

Dated: October 20, 2005.

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Acting Director, Special Review and  
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[FR Doc. 05-21626 Filed 11-1-05; 8:45 am]

BILLING CODE 6560-50-S

## ENVIRONMENTAL PROTECTION AGENCY

[OPP-2002-0311; FRL-7739-7]

### Endangered Species Protection Program Field Implementation

**AGENCY:** Environmental Protection  
Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This document describes how EPA's Office of Pesticide Programs intends to implement its Endangered Species Protection Program (ESPP or the Program). The goal of the ESPP is to carry out responsibilities under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in compliance with the Endangered Species Act (ESA), while at the same time not placing unnecessary burden on agriculture and other pesticide users. This document describes EPA's approach to implementing its responsibilities under section 7(a)(2) of ESA subsequent to a determination by EPA that geographically specific risk mitigation is necessary to protect federally listed threatened or endangered species or their critical habitat. For purposes of the ESPP, the term "listed species" or "endangered species" will encompass species listed as threatened or endangered, plus designated critical habitat of these species; the term "county" will include counties, parishes, and similar political boundaries of U.S. Territories. The implementation approach relies on pesticide labels, as appropriate, referring the pesticide user to geographically specific Endangered Species Protection Bulletins that will contain enforceable use limitations for the pesticide necessary to ensure the pesticide's use will not jeopardize the continued existence of a listed species.

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#### SUPPLEMENTARY INFORMATION:

##### I. General Information

###### A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of particular interest to State and Tribal regulatory partners, other interested Federal agencies, environmental or public interest groups, pesticide registrants and pesticide users. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

###### B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP-2002-0311. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to view public comments, to access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically.

Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

##### II. Background

###### A. What Action is the Agency Taking?

This Notice describes EPA's field implementation plan for putting in place any geographically specific pesticide use limitations EPA deems necessary to ensure EPA's compliance with ESA section 7(a)(2). This approach will be used to put in place pesticide use limitations identified as necessary by EPA during the course of its endangered species risk assessment process or through consultations with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). These protections or use limitations will be enforceable by EPA under section 12 of FIFRA.

This Notice is organized into four units. Unit I. provides general information about applicability of this document and the availability of additional information. Unit II. provides background information, including the Agency's legal authority for taking this action, and a summary of public comments on EPA's proposed approach (67 FR 71549, December 2, 2002) (FRL-7283-7) and its response to those comments. Unit III. describes the Program, including its scope, overall approach, and Endangered Species Protection Bulletins. Unit IV. contains references to other documents used in the development of and referenced in this Notice.

EPA will begin using this approach to implement geographically specific risk mitigation for the protection of listed species or their critical habitat upon publication of this Notice. EPA's plan as described in this document, however, is not a legally binding regulation and EPA may decide to revise, amend, or act at variance with the terms of this document without providing notice and comment under section 553 of the Administrative Procedure Act.

###### B. What is the Agency's Authority for Taking this Action?

Since 1970, EPA has had responsibility for regulating the sale, distribution, and use of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA has granted registrations, or licenses, for thousands of pesticides containing hundreds of active ingredients. These

registrations encompass thousands of different use sites and practices across the United States.

FIFRA as amended (7 U.S.C. 136 *et seq.*) governs the regulation of pesticides in the United States. Under FIFRA, a pesticide product generally may be sold or distributed in the United States only if it is registered by EPA. Before a product can be registered unconditionally, it must be shown, among other things, that the pesticide, when used in accordance with widespread and commonly recognized practices, will not generally cause "unreasonable adverse effects on the environment" (FIFRA section 3(c)(5)). FIFRA defines this standard to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of" the pesticide (FIFRA section (2)(bb)(1)). This is known as the FIFRA risk/benefit standard.

Amendments to FIFRA in 1988 required that, in addition to the original registration decision, all pesticides first registered before November 1984, be reviewed against more up-to-date data requirements and standards, and decisions be made about whether these pesticides should be "reregistered" (FIFRA section 4(a)). FIFRA was amended again in 1996 with enactment of the Food Quality Protection Act (FQPA). FQPA put into place a new standard for assessing human dietary risk (FIFRA section 2(bb)(2)), but it did not alter the risk/benefit standard of section 2(bb)(1) for assessing ecological risk. It also required that EPA periodically review pesticide registrations (establishing a goal of review every 15 years) to determine whether such registrations meet the requirements of the Act (FIFRA section 3(g)(1)(A)). This latter requirement is known as registration review. EPA recently published a Notice of Proposed Rulemaking (NPRM) to establish procedural regulations for conducting registration review (70 FR 40251, July 13, 2005) (FRL-7718-4).

The purpose of the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) is to protect and promote the recovery of animal and plant species that are threatened or in danger of becoming extinct and to ensure that the critical habitat upon which they depend is not destroyed or adversely modified.

Section 7(a)(1) of the ESA, 16 U.S.C. 1536(a)(1), requires federal agencies to use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species.

Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), and the implementing regulations at 50 CFR part 402, further require federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. This duty extends to licensing activities such as the registration of pesticides by EPA. In meeting the section 7(a)(2) requirement, EPA must, under certain circumstances, consult with the Secretary of the Interior (which has delegated the interagency consultation responsibilities to the FWS) and the Secretary of Commerce (which has delegated the interagency consultation responsibilities to the NMFS within the National Oceanic and Atmospheric Administration), regarding the effects of Agency actions on listed species or designated critical habitat. In fulfilling this requirement, federal agencies must use the best scientific and commercial data available.

Section 7(a)(4) of the ESA, 16 U.S.C. 1536(a)(4), requires federal agencies to confer with the Services (jointly, FWS and NMFS) on any agency action that will likely jeopardize the continued existence of any species proposed to be listed as threatened or endangered, or adversely modify critical habitat proposed to be designated for endangered species.

In 1988, Congress addressed the relationship between the ESA and EPA's pesticide labeling program in section 1010 of Public Law 100-478 (October 7, 1988), which required EPA to conduct a study and to provide Congress with a report of the results (U.S. EPA's 1991 report to Congress: Endangered Species Protection Program as it Relates to Pesticide Regulatory Activities, EPA 540-09-91-120, May 1991) on ways to implement EPA's endangered species pesticide labeling program in a manner that both promotes the conservation of listed species and minimizes the impacts to persons engaged in agricultural food and fiber commodity production and other pesticide users and applicators. This law provided a clear sense that Congress desires that EPA should fulfill its obligation to conserve listed species, while at the same time considering the needs of agriculture and other pesticide users. Further, section 1010 subsection (a) directs EPA to take public comment on any proposed pesticide labeling program imposed in order to comply with the ESA. Pursuant to that provision, EPA issued and sought public comment on its Endangered Species Protection Program in December 2002 (67 FR 71549, December 2, 2002).

