

ASSISTANT ADMISTRATOR
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

ON

**AT RISK: AMERICAN JOBS, AGRICULTURE, HEALTH AND SPECIES—
THE COSTS OF FEDERAL REGULATORY DYSFUNCTION**

**BEFORE THE
COMMITTEE ON AGRICULTURE
AND
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

WASHINGTON D.C.

May 3, 2011

Mr. Chairman, my name is Eric Schwaab and I am the Assistant Administrator for Fisheries, within the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA).

Thank you for the opportunity to discuss the National Marine Fisheries Service's (NMFS) activities to implement the Endangered Species Act (ESA) interagency consultation provisions related to the U.S. Environmental Protection Agency's (EPA) registration of pesticides.

An Overview of ESA Requirements for Federal Agencies

The ESA provides for the conservation of species that are endangered or threatened throughout all or a significant portion of their range, and conserves the ecosystems upon which they depend. The responsibility of implementing the ESA is shared between the U.S. Fish and Wildlife Service (FWS) and NMFS (collectively the Services). Generally, FWS manages freshwater and land-dependent species, and NMFS manages marine and anadromous species, including 73 of the total listed species.

Section 7(a)(2) of the ESA requires Federal agencies, in consultation with NMFS and FWS, to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of those species' critical habitat.

The interagency consultation process, or section 7 consultation, generally occurs between two Federal agencies—the agency that proposes an action that may affect threatened or endangered species and either NMFS or FWS, depending on the species affected.

Generally, the consultation process begins with the action agency's preparation of a biological assessment evaluating the impacts of its action on listed species and designated critical habitat. Upon completion of the consultation process, the Services will develop a biological opinion, which documents their determination as to whether the Federal agency's action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. Should an action be determined by the Services to jeopardize a species or adversely modify critical habitat, the Services will suggest Reasonable and Prudent Alternatives (RPAs) to the proposed Federal action in the biological opinion that, if implemented, will avoid the likelihood of jeopardizing the continued existence of a listed species or resulting in the destruction or adverse modification of critical habitat. The biological opinion will also include an incidental take statement, which may contain Reasonable and Prudent Measures (RPMs) to minimize the impact of incidental take of individuals of the species.

ESA Consultation Process for EPA Registration of Pesticides

EPA's registration of pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is a Federal authorization that is subject to the interagency consultation requirement of the ESA. Following litigation and pursuant to a settlement agreement, NMFS began consulting with EPA on the effects of 37 pesticides on threatened and endangered Pacific salmon and steel head (salmonids) in 2008. Salmonids are anadromous species that are a valuable economic resource and an icon of the Pacific Northwest and California. Protection and recovery of Pacific salmonids will help restore the economic vitality of salmonid-dependent industries and ensure the long-term survival of these important and iconic species.

NMFS issued its first biological opinion covering 3 of the 37 pesticides in late 2008 and issued two subsequent final biological opinions covering 15 additional pesticides in 2009 and 2010. NMFS is preparing a draft biological opinion on an additional 6 pesticides and will issue the final biological opinion on June 30, 2011. NMFS must complete consultation on the remaining 13 pesticides by April 30, 2012. NMFS is completing these complex consultations on a tight schedule with resource constraints.

NMFS and the plaintiffs developed a schedule for completing consultation on these 37 pesticides as part of a court settlement agreement designed to address the pesticides of greatest concern for endangered species first. The first biological opinion in 2008 analyzed the effects of malathion, diazinon, and chlorpyrifos to 28 listed Pacific salmonids. Of the 37 pesticides that NMFS is scheduled to consult on with EPA under the settlement agreement, these three present the greatest risk to threatened and endangered species of salmonids. In addition, they are broad spectrum pesticides, meaning that the pesticide can harm or kill not only endangered species of concern, but the prey upon which they feed. As a result, in its 2008 biological opinion NMFS recommended risk reduction measures to reduce exposure of listed salmonids to these pesticides from field run-off and drift.

