kept in a central database not fragmented by redundant bodies around the government. If EPA develops an additional database, it could hamper efforts by the Services and other agencies as well as hurt the species themselves, by fragmenting the availability of key information. Considering EPA’s history of isolation among government bodies and its inability to coordinate on past endangered species efforts, leaves stakeholders with little faith that future efforts will be better.

### **DEFINITION CHANGES FURTHER UNDERMINE ESA**

The CR suggests another potential effort to undermine the ESA by changing the longstanding ESA definitions of "best scientific and commercial data available" and "cumulative impacts." These changes would significantly weaken existing protections for endangered and threatened species at risk from pesticides and are entirely inconsistent with regulations that have been in place protecting our nation's most imperiled wildlife for more than 15 years.

In conclusion, the CR may potentially devastate the gains made for endangered species since ESA was first passed. For all the reasons mentioned above, this action will not further the

protection of listed species. Please take into account the OPPOSITION of Beyond Pesticides and other stakeholders in regards to this proposed rule.

Sincerely,

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