The Services have promulgated regulations at 50 CFR part 402 addressing the means by which all federal agencies may satisfy their ESA section 7(a)(2) consultation obligations. In 2004, the Services published Counterpart Regulations (69 FR 47732, August 5, 2004) that provide additional alternative procedures that EPA may use to meet its ESA section 7(a)(2) obligations for pesticide regulatory actions under FIFRA. In order to use the Counterpart Regulations, EPA entered into an Alternative Consultation Agreement (ACA) (Ref. 4) with the Services. This ACA establishes the interagency process for implementing and ensuring compliance with the Counterpart Regulations. In connection with the development of the Counterpart Regulations and the ACA, EPA developed its Technical Overview of Ecological Risk Assessment (Ref. 1), detailing EPA's approach to ecological risk assessment for endangered species. This "Overview" document and the processes it describes were reviewed by the Services and deemed to be processes that will result in ESA-compliant risk determinations (Ref. 6).

#### C. EPA's Role

1. *ESA section 7(a)(1) obligations.* As noted in Unit II.B., EPA has responsibilities under both section 7(a)(1) and 7(a)(2) of the ESA. Under section 7(a)(1), EPA uses its authorities to conserve listed species, in consultation with the Services. EPA's Office of Pesticide Programs (OPP) has carried out a number of activities intended to conserve listed species, including: Hosting a web site that contains listed species fact sheets and a county-scale data base of listed species locations by county, and producing and disseminating informational and educational materials. Additionally, EPA has worked with State agencies responsible for pesticide programs and extension services to ensure that pesticide applicators certified by the States receive, during their certification training, information on listed species' protection needs. Listed species issues and concerns are included as part of the testing requirements for State-certified applicators in many States.

2. *ESA section 7(a)(2) obligations.* Under section 7(a)(2) of ESA, EPA must ensure that its actions are "not likely to jeopardize the continued existence of any" listed species or "result in the destruction or adverse modification of" their designated critical habitat. The ESA does not, however, provide action agencies, such as EPA, with independent authority to modify agency actions for the benefit of listed species.

Rather, action agencies must utilize their existing authorities, such as EPA's authority under FIFRA, to the extent permissible, to provide such protections. Accordingly, EPA's challenge is to implement FIFRA, a risk/benefit statute, in a way that harmonizes with the ESA, to the fullest extent possible, at use sites that are geographically, ecologically, agronomically, and economically diverse and changeable. EPA seeks to carry out these protections for thousands of pesticide products in ways that users can be expected to implement reliably and routinely without unnecessary burden.

The Agency is responsible for reviewing information and data to determine whether a pesticide product may be registered under FIFRA for a particular use. As part of that determination, the Agency assesses whether listed species or their designated critical habitat may be affected by the use of the product. If EPA determines that a proposed pesticide registration action will have no effect on any listed species or designated critical habitat, consultation under ESA section 7(a)(2) is not required. A determination that a proposed pesticide registration action is not likely to adversely affect any listed species or designated critical habitat is subject to the Services' consultation regulations regarding "informal consultation." EPA may either utilize the provisions of the Counterpart Regulations at 50 CFR part 402, subpart D, and complete this determination without obtaining Service concurrence, or EPA may choose to seek the written concurrence of the Services on this finding under the Services' regulations at 40 CFR part 402, subpart B, that apply to all federal agencies. If EPA determines that a proposed pesticide registration action is likely to adversely affect a listed species or designated critical habitat, EPA is required to enter into a process with the Services called "formal consultation." The consultation process is designed to assist federal agencies in developing actions that will not jeopardize the continued existence of any listed species or result in destruction or adverse modification of any designated critical habitat (ESA section 7(a)(2)). Following consultation, the Agency is responsible for implementing protections, if necessary, through its available authority.

#### D. The Roles of FWS and NMFS

The Department of the Interior's U.S. Fish and Wildlife Service (FWS) administers the ESA for most species. The Department of Commerce's

National Marine Fisheries Service (NMFS) administers the ESA for certain marine and anadromous species. EPA may enter into informal or formal consultation with the Services concerning effects to listed species or critical habitat (or confer on proposed species). At the conclusion of formal consultation, the Services determine whether an EPA action is likely to jeopardize the continued existence of a species or destroy or adversely modify designated critical habitat. If the action is likely to cause jeopardy, the Services propose reasonable and prudent alternatives, to the extent available, to avoid jeopardy. In connection with consultation, the Services' Biological Opinion will also address whether incidental take is anticipated from the Agency's action. If so, the Services may authorize a certain amount of incidental take, provided any reasonable and prudent measures identified by the Services are adopted by the Agency and followed by pesticide users. Take, as defined in section 3(18) of the ESA, is unlawful unless the Services issue an incidental take statement that provides an exemption to the prohibitions on take of listed wildlife, incidental to certain federal actions. The Services maintain enforcement authority regarding the unlawful take of listed species under section 9 of the ESA.

#### E. Summary of Comments on EPA's ESPP Proposal

On December 2, 2002, EPA published a **Federal Register** Notice soliciting public comment on its proposed field implementation program (67 FR 71549). EPA received 228 letters in response. Most of the letters (143) were from private citizens. Letters were also received from agricultural and pesticide associations (55), State and federal agencies and their representatives (18), and environmental groups (12). When broken out into individual topics, the comments within these letters totaled more than 600.

Commenters were fairly evenly split between those who generally supported the proposal and those who generally opposed it. Supportive commenters said the proposal was an appropriate balance of Program goals that makes efficient use of resources and Agency expertise in pesticide regulation. Opposing commenters said the proposal was inadequate to protect listed species, weakened existing laws, and should in no way consider economics in determining protections for listed species.

Numerous comments were received on consultation, technical, and science policy issues that were outside the

scope of the ESPP. While the proposal included a summary of EPA's processes for making effects determinations and consulting with the Services, that information was included solely to provide context to the reader. For more information about the technical aspects of endangered species risk assessment and consultation with the Services, readers are referred to the Counterpart Regulations at 50 CFR part 402 (69 FR 47732, August 5, 2004), EPA's Overview Document (Ref. 1), and the Alternative Consultation Agreement (Ref. 4).

All comments submitted in response to the proposal are available in docket ID number OPP-2002-0311 as described in Unit I.B. A summary of the specific areas on which EPA requested comment, follows below.

1. *FIFRA section 18 emergency exemptions.* The Agency requested comment on how it proposed to address endangered species in the context of FIFRA section 18 emergency exemptions in general and specifically for public health emergencies.

*Comment:* Most of 24 commenters acknowledged the necessity for a rapid response in public health emergencies, but differed on the point at which an endangered species review should be carried out, if at all, and whether consultation may be appropriate in such situations. Suggested alternatives to the proposed approach included requiring that FWS and State, Tribal and local officials establish a balanced program to solve health emergencies on a case-by-case basis with minimal impact on listed species, and assume some take would occur (1 commenter); consulting with as many State and federal agencies as possible to respond to the emergency (1 commenter); detailing a FWS person to EPA to work with EPA on requests for crisis exemptions (1 commenter); and, if no ESA review is done because of the extreme nature of the emergency, complete the listed species review as soon as possible afterward, without extending the emergency registration until the ESA review is completed (6 commenters).

