

MEMORANDUM OF AGREEMENT

between

the Environmental Protection Agency, the Department of the Interior,
and the Department of Commerce

on

Establishment of an Interagency Working Group to Coordinate Endangered Species Act
Consultations for Pesticide Registrations and Registration Review

I. PURPOSE

This Memorandum of Agreement (MOA) establishes an interagency working group (“Working Group”) comprised of representatives from the Environmental Protection Agency (EPA), the Department of the Interior (DOI), which includes the Fish and Wildlife Service (FWS), and the Department of Commerce (DOC), which includes the National Marine Fisheries Service (NMFS) (collectively, “the Signatory Agencies”). The Working Group will provide recommendations to EPA, FWS, and NMFS leadership on improving the Endangered Species Act (ESA)¹ consultation process for pesticide registration and registration review (“pesticide consultation process”) and will ensure that the new process is recorded and formalized as appropriate.

II. BACKGROUND

Statutory Framework and Pending Reviews

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)² governs pesticide registration, distribution, and use. EPA implements FIFRA, while consulting with the Department of Agriculture (USDA) on pesticide-related rulemakings. Most pesticides distributed or sold in the United States must obtain a registration from EPA prior to their use. FIFRA additionally requires that EPA review pesticide registrations every 15 years. As of July 1, 2017, EPA has been processing 725 registration review cases that cover approximately 1,140 pesticide active ingredients.

The ESA seeks to conserve threatened and endangered species and the ecosystems upon which they depend. Pursuant to ESA section 7(a)(2), federal agencies shall “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of any listed species or result in adverse modification of critical habitat.³ Section 7(a)(2) further requires agencies to consult with FWS, NMFS, or both (collectively, “the Services”) when contemplating an agency action subject to ESA. Courts have found specific registrations and registration reviews of pesticides under FIFRA to be agency actions subject to ESA’s consultation requirements.

Status of Pesticide Consultations

America’s 3.2 million farmers operate over 2 million farms and annually produce billions of pounds of food. Responsible pesticide use is an essential tool for managing America’s estimated 915 million acres of farmland. At the same time, pesticides may impact non-target organisms, including fish and wildlife.

¹ 16 U.S.C. § 1531 *et seq.*

² 7 U.S.C. § 136 *et seq.*

³ 16 U.S.C. § 1536(a)(2).

For decades, EPA and the Services have worked to determine how best to fulfill ESA's consultation requirements when registering and reregistering pesticides:

- Initially, EPA and FWS conducted ESA consultations on individual pesticides but ended this practice after it was deemed too lengthy and ineffective in protecting listed species.⁴
- In 1981, EPA in cooperation with FWS adopted a "cluster" approach pursuant to which all pesticides registered for the same use pattern were examined concurrently. At that time, EPA received biological opinions from the Services for four clusters and began drafting implementation plans for the biological opinions. However, the implementation plans proved to be unworkable because they were "far more complex and time-consuming than originally anticipated," and as a result, the cluster approach was abandoned in 1998.⁵
- In 1989, after collaboration among EPA, the Services, and USDA, and the conclusion of a notice-and-comment period, the agencies published a revised Endangered Species Protection Plan and returned to species-based assessments. Under this approach, EPA identified species most vulnerable to pesticides, the Services identified the counties where those species lived, and USDA provided information on crop growth and pesticide application.
- In 2001, a non-government organization successfully challenged EPA's failure to consult with NMFS on 54 pesticide active ingredients and their effect on 25 listed species of salmon and steelhead.⁶ Partially in response to this challenge, in 2004, EPA and the Services issued counterpart regulations, which created a number of different procedures to conduct informal and formal ESA pesticide consultations.⁷ The implementation of one such procedure for informal consultation, the alternative consultation procedure, was challenged and, in 2006, held to be arbitrary and capricious.⁸

In an effort to address issues between federal agencies related to identifying and implementing appropriate scientific and technical approaches, EPA, the Services, and USDA requested the National Research Council (NRC) "to examine scientific and technical issues related to determining risks posed to listed species by pesticides."⁹ In 2013, the NRC released a report that identified categories of issues the agencies should seek to resolve and strategies to improve interagency coordination. As a result of the NRC report, EPA and the Services developed and are implementing a set of "interim agreements" and a "stakeholder engagement process."

The pesticide consultation process that has evolved since the NRC report remains highly challenging. For example, although EPA is required to complete registration review of more than 700 cases by 2022, it has taken EPA and the Services several years to address the three active ingredients in the first pesticides covered using the most recent approach. This experience has shown that the NRC report did not foresee the challenges associated with implementing its recommendations in view of the statutory requirements and associated regulations that the EPA and the Services must follow. In addition, the pesticide consultation process continues to be subject to litigation and various consent decrees.

