

US EPA ARCHIVE DOCUMENT



Endangered Species Act: Pesticide Consultations and Public Outreach

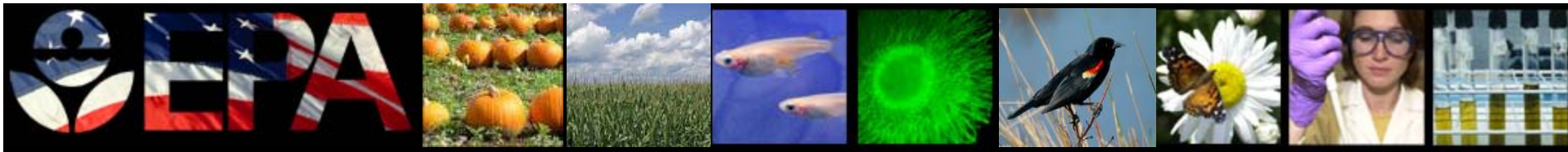
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Today's Purpose

- ESA Overview
- Consultation and Litigation History
- EPA's Recent Outreach Efforts



ESA & Implementing Regulations

- **ESA**
 - Purpose is to:
 - Provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved
 - Provide a program for the conservation of such endangered species and threatened species

Passed in 1973 (amended in '78, '82, & '88)

- **Implementing regulations**
 - USFWS and NMFS (the Services) joint regulations and
 - Services operate under combined handbook on conducting consultations.



ESA/FIFRA Nexus

- ESA 7(a)(1) – federal agencies (action agencies) must use their authority to carry out programs for the conservation of listed species
- ESA 7(a)(2) – federal agencies, in consultation with the Services must ensure that any *action* they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of habitat designated by the Services as critical
- ESA 9(a) – among other things, prohibits “take” of a listed threatened or endangered species
- FIFRA - “action” subject to the section 7(a)(2) consultation provisions of the ESA is the registration of a pesticide according to its labeling



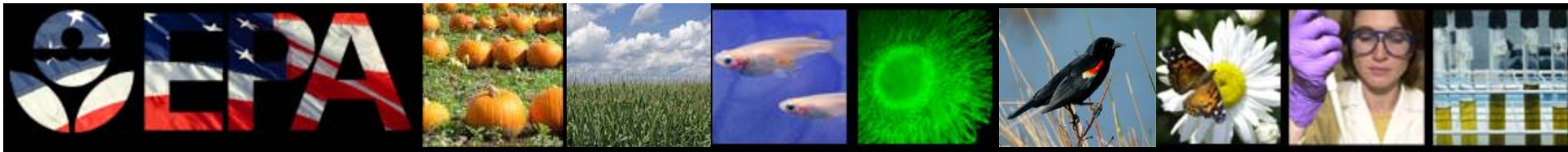
ESA Key Definitions

- **Endangered Species** – any species in danger of extinction throughout all or a significant portion of its range
- **Conservation** – use all means and methods and procedures to bring listed species to the point where protection under the ESA is no longer necessary
- **Jeopardize** (the continued existence of) – engage in an action that would reasonably be expected to, directly or indirectly, reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution
- **Take** - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct



EPA/OPP Responsibilities

- No Consultation Required
 - If the action agency determines that their actio.. will have **no effect** on a listed species or its designated critical habitat
 - If such a “no effect” determination is not possible, the agency must consult
- Consultation may be informal or formal



Informal Consultation

- Informal consultation is an optional process that includes discussions and correspondence between the Services and a Federal agency to determine whether a Federal action is likely to have an adverse effect on listed species or critical habitat.
 - During informal consultation the Services may suggest modifications to the action that a Federal agency could implement to avoid likely adverse effects to listed species or critical habitat.
 - Most often includes an action agency determination that the action is not likely to adversely affect a listed species and a request for the Services to concur in that finding
 - No time frames are mandated to conclude informal consultation



Formal Consultation

- Formal consultation is required if adverse effects are likely or if the Services have non-concurred during informal consultation on a finding that the action is not likely to adversely affect a listed species
 - EPA initiates formal consultation by sending a Biological Evaluation (a risk assessment) to the Services
 - The Services provide a Biological Opinion (BiOp) to EPA –finding either jeopardy or no-jeopardy for listed species
 - Reasonable and Prudent Alternatives and Measures (RPAs/RPMs) aka mitigation are included
 - The action agency prepares a response to the Services explaining how it will implement the RPAs/RPMs to ensure no likely jeopardy