*Response:* While EPA will endeavor to resolve concerns regarding listed species prior to taking an action, that may not always be possible for section 18s, which by their very nature are time critical, especially those involving public health emergencies. When submitting a section 18 request States, Tribes and federal agencies will be expected to demonstrate they have made a credible effort to identify and address endangered species issues. The more thorough the approach of the submitter, the more likely it will be that EPA can conduct its endangered species

assessment and consult with the Services, as necessary, within the time constraints for review of FIFRA section 18 applications. However, under the Counterpart Regulations, the Services have indicated that emergencies under section 18 of FIFRA may be treated as "emergencies" under the Services' consultation regulations. As a result, if EPA cannot perform a comprehensive endangered species assessment or, if applicable, initiate and complete formal consultation within the time constraints for review of a section 18 application, EPA may use the emergency informal consultation procedures described in the Services' Endangered Species Consultation Handbook (Ref. 5) and complete any necessary formal consultation as soon as practicable after the emergency.

**2. County Bulletins.** The proposal described the substance of county-level Endangered Species Protection Bulletins (Bulletins) that would be the mechanism to inform pesticide users of any specific changes to pesticide use required to protect a listed species. The Agency requested comment on a variety of aspects of the Bulletins, ranging from how to make them more understandable to frequency of updates and distribution mechanisms. EPA received about 150 comments on a range of issues about the Bulletins, including when their use is appropriate, how to make them easier to use, when to update them, and how to work more effectively with States in Bulletin development.

*Comment:* General--Bulletins were viewed by some as either inadequate to protect listed species (5 commenters) or as providing a practical, site-specific mechanism for protecting listed species that may be affected by pesticide use (20 commenters). About 40 commenters said Bulletins should not be required if alternative protection measures for listed species exist, such as landowner or conservation agreements; most of those same commenters said growers and their consultants should have the right to use alternative mitigation measures to protect listed species if their methods are scientifically defensible. Other commenters supported the Bulletins, but expressed concerns about privacy, frequency and notification of updates, and methods used to determine areas requiring protections for listed species.

*Response:* EPA continues to believe that Bulletins offer the best compromise between the lengthy time required to change product labels and being able to more quickly inform pesticide users of any required use limitations to protect listed species or critical habitat. Under the Agency's approach, the label will

carry a generic label statement referring pesticide users to the Bulletin. The Bulletins will carry the same weight for enforcement purposes as information on the label, and failure to follow the appropriate Bulletin would be subject to enforcement action under FIFRA.

The ESA requires EPA to ensure that the pesticide registration actions it authorizes are not likely to jeopardize the continued existence of listed species or adversely modify the designated critical habitat of such species. The Services have endorsed EPA's risk assessment process for pesticides, as outlined in the Agency's Overview Document (Ref. 1), as an appropriate means of assessing risks and making effects determinations for listed species and designated critical habitat. Before EPA could consider an alternative protective measure, it would need to ensure that the assessment methods used by the State or Tribe were adequate to evaluate risks to the species and critical habitat and that any alternative measures would provide adequate protection. EPA cannot, therefore, omit from consideration lands subject to landowner or conservation agreements when assessing risks to listed species. However, if EPA's risk assessment concludes that such agreements are an appropriate and effective means to protect listed species, EPA could adopt those measures by stating in the Bulletin itself that a pesticide user must apply the pesticide only under the terms and conditions of the agreement.

EPA will seek input, as appropriate, from stakeholders on use limitations it includes in the Bulletins prior to adopting them. It would be appropriate to bring to EPA's attention any alternative protective methods the user community believes exist at that time. Opportunities for public participation exist throughout EPA's decision process. Therefore, users are particularly encouraged to stay involved in that decision process so that EPA can incorporate practical measures into its decisions and Bulletins as early as possible.

*Comment:* Ease of use--EPA should use clear, consistent, plain-language statements and formats throughout all Bulletins and, in particular, in pesticide use restrictions (44 commenters). Use a pesticide's common, trade or brand name instead of active ingredient name in the table of pesticides (11 commenters).

*Response:* Bulletins will convey geographically specific pesticide use information to pesticide users, so it is crucial that they understand and can easily use the information the Bulletins present. EPA agrees that language,

terminology, format, etc., must be as clear, concise, and uniform as possible. EPA has been working with other federal agencies, States, Tribes, and other stakeholders to revise and improve the Bulletins, especially the maps and tables of pesticide use restrictions, with the goal of achieving consistency and ease of use of all information presented.

Maintaining Bulletins and the information appropriate to each county where a geographically specific use limitation is needed will be a significant undertaking. EPA is disinclined to add to this undertaking the challenge of keeping current all the product names for each active ingredient subject to one or more Bulletins across the country. Therefore, EPA does not intend to include trade or product names in the Bulletins but instead intends to use the active ingredient name.

*Comment:* Maps and private lands-- Suggestions varied for how EPA can make protection areas as specific as possible without infringing on individual landowners' privacy. The largest number of comments on this topic (14 commenters) concerned respect of private property rights in developing county maps. Thirteen commenters suggested that in cases where a listed species occurs only on privately owned lands, landowner agreements be used in lieu of publishing a Bulletin that would identify those lands.

*Response:* EPA agrees that it is important to respect the privacy of individuals. However, EPA is not in a position to enter into landowner agreements with all individuals regarding their use of pesticides. Further, concern regarding the enforcement of any such agreements if landownership changes is one of the many complex implementation issues that EPA would have to resolve to adopt such an approach. Additionally, while a species may be located only on lands owned by a single individual, use of pesticides adjacent to that land or upstream from a particular geographic location could also have effects on the listed species or its critical habitat. For these reasons, EPA does not intend to forego Bulletin development in favor of landowner agreements.

*Comment:* Maps and delineation of use limitation areas--Nine commenters said township-range-section designations alone, or in conjunction with natural and man-made landmarks and boundaries, should be used to delineate species protection areas. Nine other commenters said map locations alone, not natural boundaries, habitat types, etc., should be used because

those designations can result in larger restricted areas than warranted by sound science. Seven commenters said protection areas should be referenced by Geographic Positioning System (GPS)-compatible points. Eight commenters supported the use of narrative descriptions of listed species and/or habitat to explain use restrictions in a Bulletin.

*Response:* EPA acknowledges that State, Tribal and local situations greatly influence the most appropriate designation to use in producing maps and protection boundaries. The Agency will be flexible in its choices when preparing draft maps for State and Tribal input. EPA will use both natural and man-made boundaries as appropriate and necessary with the goal of identifying the geographic area where any use limitation applies but without unnecessarily enlarging that area.

Bulletins will generally contain a county map showing the geographic area associated with the protection measures, depending on the sensitivity of the species to other factors such as collection. Typically, maps will show a patterned or shaded area indicating where pesticide use must be limited to protect that species. Within patterned or shaded areas on the maps, the specific protection measures will generally be identified for each pesticide and the species being protected. Where species or habitat descriptions are helpful or necessary to identify use limitations, EPA will include that information in Bulletins. Also, where possible without causing further threat to a species, the Bulletins will provide a picture and description of the species. While it is EPA's intention to use geographic information systems to develop and produce the maps that will be included in Bulletins, we do not intend to provide specific GPS coordinates in the Bulletins.

*Comment:* Notifying users when a Bulletin applies--EPA requested comment on how the Agency could ensure that growers know they have the most recent Bulletins. Seven commenters said there must be a uniform mechanism for informing pesticide users of when a Bulletin is available; five of those commenters suggested computer-generated Bulletins at the time of sale as the appropriate mechanism. Three other commenters suggested placing a notice on EPA's web site.