⁴ ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS ON THE ENDANGERED SPECIES PROTECTION PROGRAM AS IT RELATES TO PESTICIDE REGULATORY ACTIVITIES, at 6 (1991), *available here*.

⁵ *Id.* at 8.

⁶ *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006).

⁷ 50 C.F.R. § 402.40-48 (2016).

⁸ *Wash. Toxics Coal. v. United States Dep't of the Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

⁹ ASSESSING RISKS TO ENDANGERED AND THREATENED SPECIES FROM PESTICIDES, at 3 (2013) *available here*.

III. ACTIONS

Creation of Interagency Working Group

This MOA establishes a Working Group to support EPA and the Services in meeting their obligations related to the pesticide consultation process. The Working Group shall consist of the Signatory Agencies to this memorandum. In addition, the Signatory Agencies request that USDA, the Council on Environmental Quality (CEQ), and the Office of Management and Budget (OMB) join the Working Group, and that CEQ serve as Chair of the Working Group. The Signatory Agencies may also request the participation of other federal agencies or offices in the Working Group as appropriate.

Action Plan

Federal agency coordination and support is necessary to meet ESA obligations with regard to pesticide consultations. The Working Group will (1) outline a legal and regulatory framework by analyzing the relevant statutes, regulations, and case law, (2) review past pesticide consultation practices to learn from those experiences, (3) develop scientific and policy approaches that will increase the accuracy and timeliness of the pesticide consultation process, and (4) memorialize the proposed approach through a memorandum of understanding, revised regulations, or another legal mechanism:

1. **Analyze relevant statutes, regulations, and case law.** The Working Group will review (1) the statutory requirements under ESA and FIFRA, (2) the case law that has developed on the intersection of ESA and FIFRA, and (3) existing regulations for the pesticide consultation process. For example, the Working Group will review 50 C.F.R. § 402.46-47 (the optional formal consultation procedure) and determine whether its application would improve the pesticide consultation process. The Working Group should also provide advice on how best to define the scope of the agency action subject to consultation, and on how to properly identify and classify direct and indirect effects of the agency action. The Working Group will identify statutory obligations and limitations, providing a legal and regulatory framework to guide the Working Group as it develops its scientific and policy recommendations for the pesticide consultation process.
2. **Review past ESA pesticide consultation practices to learn lessons from recent experience.** The Working Group will review current and previous pesticide consultation practices to identify problems and areas for improvement, as well as best practices that should be used in future pesticide consultations.
3. **Prepare recommendations to improve scientific and policy approaches.** The Working Group will provide recommendations on how to improve scientific and policy approaches to ESA pesticide consultations. For example, the Working Group will develop a streamlined process for identifying which actions require no consultation, informal consultation, or formal consultation. The Working Group will also help provide clarity as to what constitutes the “best scientific and commercial data available” in the fields of pesticide use and ecological risk assessment, which EPA and the Services are required to use under ESA section 7(a)(2).
4. **Document the approach.** To the extent that current authorities and practices do not allow for the timely and accurate review of pesticides consistent with governing authorities, the Working Group may memorialize its recommendations for a revised regulatory framework, including addressing agency responsibilities, recommended technical approaches, and recommendations for

new regulations, a memorandum of understanding, or other appropriate documentation. Documenting the new approaches would promote lasting cooperation between the agencies.

IV. OTHER PROVISIONS

1. ***Period of Agreement.*** The term of this MOA will commence upon full execution by the Signatory Agencies, and shall remain in effect until such time as the MOA is terminated by any Signatory Agency or its successor.
2. ***Modification.*** This MOA, or subsequent annexes, may only be modified by mutual agreement of the Signatory Agencies or their successors. Such modifications shall be in writing and will take effect upon execution by the Signatory Agencies or their successors.
3. ***Rights and Benefits.*** Nothing in this MOA is intended to diminish or otherwise affect the authority of any agency to carry out its statutory, regulatory or other official functions, nor does it create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies or officers, State agencies or officers carrying out programs authorized under Federal law, or any other person.
4. ***Agreement Does Not Involve Funding.*** This MOA, in and of itself, does not result in the transfer of funds or other financial obligations between the Signatory Agencies. No provision of this MOA shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. Funding arrangements, if any, shall be the subject of separate agreements that will be subject to the availability of funds.
5. ***Stakeholder Input.*** In carrying out Section III of the MOA, the Working Group is not prohibited from seeking or receiving stakeholder expertise, experience, input, information, or other items deemed appropriate, consistent with the requirements of the Federal Advisory Committee Act (FACA).

V. SIGNATORIES

Ryan Zinke
Secretary
U.S. Department of the Interior

Date:_____

Wilbur Ross
Secretary
U.S. Department of Commerce

Date:_____

Scott Pruitt
Administrator
U.S. Environmental Protection Agency

Date:_____