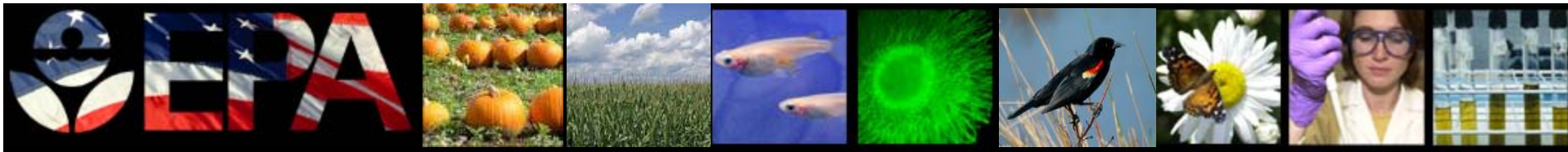
Scientific Challenges in Consultation

- Best available data
 - ESA requires agencies to use “best scientific and commercial data available” in determining if their action will affect a listed species.
 - However, there is no definition of “best scientific and commercial data.”
 - EPA believes it should mean best (highest quality) data, that are readily available to the action agency, regarding the effects of the action on listed species.
 - OPP has a published and well documented approach for classifying and using data



Scientific Challenges in Consultation

- Mixtures
 - Services are concerned about impact of formulated and tank mixtures, and environmental mixtures
 - EPA does not believe there is any agreed upon, peer reviewed method to assess the risks from mixtures
- Sub-lethal effect
 - There is not agreement among federal agencies on how to account for sub-lethal effects.
 - EPA believes these effects are only significant if they are related to demonstrable effects on survival, growth and fecundity
 - Survival, growth and fecundity being factors involved in whether jeopardy may result



Administrative Challenges in Consultation

- **Resource Considerations**

- The Services do not have the resources to complete consultations consistent with their statutory or regulatory timelines.
- OPP is beginning to conduct national analyses for pesticides. These analyses will cover the whole country and potentially many listed species
- The scope and complex scientific analyses exacerbate the resource issues.

- **Transparency and Administrative Process**

- OPP's work typically involves multiple opportunities for public participation
 - Scientific processes are subject to peer review
 - Scientific basis for conclusions is made public
 - Analyses are available for public input and in most cases this input is overtly sought.
 - Our response to input is made public.
- Services have a different administrative process that does not include public participation in the development of biological opinions
- EPA is committed to developing mechanisms to obtain public input on the measures the Services recommend



OPP's Overall Desired Approach

- Assess potential risks to listed species during course of overall ecological risk assessment for registration review (program mandated by statute to review all currently registered pesticide on a 15 year cycle – over 600 active ingredients and nearly 20,000 products)
- During this process, EPA conducts a pesticide-specific ecological risk assessment resulting in a determination as to whether the pesticide's use according to its label will have “no effect” or “may affect” any listed species or destroy or adversely modify designated critical habitat.



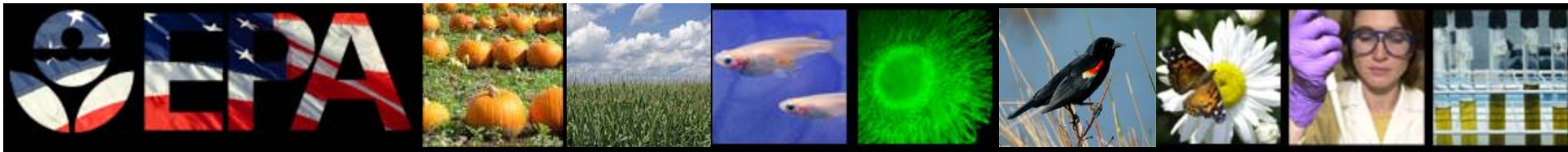
Implementation of Protections

- By their nature, limitations to protect listed species are anticipated to be geographically specific. All such limitations will be contained in Endangered Species Protection Bulletins
- Bulletins are linked to pesticide labels and contain enforceable use limitations intended to reduce species' exposure and ensure no likely jeopardy