*Response:* EPA has developed a uniform mechanism for notifying pesticide users when a Bulletin may apply to their pesticide application; that is, through placement of a generic statement on the pesticide label

directing pesticide users to follow the Bulletin for their county if one is available. Pesticide users may access the appropriate Bulletin for their pesticide use in one of two ways: Either by checking EPA's web site, <http://www.epa.gov/espp>, or if Internet access is not available, users may determine whether a Bulletin exists for their pesticide use by calling 1-800-447-3813, and if a Bulletin is available it can be mailed to the caller. Pesticide users should check for availability of a relevant Bulletin no more than 6 months before applying a pesticide to ensure they are using the current Bulletin for the county.

*Comment:* Updating frequency and effective date of Bulletins--EPA requested comment on whether annual updating of the Bulletins is the appropriate frequency and, if so, what an appropriate effective date would be. Fifteen commenters said Bulletins should be updated annually. Other suggestions ranged from, simply, "regular updating," to "as soon as consultations are completed and use limitations put in place," to "a 3-year schedule." Ten commenters said Bulletins also need to be dated so pesticide users can be assured they are using the current version of the Bulletin.

*Response:* It is not EPA's intent to constantly seek changes to product labels and make Bulletin changes. At the same time, EPA intends to maintain the ability to act on listed species and critical habitat issues when protection decisions are made or when a new body of data becomes available. EPA believes the best compromise between acting quickly to protect listed species and not engendering confusion with constant changes in label instructions can be reached by providing Bulletins via a web-based system, as described below. The generic statement on the label will direct pesticide users to follow the use limitations in a Bulletin applicable to their county and their pesticide application; pesticide users may generally obtain this information 6 months before the date on which they intend to apply the pesticide.

Bulletins will be available for viewing and printing on the web at <http://www.epa.gov/espp>. Those without access to the Internet may call EPA at 1-800-447-3813 to determine applicability and availability of a Bulletin. Bulletins will be printed and mailed upon request. Bulletins obtained either from the web or from EPA will indicate the time frame for which they apply.

*Comment:* EPA and the States and Tribes working together to improve the development of Bulletins--EPA

proposed specific roles for States and Tribes that would include review of county maps; review of use limitations to protect species; determining the effectiveness of the program; and, at their discretion, development of alternative approaches for protecting listed species in the form of State or Tribal initiated plans. Several commenters supported this proposed approach, but expressed concern about having the resources to undertake such a program. One suggestion was to incorporate Bulletin development into performance partnership grant agreements.

Other comments received were not necessarily specific to Bulletin development, but still addressed how EPA, States and Tribes should work together to protect listed species. About 50 commenters said EPA should broadly define the Program goals and help develop a general process, but then allow programs to be fully developed and tailored at the State and Tribal level.

*Response:* Given the specifics of the program as articulated, EPA believes it will not result in significant additional resource needs on the part of States and Tribes. EPA will provide Bulletins via the web or through a toll-free number, thus eliminating the proposed role of the States and Tribes in Bulletin distribution. Enforcement actions will be carried out through existing methods of FIFRA inspection, investigation and enforcement, just as all pesticide use requirements are enforced. EPA is not requiring States, Tribes, local governments or others to participate in Bulletin review; rather, the Agency will provide an opportunity for review at appropriate points in the risk assessment process and prior to publishing Bulletins on the web. This cooperative activity may be incorporated into performance partnership grant agreements so that EPA and the States and Tribes can effectively negotiate resources and clearly define outputs and outcomes.

The ESPP continues to provide States and Tribes an opportunity to develop State or Tribal initiated plans. Again, these plans are not a requirement but an option in which they may choose to engage.

*Comment:* Bulletin Distribution--When the ESPP was proposed for comment, EPA had been developing a broad-based distribution plan for Bulletins and other ESPP information that was based on availability of both paper and electronic copies of Bulletins. A key factor in developing that plan was to make sources of Bulletins and other information convenient to pesticide

users. The overwhelming sense of more than 50 comments received on this topic was that Bulletins must be easily and readily accessible. About a dozen commenters preferred availability on the web, although concerns were expressed regarding web access and ease of printing (3 commenters), as well as possibly publicizing exact species locations when specific farms or ranches might be identified in county maps (5 commenters). Other suggested distribution mechanisms for paper copies of Bulletins included points of sale such as pesticide dealers, distributors and retail stores; State lead agencies; U.S. Department of Agriculture's Cooperative Extension Service; the Services; and applicator training programs.

*Response:* In the time since EPA proposed the ESPP, EPA's ability to utilize web-based technology has evolved and funding situations have changed. These factors, combined with the public comment on the proposal and EPA's desire to minimize label changes while providing timely protection to listed species, have led to EPA's decision to use a web-based system as the main route of Bulletin distribution. EPA believes web-based Bulletin distribution provides the best compromise between the time required to change product labels and being able to more quickly inform pesticide users of any required use restrictions to protect listed species or critical habitat. The Agency also believes such a system is more cost-effective than printing paper copies and will eliminate possible confusion about whether pesticide users have the current version of a Bulletin. Therefore, EPA will provide Bulletins via a web-based system or, if a pesticide user does not have access to the Internet, through calling a toll-free number, as described above.

3. *Labels and Bulletins.* EPA proposed to use a generic label statement that would be included on the labels of products for which pesticide use limitations were necessary to ensure protection of listed species. This generic statement would refer the pesticide user to further use limitations in a county-level Bulletin.

*Comment:* More than 110 commenters said mandatory protections for listed species must be on the pesticide label, not in a Bulletin or on a web site. Many indicated specific information they believed should be included on the label such as: The name of the species to be protected, what protections apply, where those protections apply, and penalties for failure to comply with the label restrictions. Eleven commenters said pesticide users should not have to

go to more than one source to obtain compliance information. Seventeen commenters expressed some level of support for a generic label statement directing pesticide users, when necessary, to follow a Bulletin.

*Response:* EPA has considered again the feasibility and desirability of including all pertinent information regarding listed species protection on the actual pesticide product label itself. EPA continues to believe this approach is not feasible, would not result in better protection for listed species, and would by necessity be overbroad in terms of geographic areas in which limitations on pesticide use are necessary to protect listed species. EPA intends to provide protection for listed species while minimizing any unnecessary burden on pesticide users, as we believe was the intent of Congress in passing section 1010 of Public Law 100-478 (October 7, 1988). While geographically specific use limitations may certainly be described in text, such description could be very lengthy consisting of numerous coordinates of many geographic points. This type of information is more amenable to portrayal through graphic methods. Further, should changes be necessary as a result of additional species being listed etc., changes to the Bulletin could be accomplished more readily than further changes to a pesticide label. Therefore, by using Bulletins rather than the pesticide product label to relay the specific use limitations, protection will be more timely for the listed species.

4. *Enforcement.* For pesticide products determined to affect listed species or critical habitat, the Agency proposed that the product labels carry a statement directing users to follow the appropriate Bulletin in effect at the time of product application or that all Bulletins published by an annual date be in effect for 12 months. In either case, pesticide users who fail to follow provisions applicable to their pesticide application, whether that failure results in harm to a listed species or not, would be subject to enforcement under the misuse provisions of FIFRA (section 12(a)(2)(G)).

