



# PPC

**PESTICIDE POLICY COALITION**  
A Coalition Working for Sound Pest Management Policies

[www.pesticidepolicy.org](http://www.pesticidepolicy.org)

September 28, 2010

Office of Pesticide Programs  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

**Re: Petition for Rulemaking to Establish Procedures for the Creation and Amendment of Endangered Species Protection Bulletins; Notice of Availability, 75 FR 44246 (July 28, 2010) [Docket No. EPA-HQ-OPP-2010-0474]**

The Pesticide Policy Coalition (“PPC”) submits the following comments in support of the petition for rulemaking to establish procedures for creating and amending the Endangered Species Protection Bulletins that EPA intends to require on pesticide product labels as part of its Endangered Species Protection Program (“ESPP”).

PPC is a coalition of food, agriculture, pest management, and related organizations that support transparent, fair, and science-based regulation of pest management. PPC members include nationwide and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers, formulators and distributors; pest- and vector-control operators; research organizations; and other interested parties. PPC serves as a forum for the review, discussion, development, and advocacy of pest management policies and issues important to its members.

The PPC recognizes that section (7)(a)(2) the Endangered Species Act (“ESA”) imposes a duty on federal agencies, including the Environmental Protection Agency (“EPA”), to ensure that actions carried out by agencies are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species...” 16 USC Section 1536(a)(2). This duty applies to the registration of pesticide products by EPA. The PPC also understands that this may, in some circumstances, result in additional restrictions on pesticide use by growers, pesticide applicators, and other end users in limited geographical areas.

In 1988, EPA proposed the Endangered Species Protection Program (“ESPP”) as a mechanism for implementing its obligations under the ESA. 53 FR 7716 (Mar. 9, 1988). Initially, this was a voluntary program that provided for pesticide label statements referring users in specified counties of concern to county bulletins detailing pesticide use limitations designed to protect listed species based on maps of species and habitat location provided by the Fish and Wildlife Service.

Congress expressed immediate concern about the impact of the Agency’s proposal on agricultural lands, inaccuracies in the maps, inadequate public review and comment opportunities, and the need for additional education and training programs. As a result, Congress enacted Section 1010 of the Endangered Species Act amendments of 1988. Pub. L. No. 100-478, 102 Stat. 2306, Section 1010 (1988). The intent of Section 1010 was to ensure that EPA put measures in place under the ESPP to “minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators.”

The petition before the Agency to promulgate procedures for creating and amending the Endangered Species Protection Bulletins under ESPP is consistent with the intent and scope of this legislative directive, and is therefore supported by the PPC.

The PPC urges EPA to act immediately on the recommendations of this petition. Although implementation of Endangered Species Protection Bulletins has the potential to dramatically impact agricultural practices for use of pesticides across millions of acres of farm and forest land, EPA has developed the first sets of draft bulletins related to Pacific salmon in a haphazard fashion, without a transparent and well-defined process for collecting and fairly evaluating comments of affected agricultural producers, pesticide applicators, and other end users. The PPC is specifically concerned with the following aspects of recently proposed bulletins:

- Maps that are misleading or inaccurate;
- Requirements that growers access information via specialized software (which they may not have);
- Requirements that growers have Internet access (which may not be available to them);
- Lack of clarity in the bulletins regarding specific waters or habitat affected by the restrictions;
- Inadequate time for stakeholders, such as growers, to review and comment on the bulletins;
- Random EPA outreach to affected growers, resulting in communications with some while others are omitted; and
- A “one size fits all” approach to restrictions that does not make sense for all pesticide-crop combinations.

While the PPC supports the recommendations contained within this petition, the Coalition does not believe the petition goes far enough, as it only address stakeholder

input *at the end of the process*. Congress had a bigger vision when it enacted Section 1010, which directs EPA to:

provide the public with notice of, and opportunity for comment on, the elements of any such program and requirements based on compliance with the Endangered Species Act, including (but not limited to) [1] an identification of any pesticides affected by the program; [2] an explanation of the restrictions or prohibition on the user or applicator of any such pesticide; [3] an identification of those geographic areas affected by any pesticide restriction or prohibition; [4] an identification of the effects of any restricted or prohibited pesticide on endangered or threatened species; and [5] an identification of the endangered or threatened species along with a general description of the geographic areas in which such species are located wherein the application of a pesticide will be restricted, prohibited, or its use otherwise limited, unless the Secretary of the Interior determines that the disclosure of such information may create a substantial risk of harm to such species or its habitat.