ESA Considerations in Registration Review

- Registration Review program began in 2007
 - Over 1100 active ingredient_
 - Will ultimately include nation-wide ESA assessments for 70+ pesticides annually
 - Nation-wide preliminary risk assessments developed for
 - Clomazone and Fomesafen
 - Formal consultation initiated but FWS declined to consult
 - In discussions with Services on substance of effects determination package
 - Sodium and potassium nitrates, Carbon, Carbon Dioxide and Sulfur gas cartridges
 - Informal consultation for purposes of technical assistance was initiated during public comment period but FWS has not responded



ESA Litigation

- Although it is not OPP's intent to address ESA via lawsuits, these suits are influencing priorities and policy for both EPA and the Services
- Current ESA Litigation influencing OPP priorities:
 - NRDC v. EPA (21 species and atrazine) – OPP obligations completed and awaiting consultation with Services
 - Center for Biological Diversity and Save Our Springs Alliance v. EPA (6 pesticides and the Barton Springs Salamander) – OPP obligations completed and awaiting consultation with Services
 - Center for Biological Diversity v. EPA (CRLF) – OPP obligations completed and awaiting consultation with Services
 - Center for Biological Diversity v. EPA (11 SFB species) – OPP completing assessments 4 per quarter and awaiting consultation with Services
 - Washington Toxics Coalition v. EPA (Pacific Salmon and Steelhead) – OPP obligations completed and Biological Opinions being developed by NMFS
- Effects determinations for each pesticide can be found @
 - <http://www.epa.gov/espp/litstatus/effects/index.htm> and
 - <http://www.epa.gov/espp/litstatus/effects/redleg-frog/index.html>



WTC v. EPA - Salmonids

- Court ordered measures in effect until EPA completes its consultation obligations under Section 7 of ESA
 - Buffer zones in effect for certain water bodies in Oregon, California, and Washington State
- Active consultations with NMFS resulting from court-ordered deadlines on use of 37 pesticides in CA, OR, WA and ID
 - Biological Opinions due between Nov 2008 and April 2012.
 - 3 BiOps completed covering 18 pesticides
 - Remaining BiOps expected from April 2011 through April 2012



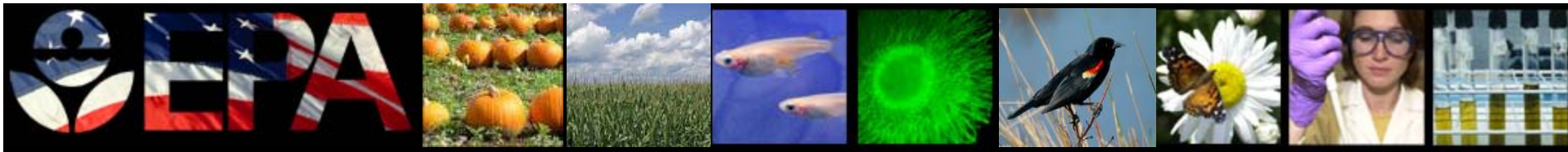
WTC v. EPA - Salmonids

- 1st BiOp completed November 2008
 - Endangered species bulletins containing use limitations provided to registrants, states, EPA Regions, tribes for review
 - Registrants declined to adopt limitations
- 2nd BiOp completed April 2009
 - Endangered species bulletins containing use limitations provided to registrants, states, tribes, and regions for review
 - EPA addressing input and will provide final bulletins to registrants
- 3rd BiOp completed August 30, 2010
 - EPA developing its response to NMFS regarding how EPA will proceed to ensure no likely jeopardy
- November 2010: New litigation brought against EPA for failure to implement the two biological opinions



Public Participation

- EPA considers any timely information received relevant to an ongoing risk assessment
- EPA seeks broad public input when identifying potential mitigation measures if such measures are being sought prior to consultation
- EPA publishes draft Biological Opinions for purposes of obtaining input to Draft Reasonable and Prudent Alternatives (RPAs) and Measures (RPMs)
 - EPA may use this input in its response to the Services
 - Input received on other aspects of the BiOp is provided to the Services for their consideration



Recent Efforts to Increase Public Participation

- Growers want more involvement in the process
- EPA is providing early notification to all stakeholders of when draft biological opinions are expected
- EPA is continuing to meet with all interested parties
- Participation in workshops
 - NOAA-sponsored meetings in California and Pacific Northwest
 - Spring 2011 MCFA Workshop