*Comment:* Liability and incidental take--Most of about 18 commenters in this area were concerned with liability and incidental take. Fourteen commenters said those who follow label instructions and accidentally harm a listed species should not be subject to any liability, and any enforcement of the ESPP should be done through FIFRA, not the ESA.

*Response:* The obligation of pesticide users under FIFRA to comply with a pesticide product's label will not change

under the Program. Bulletins will be enforced as are pesticide labels since compliance with the Bulletins will be a labeling requirement. As for the ESA, the Services may under some circumstances issue what is called an "incidental take statement" which authorizes take of species under certain circumstances. If such a statement authorizes take that may result from the use of a pesticide in compliance with FIFRA, a pesticide user applying the pesticide consistent with the labeling would not be subject to enforcement action under the ESA for taking a listed species. However, if the Services have not authorized take by issuance of an incidental take statement, and take occurs from use of the pesticide, a pesticide user could be liable for take under section 9 of the ESA, regardless of whether they complied with the use requirements for the pesticide or not. In situations where EPA's analysis results in a determination that a pesticide's use is "likely to adversely affect" a species, EPA will be consulting with the Services. If the pesticide's use will not, in the opinion of the Services, result in jeopardy to the species, they may develop and issue an incidental take statement. In situations where EPA's analysis results in a determination that use of the pesticide with any use limitations in the Bulletin is "not likely to adversely affect" the species, further consultation with the Services may not occur. In these situations, there is by definition, no incidental take anticipated since the pesticide is "not likely to adversely affect" a species. Thus, while a pesticide user could be liable for take under the ESA of a listed species even when following all the appropriate use requirements, including those articulated through a Bulletin, this scenario is highly unlikely to occur.

5. *Enhanced monitoring.* EPA proposed several ways to evaluate the extent to which the ESPP is protecting and contributing to the conservation of listed species. EPA proposed to use existing monitoring and incident data more effectively, to monitor effectiveness of Bulletins after they have been used for a time, and to sponsor some limited terrestrial monitoring to better understand whether specific provisions in Bulletins were resulting in decreased potential for a listed species to be exposed at levels of concern.

*Comment:* Nearly 60 comments were received on this broad area of discussion. More than 30 commenters said any monitoring data should be used either to refine the endangered species risk assessment or to minimize the areas affected by pesticide use limitations designed to protect listed species or

critical habitat. Ten commenters said monitoring must involve the States, be done at the State level or be done by the States. In response to our proposal to augment monitoring data with targeted terrestrial residue monitoring, possibly to include post-registration monitoring by registrants or others, 13 commenters objected to registrants playing a role in any monitoring because of potential conflicts of interest or the added burden to the companies, while five commenters said the Services should play some role in monitoring, ranging from oversight of others to performing the monitoring themselves. Six commenters questioned the utility and applicability of incident data in risk assessments, largely because of quality-control issues and the lack of a definition of best available data. Nine commenters agreed that EPA should make better use of existing monitoring programs, rather than adding additional monitoring schemes.

*Response:* Given the comments received, the potential of budget considerations at the federal, State and Tribal levels of government, and the need to ensure that any new monitoring undertaken by the federal government is well defined and considers input of stakeholders, this notice does not include an EPA plan for new terrestrial monitoring. However, this is an area that EPA will continue to explore as the program moves forward, to determine whether it has broad utility in evaluating the effectiveness of the program.

EPA will continue to consider and improve upon its use of existing monitoring and incident data in its analyses of potential effects to listed species. EPA continues to believe that the result of monitoring programs generally do not provide sufficient information on which to base a regulatory decision unless those programs are specifically designed to answer the particular questions being posed. However, both monitoring and incident data may, to varying degrees based on the quality of the information and the confidence in the information, be of value in characterizing the extent of potential exposure of a listed species to a pesticide. EPA will consider incident information reported to its incident monitoring programs and monitoring data conducted under the U.S. Geological Survey's National Water Quality Assessment Program and monitoring data submitted to EPA's Office of Water under the Clean Water and Safe Drinking Water Acts, to help characterize the extent of potential risk to listed species. Additionally, if OPP is aware of monitoring programs

conducted by OPP's State or Tribal regulatory partners, EPA will assess the utility of the data resulting from those programs and use those data, as appropriate. Finally, there may be specific targeted monitoring conducted by the regulated industry at EPA's request. These data too will be used, as appropriate, to help characterize the extent of potential exposure of listed species to pesticides.

6. *Public participation.* The proposal articulated EPA's commitment to appropriate public participation and outlined three general stages at which public input could be of particular value: During analysis of a pesticide's potential effects, subsequent to a determination of potential effect, and subsequent to development of a draft Biological Opinion on the part of the Services, if appropriate. EPA proposes that when any of these phases corresponds with a public participation phase under EPA's ongoing review processes (e.g., reregistration), that ongoing public process will be used.

*Comment:* Virtually all commenters agreed that more opportunities must be available for public participation in all areas of listed species protection, from the initial risk assessment through determining mitigations where needed and developing appropriate Bulletins.

*Response:* Endangered species risk assessment processes and risk management decisions are being incorporated into EPA's existing processes of registration, reregistration and registration review, and will generally be afforded the same level of transparency and opportunity for comment as provided in those processes. EPA has discussed public participation with its Federal Advisory Committee (the Pesticide Program Dialogue Committee) on several occasions and will continue to work with that committee to further define specific aspects of public participation relative to listed species concerns. EPA is committed to a transparent and participatory process to the extent that can be accomplished in a manner that continues to allow EPA to meet its statutory obligations.

7. *Implementation timing.* EPA solicited comment on ways to time the release of Bulletins to minimize the potential disruption to pesticide users during a growing season. Among other details, the Agency proposed to begin reviewing existing Bulletins within 6 months of publication of this final Program notice to ensure they are still valid, and to update each Bulletin no more than once annually.

*Comment:* Eight commenters said Bulletins should be updated annually,

in time for growers to plan for the upcoming season. Suggestions for when to update them ranged from the end of the fall growing season to January of each year.

*Response:* Given a web-based approach to Bulletin production and distribution as articulated in this Notice, EPA intends to update Bulletins as protection decisions are made or when a new body of data becomes available. However, this web-based system is designed so that a pesticide user may obtain any applicable pesticide use limitations for a particular use in a particular location, up to 6 months prior to the application date. EPA believes this 6-month window will allow adequate time in most cases, for a pesticide user to plan their application of a pesticide. Further, EPA believes that this will allow protections to be implemented in a more timely manner than if EPA were to select one date per year on which all changes would become effective.

All of the submitted comments are available in docket ID number OPP-2002-0311, as described in Unit I.B.

### III. The Endangered Species Protection Program Field Implementation

EPA's implementation plan is based on two goals. The first is to provide appropriate protection to listed species and their designated critical habitat from potential harm due to pesticide use. The second is to avoid placing unnecessary burden on pesticide users and agriculture. The following sections describe the elements of EPA's approach to implementing listed species protections where such protections are deemed necessary.

EPA's plan as described in this document is not a legally binding regulation and EPA may decide to revise, amend, or act at variance with the terms of this document without providing notice and comment under section 553 of the Administrative Procedure Act.