Endangered Species Act Amendments of 1988, Section 1010(a).

Indeed, when EPA announced changes to the ESPP in 2005, it acknowledged that Section 1010 “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” and made a commitment that it would provide opportunity for public input during three phases of an assessment, “[p]rior to a ‘may affect determination’ by EPA; identifying potential mitigation; and prior to issuance of a Biological Opinion to EPA by the Services.” 70 FR 66392, 66401 (Nov. 2, 2005).

Despite a 22-year-old legislative directive and a commitment by EPA in 2005 to include agricultural producers, pesticide applicators, and other end users in the effects determination and consultation processes, EPA has yet to establish procedures to do so.

On September 16, 2010, Growers for ESA Transparency (“GET”), a coalition of growers throughout the western United States, filed a petition with EPA to promulgate procedures for notice and comment on the Agency’s pesticide effects determinations for endangered species and potential pesticide restrictions, consistent with the broader requirements of Section 1010. In its petition, GET requests that EPA:

- Confirm that EPA will invoke the Section 1010 procedures, when (1) EPA completes a biological assessment or (2) during informal and formal consultation with a Service that may result in an EPA determination to amend labeling of an existing product to address ESA concerns, or to impose ESA labeling requirements on a new product to address ESA concerns.

- Establish provisions granting to agricultural producers, pesticide applicators, and other end users the following rights with regard to an initial determination that informal or formal ESA consultation is appropriate:
  - Timely public notification of an EPA determination that a pesticide may affect a listed species or its critical habitat. The regulation should set forth the minimum content of such a notice, including
    - the identification of any pesticide affected by the determination;
    - a detailed explanation of the basis of the effects determination, including a clear delineation of assumptions on which the determination is based;
    - a description of the specific geographic area related to the effects determination; and
    - identification of the endangered or threatened species along with a general description of the geographic areas in which such species are located and the application of a pesticide will be restricted, prohibited, or its use otherwise limited, unless the Secretary of the Interior determines that the disclosure of such information may create a substantial risk of harm to such species or its habitat.
  - Not less than ninety days for agricultural producers, pesticide applicators, and other end users to submit comments.
  - A commitment by EPA to evaluate and summarize all comments prior to formally or informally requesting ESA consultation from FWS or NMFS, and to share all comments with FWS or NMFS.
  
- Establish provisions granting to agricultural producers, pesticide applicators, and other end users the following rights with regard to a draft Biological Opinion, prior to EPA's final action:
  - Timely public notification of the contents of the draft Biological Opinion. The regulation should set forth the minimum content of such a notice, including but not limited to:
    - identification of any affected pesticide;
    - identification of the effects of any restricted or prohibited pesticide on endangered or threatened species, including a clear delineation of assumptions on which the determination is based;
    - explanation of the restrictions or prohibition on the user or applicator of any such pesticide;
    - identification of those geographic areas affected by any pesticide restriction or prohibition;
    - assessment of the impact of proposed restrictions on the production of agricultural foods and fiber commodities; and
    - identification of the endangered or threatened species along with a general description of the geographic areas in which such species are located, and the application of a pesticide will be restricted, prohibited, or its use otherwise limited, unless the Secretary of the Interior determines that the disclosure of such information may create a substantial risk of harm to such species or its habitat.

- Not less than ninety days for agricultural producers, pesticide applicators, and other end users to submit comments.
- A commitment by EPA to evaluate and summarize all comments prior to taking final action on any proposed RPAs and/or RPMs.
- Establish provisions granting to agricultural producers, pesticide applicators, and other end users the following rights regarding implementation procedures related to EPA's proposed final action:
  - Timely public notification of EPA's final action;
  - EPA's assessment of the impact of final restrictions on the production of agricultural foods and fiber commodities; and
  - Not less than ninety days for agricultural producers, pesticide applicators, and other end users to submit comments on EPA's implementation procedures.

The PPC supports the aforementioned petitions and urges EPA to (1) immediately publish the GET petition for public comment, and (2) promulgate procedures that adopt the recommendations of both petitions.

The PPC appreciates the opportunity to submit these comments, and welcomes detailed discussion of them in more detail with EPA.

Sincerely,



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