



The National Association of State Departments of Agriculture  
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March 10, 2003

Public Information & Records Integrity Branch (PIRIB)  
Office of Pesticide Programs (OPP)  
Environmental Protection Agency (7502C)  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460

**Re: Request for Public Comment on Advanced Notice of Proposed Rulemaking (ANPR) to promulgate “counterpart regulations” under the Endangered Species Act (ESA). Docket ID No. OPP-2003-0010**

Dear Sir/Madam:

The National Association of State Departments of Agriculture (NASDA) respectfully submits the following comments on the agency’s Advanced Notice of Proposed Rulemaking (ANPR) on how the Endangered Species Act (ESA) consultation process can be made more effective and efficient with respect to pesticide registration actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulatory program.

NASDA represents the commissioners, secretaries, directors of the state departments of agriculture in the fifty states and four territories. Our members are partners and co-regulators with the Environmental Protection Agency (EPA) as the lead state agencies responsible for administering, implementing and enforcing federal pesticide laws and regulations. There are numerous pesticide related functions that states perform, and we support efforts to ensure that pesticide use does not cause unreasonable adverse affects to human health and the environment.

We support the stated goals of the ANPR to “better integrate the ESA and FIFRA processes and to ensure that the FIFRA program provides adequate protection to listed species and their habitat.” In particular, NASDA is encouraged that the ANPR was prepared in collaboration with USDA, in addition to the Department of Interior’s Fish and Wildlife Service (FWS) and the Department of Commerce’s National Marine and Fisheries Service (NMFS). The issues addressed by the ANPR are of significant importance to the state agriculture departments and the agricultural community at large because of their potential impacts on state pesticide regulatory activities, pesticide products and use, individual growers, land use and agricultural production. We believe that this cooperative and comprehensive approach will result in an enhanced process that will ensure appropriate protection to listed species and their habitats, make endangered species assessments more uniform and consistent for products regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and develop a pesticide regulatory process that provides for the efficient and timely registration of safe and effective agricultural products.

NASDA members are especially concerned about the continued availability of safe and effective agricultural products. Currently, EPA faces six lawsuits challenging the agency’s compliance with the ESA in its FIFRA pesticide regulatory program, and additional lawsuits are expected. All of these lawsuits seek to dramatically restrict or eliminate pesticide use in areas wherever threatened and endangered species might be found. These legal challenges do not help the cause of species protection. Rather, they divert important resources and prevent the implementation of protections for listed species. In addition, they can result in conflicting standards, *ad hoc*



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judicial determinations, and processes that vary from one jurisdiction to another. Unless a program is developed to integrate activities under FIFRA and the ESA consultation process, these lawsuits may result in indiscriminate bans or restrictions on pesticide use, may eliminate safe products because of inadequate or inaccurate data, and may increase the costs of crop protection products for growers.

We offer the following recommendations to improve the consultation process:

- USDA must have full right to participate in the consultation process. At initiation, consultation should identify all product and use combinations at issue. This is consistent with congressional intent for developing a program that would ensure that growers could “continue production of agricultural food and fiber commodities.”
- EPA should be provided with both the responsibility and the authority for carrying out adequate product assessment and species protection in an efficient and consistent manner. Specifically, EPA’s Office of Pesticide Programs should be identified as the expert agency under the designation allowed by the ESA. Under FIFRA, EPA is already obligated to undertake rigorous scientific and ecological risk assessment analyses in the registration and reregistration of pesticides. This analysis is subject to significant scrutiny which conforms to the best available levels of scientific methodology. In addition, along with each registration and reregistration application, EPA receives and reviews a tremendous amount of information, such as environmental fate, exposure, and ecotoxicology studies, addressing the safety of particular products to non-target organisms including endangered and threatened species. Therefore, we believe that EPA is in the best position to make informed analyses and determinations in pesticide endangered species risk assessment and risk management matters.
- EPA should be given the authority and responsibility of making “*not likely to adversely affect*” determinations without requiring further consultation with or concurrences from FWS and NMFS. Under the current process, these determinations must be made in consultation with or with the concurrence of the Services. However, this step is unnecessary and serves no purpose other than to lengthen the already extensive process. As mentioned above, EPA has the relevant and necessary expertise for making such determinations. Removing this step from the process may be the most effective way to truly streamline the consultation process and marry the EPA pesticide regulatory process with the requirements of the ESA. This does not mean that the Services’ opinions should be excluded. The process could include an opportunity for the Services to object to an EPA “*not likely to adversely affect*” determination if the Services provide evidence that EPA failed to follow proper procedures in reaching the determination, or failed to assess the data in a scientifically sound manner. In other words, the Services would bear the burden of establishing that EPA’s findings are flawed. This would eliminate wasteful repetition of assessments already conducted by EPA.
- A process should be established for evaluating and resolving disagreements between EPA and the Services. In addition, the process should provide an opportunity for state and local input. This would ensure that EPA and the Services have accurate and complete information about local conditions and activities before issuing their opinion. Such information is vital in determining the actual impact of proposed federal actions on at-risk species and realistic measures that would best protect such species.
- The proposed rulemaking should identify and establish procedures for dealing with Section 18 emergency designations and other expedited reviews. Review by the Services is **not** appropriate for actions related to Section 18 or public health emergencies.
- Time frames should be established for completing formal and informal consultations on pesticide regulatory actions.

NASDA appreciates the opportunity to provide these comments. We believe that implementation of a sound ESA-compliance FIFRA process will ensure species protection, and at the same time, provide the necessary crop protection products for growing food and fiber. As partners in the regulation of pesticides, state departments of agriculture stand ready to continue to work with EPA as program rules are developed.

Sincerely yours,

<signed>

Richard W. Kirchoff  
Executive Vice President & CEO