#### A. Scope of the ESPP

All pesticide products that EPA determines "may affect" a listed species or its designated critical habitat may be subject to the ESPP. The scope potentially includes pesticide actions under sections 3, 5, 18, and 24(c) of FIFRA.

1. *Indoor products determination.* EPA has determined that pesticide products bearing label directions only for use indoors, and where the applied pesticide remains indoors, will not result in exposure to listed species. Therefore, these products will have "no effect" on listed species and would not

be subject to the ESPP. Indoor use includes application within transport vehicles and within any structure with enclosed walls and a roof, such as buildings, greenhouses, outbuildings, etc. This “no effect” determination does not apply to a pesticide that is applied indoors, but could expose outdoor environments (such as pesticides applied in cooling towers or used as cattle dips). Whether these products result in a “may affect” determination will be assessed on a case-by-case basis. If a “may affect” determination is made for these products, they would be subject to the ESPP.

2. *FIFRA section 18s.* Section 18 of FIFRA authorizes EPA to issue “emergency exemptions” to States and federal agencies to use a pesticide for an unregistered use for a limited time if EPA determines that emergency conditions exist. While EPA will endeavor to resolve concerns regarding listed species prior to taking an action, that may not always be possible for section 18s, which by their very nature are time critical, especially those involving public health emergencies. When submitting a section 18 request to EPA, States, Tribes and federal agencies will be expected to demonstrate they have made a credible effort to identify and address endangered species issues. The more thorough the approach of the submitter, the more likely it will be that EPA can conduct its endangered species assessment and consult with the Services, as necessary, within the time constraints for review of FIFRA section 18 applications. However, under the Counterpart Regulations, the Services have indicated that emergencies under section 18 of FIFRA may be treated as “emergencies” under the Services’ consultation regulations. As a result, if EPA cannot perform a comprehensive endangered species assessment or, if applicable, initiate and complete formal consultation prior to the emergency, EPA may use the emergency informal consultation procedures described in the Services’ Endangered Species Consultation Handbook (Ref. 5) and complete any necessary formal consultation as soon as practicable after the emergency.

#### B. Overall Approach

The task of assessing pesticide registrations’ potential effects to listed species has the potential to be quite significant. There are more than 900 active ingredients used in more than 19,000 formulated products registered under FIFRA. Each product is registered for one to potentially many use sites. Each use site and its specific use instructions have different potentials to

affect a listed species or critical habitat. With more than 1,200 listed species in one or more of over 2,000 counties throughout the United States, the job of determining what use patterns of each pesticide have the potential to affect which species, is not a task that can be accomplished quickly.

EPA’s overall strategy is to address listed species concerns within the context of the pesticide registration, reregistration, and registration review processes. As explained in the Agency’s risk assessment Overview Document (Ref. 1), endangered species assessments are, essentially, geographic and biological refinements of the core environmental risk assessment performed to support a registration, reregistration or, in the future, registration review decision. Since the refinements to assess the potential effects of a pesticide’s use to a listed species stem from this core assessment, and since that core assessment feeds into a decision regarding the registration status of a pesticide, it seems both logical and efficient to develop processes to accomplish the endangered species refinements within the context of the broader activities of registration, reregistration and, in the future, registration review. FIFRA section 3(g) requires the Agency to periodically review pesticide registrations. After establishing procedures for registration review, EPA’s goal is to review the registration of each pesticide every 15 years. The purpose of this review is to assess whether a pesticide continues to meet FIFRA requirements for registration. During a pesticide’s registration review, the Agency would, among other things, determine whether endangered species assessments must be conducted. If so, such assessments would generally be conducted as part of the pesticide’s registration review where possible.

While it is OPP’s intent to accomplish endangered species assessments through these processes, there may be situations in which the potential risks to a listed species are addressed apart from these processes. For example, there may be situations in which new, valid information becomes available on existing pesticide registrations, or on a listed species, that will compel EPA to re-evaluate its determinations and reinitiate consultation, as appropriate, outside those existing processes. In those circumstances, case-by-case decisions will be made on whether to review a pesticide prior to its scheduled review time.

#### C. Results of Endangered Species Assessments: “Effect Determinations”

The result of EPA’s assessment of a pesticide use’s potential effects to listed species is an effects determination. This determination will generally be included in the ecological risk assessment conducted to support a decision regarding the registration status of the pesticide (see Unit III.B.). EPA will make one of three determinations regarding the potential of a pesticide to have an effect on listed species: (1) The pesticide will have “no effect” on the species, (2) the pesticide “may affect but is not likely to adversely affect” the species, or (3) the pesticide is “likely to adversely affect” the species. The processes by which these determinations are made are described in the Agency’s Overview Document (Ref. 1). Each determination may relate to a specific use of a particular pesticide and a particular listed species. Based on these determinations and any required consultation under section 7(a)(2) of the ESA, some pesticides will likely require changes to their use instructions in particular geographic areas to ensure protection of listed species.

Decisions that change the use instructions on a pesticide and subsequent implementation of those changes can occur in several ways. If EPA’s listed species assessment results in a determination that the pesticide “may affect but is not likely to adversely affect” or that it is “likely to adversely affect” a listed species, EPA will address its consultation obligations as described in the Services consultation regulations at 50 CFR part 402, unless the applicant or registrant adopts changes to product labeling that allow EPA to make a “no effect” determination for the pesticide. If EPA makes a “not likely to adversely affect” determination for the pesticide under the procedures of the Counterpart Regulations at 50 CFR part 402, subpart D, no further consultation or written concurrence from the Services is required. EPA may, however, choose to utilize the informal consultation procedures of the Services regulations applicable to all federal agencies by seeking the written concurrence of the Services on this finding. The result of formal consultation following a “likely to adversely affect” determination will be a Biological Opinion issued to EPA by the Services. This Opinion will contain the Services’ determination of whether the pesticide’s use could jeopardize the continued existence of the species. If the Services believe that the action will likely jeopardize listed species or destroy or adversely modify



designated critical habitat, then the Services will include changes to the pesticide registration in the Biological Opinion that EPA may consider adopting to avoid jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat (called reasonable and prudent alternatives). If the Services determine that jeopardy to the species will not result from use of the pesticide and authorizes incidental take of the species, the Biological Opinion will contain measures that must be followed in order for any take of the species to be authorized by the ESA (reasonable and prudent measures). These alternatives and measures may form the basis for specific changes to the use instructions for a particular pesticide in a particular geographic location.

Finally, EPA may identify a potential risk to a listed species and request public input to suggest ways in which the pesticide use instructions could be modified to reduce the potential risk. This public input could form the basis for EPA exploring a variety of potential changes to the pesticide's use in order to ensure it is in compliance with the ESA.

By their very nature, the geographic range of each listed species and the area required to support each species is usually quite limited; therefore, changes to use instructions to protect listed species will also, where appropriate, be geographically limited even for a particular use of the pesticide. For example, in order to ensure protection of a listed species, EPA may determine that use of a pesticide for a particular crop need be changed only in a small geographic area within a county, rather than for the crop nationwide.