Stakeholder Involvement in Consultation Process

When a proposed action involves the Federal agency formally approving or authorizing an activity of a non-Federal entity, the applicant for the Federal authorization can also play a role in the consultation process. With regard to the pesticides consultations, EPA and NMFS meet with the pesticides registrants during several stages of the process to exchange information. If NMFS reaches a jeopardy determination, EPA and NMFS will seek input from the registrants into the development of reasonable and prudent alternatives to the action to minimize risk to listed species. EPA also provides the public an opportunity to comment on the draft reasonable and prudent alternatives in the biological opinions.

NMFS and EPA recognize that the implementation of the biological opinions affect other stakeholders and are increasing the participation of those stakeholders in the consultation process, both in EPA's preparation of biological assessments and in NMFS' biological opinions. This year, NMFS hosted stakeholder forums in Portland, Oregon and Sacramento, California to explain the consultation process. In addition, NMFS, EPA, USDA, and FWS are participating in a workshop with the Minor Crop Farmer Alliance on pesticide registration review and ESA consultations. The workshop, which will be held May 24-25, 2011, in Denver, Colorado, is designed to provide grower representatives an understanding of the processes and analyses used by our agencies to identify risk and mitigation options and to identify grower level data that may be available that would enhance the risk identification and risk mitigation decision process.

The Way Forward

The Administration recognizes the scope and complexity of the challenge of the conservation of endangered species and the administration of FIFRA. It has through EPA, NOAA and FWS formed an interagency workgroup of senior policy leaders to craft a multi-faceted strategy to address the challenge. Joining in that group are representatives of the U.S. Geological Survey (USGS) and the USDA Office of Pest Management Policy because of their specialized expertise in the topic area.

One major element of this effort is to address core scientific issues underlying the effective integration of FIFRA and ESA responsibilities. EPA, NOAA, USDA, and FWS asked the National Academy of Sciences to convene a panel to provide its expert advice on certain core scientific and technical issues that serve as the foundation for assessing risks to listed species associated with EPA's FIFRA-related activities. We believe that seeking independent advice on certain scientific issues involved in these processes, will provide the scientific and technical foundation for successful agency collaborations on consultations, enhance consistency in approaches to these issues within the involved agencies, and expand the public understanding of the scientific methods and approaches and their underlying rationale. We requested the National Research Council of the National Academy of Sciences to provide us with its advice on the following topics: (1) best available scientific data and information; (2) sub-lethal, indirect and cumulative effects; (3) mixtures and inert ingredients; (4) modeling; (5) interpretation of uncertainty; and (6) geospatial information and datasets. We developed Terms of Reference for this

review, and are currently working with the Academy to convene a panel and proceed with this important work. Once the panel is convened, we expect to receive the panel's recommendations and report within eighteen months. The agencies will consider the advice of the panel and will work together with the goal of developing an agreed upon risk assessment methodology for addressing the requirements of the ESA.

The interagency workgroup is also exploring the potential utility of additional data and modeling capabilities in future consultations. It will undertake work with relevant state pesticide programs to further refine the information utilized in the consultation process. Finally, it will explore the possibility of expanding USGS's water quality monitoring program and modeling capability to help refine projections of exposures that are likely to occur over the 15 year life of a registration.

Finally, NMFS, FWS, and EPA recognize the importance of expanding the opportunities for public participation in the consultation process associated with these FIFRA actions. We intend to pursue expanded opportunities to participate in the consultation processes for the registrants, the affected states, farming organizations and other interested parties. The agencies will solicit recommendations on improving access to scientific information, monitoring data, and other information pertinent to the ESA consultation issues "up-front" in the early preparation of biological assessments by EPA, and over the course of the preparations of biological opinions by both NMFS and FWS in the case of formal consultations.

Thank you again for the opportunity to provide an update on NMFS' activities to implement the ESA section 7 consultation processes related to the EPA's registration of pesticides. We are available to answer any questions you may have.