When changes to a pesticide's use are necessary to protect a listed species, and those changes are geographically specific, EPA intends to implement those changes through Endangered Species Protection Bulletins (Bulletins). The Bulletins will be at a county scale, with specific geographic areas indicated within the county where use limitations exist. In these cases, the Bulletin will be referenced on the pesticide label by a generic statement that tells the pesticide user that the product may harm some endangered or threatened species or their critical habitat; that the user must follow the use limitations in the Bulletin for the county in which they intend to apply the pesticide; and how they may access the Bulletin for their county and pesticide use.

#### *D. Endangered Species Protection Bulletins and County Bulletins*

1. *Endangered Species Protection Bulletins (Bulletins)*. If as a result of EPA's review of a pesticide, or as a result of consultation with the Services, geographically specific use limitations are necessary to ensure a pesticide registration complies with the ESA and FIFRA, those use limitations will be relayed to pesticide users through Bulletins referenced on the labels of affected pesticide products. Bulletins will become enforceable use requirements once referenced on the pesticide label.

Endangered Species Protection Bulletins will:

- Identify the species of concern.
- Name the active ingredient(s) for which use limitations apply.
- Describe the use limitation necessary for protection of the species. Where species or habitat descriptions are helpful or necessary to identify use limitations, EPA will also include this information.
- Contain a county map on which is shown the specific geographic area in which the use limitations apply, depending on the sensitivity of the species to other factors such as collection. Typically, maps will show a patterned or shaded area indicating where pesticide use must be modified to protect the listed species and to ensure the pesticide user is not violating the misuse provisions of FIFRA. Within patterned or shaded areas on the maps, the specific use limitations will be identified for the pesticide and the species being protected.
- Where possible without causing further threat to a species, provide a picture and description of the species.

2. *Voluntary County Bulletins*. There are a number of county bulletins that EPA has developed in the past based on consultations with the Services. These county bulletins have been posted on EPA's web site for voluntary use by pesticide applicators but are not required to be followed to comply with the pesticide use requirements. EPA is pursuing whether a method exists, short of a full re-evaluation of each pesticide's use included in existing county bulletins, to validate the information contained in these voluntary county bulletins. If that proves to be possible, EPA intends to pursue public comment on the process before finalizing the method. EPA then intends to incorporate the validated information into new Endangered Species Protection Bulletins, as resources permit. EPA would then request that applicants and registrants reference these Bulletins on

their affected product labels using the label statement identified in Unit III.E.

3. *Access to Endangered Species Protection Bulletins*. Endangered Species Protection Bulletins will be available for printing on the web at <http://www.epa.gov/espp>. EPA is developing a web-based Bulletin-retrieval system that will enable pesticide users to enter basic information such as their state, county, and month of anticipated pesticide use. The system will then display the appropriate Bulletin for printing. The printed Bulletin will display the month for which it is valid. These Endangered Species Protection Bulletins will be available on a distinct web site that will be referenced on the pesticide label to avoid possible confusion with the existing, voluntary county bulletins that will remain available for public reference but do not contain enforceable use limitations.

Bulletins will generally be available 6 months in advance of their effective date. Pesticide users should therefore check for availability of a relevant Bulletin no more than 6 months before applying a pesticide to ensure they are using the current Bulletin for the county.

Those without access to the Internet may call EPA at 1-800-447-3813 to determine applicability and availability of Endangered Species Protection Bulletins. If a Bulletin does apply, it will be printed and mailed upon request.

#### *E. Pesticide Label Language*

When geographically specific use limitations are necessary to ensure legal use of a pesticide product will not result in jeopardy to the species, EPA will generally seek to ensure that registrants include the following statement on the product label at the beginning of the product's Directions for Use:

##### **ENDANGERED SPECIES PROTECTION REQUIREMENTS**

This product may have effects on federally listed threatened or endangered species or their critical habitat in some locations. When using this product, you must follow the measures contained in the Endangered Species Protection Bulletin for the county or parish in which you are applying the pesticide. To determine whether your county or parish has a Bulletin, and to obtain that Bulletin, consult <http://www.epa.gov/espp/>, or call 1-800-447-3813 no more than 6 months before using this product. Applicators must use Bulletins that are in effect in the month in which the pesticide will be applied. New Bulletins will generally be available from the above sources 6 months prior to their effective dates.

Absent the appropriate label statement, EPA believes a pesticide

generally will not meet the FIFRA risk/benefit standard. EPA may, therefore, initiate cancellation or denial proceedings under FIFRA against any product for which EPA has determined this label statement is necessary and for which the applicant or registrant refuses to adopt such restrictions.

Note that a more specific web-site address will be included in this language once a permanent web address is secured for enforceable Endangered Species Protection Bulletins.

#### F. Enforcement

Pesticide users who fail to follow label provisions applicable to their pesticide application, whether that failure results in harm to a listed species or not, would be subject to enforcement under the misuse provisions of FIFRA (section 12(a)(2)(G)). Products that do not bear appropriate endangered species labeling may be subject to enforcement under the misbranding provisions of FIFRA (section 12(a)(1)(E)). Absent an incidental take statement issued by the Services that authorizes take that may occur from the use of a pesticide consistent with its labeling, users maintain liability under section 9 of the ESA for any take that occurs as a result of pesticide application, regardless of whether label provisions were followed. While enforcement actions under FIFRA are brought by EPA and the States, enforcement of the ESA is the responsibility of the Services.

#### G. Public Participation

1. *General.* EPA has encouraged the involvement of federal agencies, States, Tribes and members of the public throughout the development of the ESPP and will continue to provide opportunities for public participation. EPA intends the ESPP to be as flexible as possible and to modify it as necessary to achieve the goals of protecting listed species and minimizing the impact on pesticide users. The ongoing program will meld its components of public participation with existing practices in the registration, reregistration, and registration review processes. The processes for public participation during registration and registration review are under development. Reregistration generally is a four- or six-phase process and generally provides one or two formal opportunities for public input.

There are three major phases of a listed species assessment that may provide opportunity for public input: Prior to a "may affect determination" by EPA; identifying potential mitigation; and prior to issuance of a Biological Opinion to EPA by the Services. EPA

will generally engage the public in each of these phases as outlined below. When any of these phases corresponds with a public participation phase under EPA's ongoing review processes (e.g., reregistration), that ongoing public process generally will be used.

##### *In general--*

- *Prior to a "may affect determination."* During the risk assessment process, anyone may provide additional or new information for the Agency to consider. Of particular use would be information on local use practices and use site locations.

- *Potential mitigation.* Provide suggestions on use practice changes, how certain changes may impact the pesticide user community, and input on risk mitigation scenarios.

- *Draft Biological Opinion.* If EPA must formally consult with the Services, after the Services issue a draft Biological Opinion, EPA will welcome input from State, Tribal and local governments on draft reasonable and prudent measures and alternatives. The purpose of this review would be to determine whether the alternatives or measures can be reasonably implemented and whether there are different measures that may provide adequate protection but result in less impact to pesticide users. The Agency will consider this input in developing its response to draft Biological Opinions.

2. *Role of the States and Tribes.* States and Tribes will continue to be integral to the success of the ESPP. Local, State and Tribal circumstances may influence the effectiveness of different approaches to listed species protection; therefore, local, State and Tribal governments may be afforded specific opportunities for Bulletin review. Also, at their discretion, States and Tribes may initiate alternative approaches for protecting listed species (Unit III.H.) that EPA could adopt as the EPA approach in that jurisdiction. States and Tribes may also assist in determining the effectiveness of the ESPP via enforcement and inspection activity.

Opportunities for State and Tribal review of Bulletins may include:

- *Review of maps.* States and Tribes generally may be requested to provide input to the Agency on maps that will be incorporated into Endangered Species Protection Bulletins, to accomplish several things. First, accuracy of the maps is key to success of relaying information to pesticide users. Therefore, States and Tribes will be requested to provide feedback on draft maps relative to whether they accurately depict landmarks, rivers, roads, etc. Further, State and Tribal input on how best to characterize use

limitation areas on the maps will be sought. For example, some States believe that their pesticide users would be best served by designating limitation areas based on township-range-section mapping, while other States believe their pesticide users would prefer designations based on natural and man-made landmarks such as rivers, roads, and railways.

- *Review of use limitations to protect species.* States and Tribes also will be requested to provide input to the Agency on any potential use limitations for species protection. The purpose of this review would be for the Agency to ascertain, based on local conditions, whether specific use limitations could be implemented. States and Tribes will also be sources of input on the technological and economic feasibility of implementing any proposed use limitations.

3. *Role of pesticide registrants.* As with any potential change to a pesticide product label, the registrant of a product for which it has been determined the generic endangered species statement needs to be included, will have an opportunity to review the specific use limitations that may be included in the Bulletins, prior to Bulletin issuance. If once a product is labeled with the generic statement, changes in the Bulletin which would affect that product's use are necessary, the registrant will have an opportunity to review the changes prior to issuance. Further, the registrants retain any rights they may have under FIFRA, regarding EPA's determination that use of the product needs to be modified.

EPA will publish specific details of this public participation process on its web site, <http://www.epa.gov/espp>, as they are developed and refined.

#### H. State- and Tribal-initiated Plans

States and Tribes may develop and propose plans for their specific involvement in protecting listed species beyond the involvement outlined in this Notice. For example, such a plan could include varying provisions for how use limitations are articulated in a Bulletin; actual development of maps for inclusion in Bulletins; provisions for specific information a State or Tribe may provide to EPA to consider during its risk assessment process (for example, specific information regarding geographic location of certain crop types); or could recommend specific approaches that EPA could use to protect listed species in a specific area, such as State-administered land owner agreements.

If such plans are submitted by a State or Tribe, EPA will review the plan to

ensure the provisions of the plan can be implemented by EPA through the labeling and Bulletin approach discussed in this Notice. EPA will also determine whether the Services need to be consulted on the contents of the plan before EPA adopts the plan. After the necessary reviews EPA will approve or disapprove the plan. If approved, EPA would then adopt it and could require, through Bulletins, that users comply with the requirements of the plan, as appropriate.

An alternative plan may be submitted to EPA at any time. However, once the federally initiated actions are implemented within an area, those requirements will be effective in that area until the alternative plan is approved for implementation and EPA implements the plan through changes to the appropriate Bulletins. Section 24(a) of FIFRA reserves to States the authority to impose different requirements on registered pesticides provided they do not permit any sale or use prohibited by FIFRA. Accordingly, this Notice is not intended to modify any State authority to impose additional State requirements regarding listed species.

#### I. Monitoring

EPA is committed to improved use of existing monitoring data in our risk assessments. Federal and State budget outlooks make it important that data being collected through appropriate sources be used to the fullest extent possible to maximize efficiencies and minimize costs. EPA will continue to use, in the most effective manner possible, the information being obtained by the U.S. Geological Survey to detect pesticides in surface water and ground water, information provided to EPA's Office of Water under the Clean Water and Safe Drinking Water Acts, and State- or Tribal-level ground water or surface water monitoring resulting from State or Tribal pesticide program efforts where those results are known to OPP. EPA will also use the technical data identified during ESA section 7 consultations with the Services to assist in determining if pesticide residues are occurring at levels of concern in the environment. Where appropriate terrestrial monitoring is known to EPA, that too will be used in the most effective manner possible, to inform EPA's assessments.

EPA will continue and improve upon its cooperation with the Services, States, Tribes, and others to use reported incidents in which pesticides may have had an impact on listed species and critical habitat. EPA has been working with FWS field offices throughout the country, as well as other federal and

State agencies, to ensure that EPA has the best possible information on incidents. EPA's Environmental Fate and Effects Division maintains an Ecological Incidents Information System to house and retrieve this information. EPA also gathers incident information from registrant reports that are required to be submitted under FIFRA section 6(a)(2).

EPA also intends to develop a process for monitoring the effectiveness of Bulletins after the Program has been in effect for some time. At that time, the Agency will solicit public comment on ways to determine whether Bulletins are effective at protecting listed species and critical habitat.

#### J. Implementation Timing

Endangered Species Protection Bulletins will be effective and enforceable upon reference to them on a product label. EPA will be establishing a web site prior to enforceable label references appearing on products in the market place, that will allow pesticide users to determine the appropriate Bulletin to follow, if any, as described in Unit III.D.

#### IV. References

All references are available for public review in the public docket as described in Unit I.B. The references used in this document are:

1. U.S. Environmental Protection Agency. January 23, 2004. Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs, U.S. Environmental Protection Agency-Endangered and Threatened Species Effects Determinations (<http://epa.gov/espp/consultation/ecorisk-overview.pdf>).

2. U.S. Environmental Protection Agency. 2002. Process for Assessing Potential Risks to Endangered and Threatened Species and Consultation with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service.

3. U.S. Department of the Interior, Fish and Wildlife Service; and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. August 5, 2004. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations; Final Rule. 69 FR 47732, codified at 45 CFR part 402.

4. U.S. Environmental Protection Agency; U.S. Department of the Interior, Fish and Wildlife Service; and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. August 2004.

Alternative Consultation Agreement for Implementation of Optional Alternative Consultation Procedures (ACA) (<http://www.epa.gov/espp/consultation/final-aca.pdf>).

5. U.S. Fish and Wildlife Service and National Marine Fisheries Service. March 1998. Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (<http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>).

6. Letter of January 26, 2004 from Steve Williams, U.S. Fish and Wildlife Service and William Hogarth, National Marine Fisheries Service to Susan B. Hazen, U.S. Environmental Protection Agency (<http://www.fws.gov/endangered/consultations/pesticides/evaluation/pdf>).

#### List of Subjects

Environmental protection, Pesticides, Endangered species.

Dated: October 25, 2005.

**Susan B. Hazen,**

*Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. 05-21838 Filed 11-1-05; 8:45 am]

BILLING CODE 6560-50-S

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7992-9]

### Safe Drinking Water Act Determination; Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Program Permitting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of prospective determination.

**SUMMARY:** EPA must determine whether any of the approximately 160 acres of land located in the southeast portion of Section 8, Township 16N, Range 16W, in the State of New Mexico, is part of a dependent Indian community under 18 U.S.C. 1151(b) and, thus, considered to be "Indian country." This determination is necessary in order to establish whether EPA or the New Mexico Environment Department is the appropriate agency to issue a particular underground injection control permit under the Safe Drinking Water Act. EPA is seeking comments and information from the public and all interested parties regarding the possible Indian country status of this land and is