FIFRA and the Endangered Species Act:
Finding a Balance Between Agricultural Efficiency, Environmental Sustainability, and Regulatory Stability
CAST Quick Facts

- 501(c)3 membership-supported nonprofit
- Formed in 1972 as a result of 1970 National Academy of Sciences Report
- Nonpartisan and apolitical
- Membership includes 27 scientific societies; 20 universities; 19 libraries; 45 nonprofits; 21 companies; and over 500 individuals from 46 states and 7 countries
- Celebrated its 50th anniversary in 2022
Mission

CAST convenes and coordinates networks of experts to assemble, interpret, and communicate credible, unbiased, science-based information to policymakers, the media, the private sector, and the public.

Vision

A world where decision making related to agriculture, food, and natural resources is based on credible information developed through reason, science, and consensus building.
How CAST Accomplishes Its Mission

With the help of many volunteer contributors:

• 65 Board Members representing scientific societies, companies, nonprofits, and universities
• Nearly 200 active task force members working on CAST reports yet to be released
• Volunteer scientific experts as authors and reviewers—more than 1800 volunteers since 2008
CAST WEBINAR SERIES ON
FIFRA AND ESA
FIFRA and the Endangered Species Act: Finding a Balance Between Agricultural Efficiency, Environmental Sustainability, and Regulatory Stability

Task Force Chairs | Authors

Bernalyn McGaughey
Compliance Services, Inc. | Lakewood, WA

Dr. Stanley Culpepper
University of Georgia | Athens, GA

Reviewer

Dr. Cameron Douglass
USDA | Washington, D.C.

Dr. Andrew Goetz
BASF | Cary, NC

CAST Liaison

Dr. Tony Burd
Syngenta | Greensboro, NC
Milestones in the FIFRA/ESA Timeline: **1972 to 1992**

- **Environmental Protection Agency established** December 2, 1970
  - The cancellation proceedings associated with DDT ushered in a focus on pesticide environmental and wildlife impacts and how to predict and evaluate them
- **Endangered Species Act enacted on** December 28, 1973
- **First known EPA consultation request, on all uses of toxaphene** October 17, 1977
- **US FWS final opinion on toxaphene** July 11, 1978
  - Only 7 years after EPA was established and 4 years after the enactment of ESA, OPP made their first consultation request, before the TVA decision mandated consultation as we know it today. FWS issued a responsive Biological Opinion 9 months later.
- **Hundreds of pesticide BiOps issued or reissued** 1977 through 1989
  - For the 10-to-12-year period when consultation was being attempted, outcome was still considered too slow, differential to new products versus old, and difficult or impossible to implement. Approaches to listed species risk assessment (and listed species per MOU) were solidified but consultation approaches changed, and several consultations were reinitiated, but the backlog grew, and the program faltered with enough concern that Congress stepped in to enact Section 1010 of the ESA amendments of 1988. The overriding themes of Section 1010 are the need to educate agricultural producers on and include them in the development of ESA use restrictions on pesticides, and to minimize the restrictions' impacts on producers.
- **OPP Section 1010 Report to Congress, May 1991**
  - OPP reported on their efforts planned to identify reasonable and prudent means to implement an endangered species protection program as it relates to pesticide regulatory activities. The goal was implementation of the outcome of consultation, because implementation is what ground the process to a halt in the 80's.
**Events that Shifted FIFRA/ESA Policy**

- *Environmental Protection Agency established on December 2, 1970*
- *After a series of DDT use cancellations beginning in 1958, all remaining uses were cancelled on June 14, 1972*
- *Endangered Species Act enacted on December 28, 1973*
- *Tennessee Valley Authority v. Hill decision, establishing ESA primacy, June 15, 1978*
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**Milestones in the FIFRA/ESA Timeline: 1972 to 1992**

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Consultation changed from a.i. basis to “cluster” (crop groups), 1982.


“Cluster” approach re-initiated


Section 1010, ESA amendments.


1988-89


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Milestones in the FIFRA/ESA Timeline: 1972 to 1992

Environmental Protection Agency established December 2, 1970

The cancellation proceedings associated with DDT ushered in a focus on pesticide environmental and wildlife impacts and how to predict and evaluate them.


Section 1010 required agency reports to Congress and in 1991, OPP reported to Congress on their efforts and planned to identify reasonable and prudent means for an endangered species protection program as it relates to pesticide use. The goal was implementation of the outcome of consultation, because implementation is what ground the process to a halt in the 80’s.

OSPP Section 1010 Report to Congress, May 1991

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1994 Wyoming Toad Protection Program  ~July 1994
First evidence of implementation of field program as a result of FIFRA/ESA consultation finding jeopardy for 43 active ingredients.

EPA OPP “ECOFRAM” Established 1996

ECOFRAM was formed to bring consensus to aquatic and ecological risk assessment approaches and use of refined risk methodologies in the concept and implementation of the “New Paradigm.”

Guidelines for Ecological Risk Assessment  April 1998

ECOFRAM Aquatic and Terrestrial Draft Reports  May 1999


Proposed Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, January 30, 2004

Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs, January 23, 2004

Step-Wise Approach to Assessing Potential Effects of Pesticides on Listed Species and Critical Habitat, March 3, 2005

Counterpart regulations signed and ESPP reinstall (2005)

• Do things faster! The New Paradigm (1992)
• Show progress: Wyoming Toad Protection Program (1994)
• Formalize method: Joint Counterpart Regulations (2004)

Events that Shifted FIFRA/ESA Policy

LITIGATION

REGROUP!!!

LITIGATION
Events that Shifted FIFRA/ESA Policy

Milestones in the FIFRA/ESA Timeline: 2006 to 2023

Counterpart regulations litigated and vacated (2006)

Salmon BiOps finalized (and litigated) (2006+)

Attempt to solve controversy by science – NAS Report (2013)

We entered 2023 with the Updated Method – and a Historical Pattern

Over the long history of FIFRA/ESA consultation, the stall point has always been the same: implementation. And that is where we are now. We are now faced with finding a way out of the loop or regrouping to a new policy approach repeating the cycle.
As the Timeline Moves on . . .

• What implications does the “Mega Suit” settlement have?
  • Most of you probably know the mega-suit covered multiple pesticides in a “failure to consult” ESA case
  • Letting the courts decide outcome was unpredictable
  • Settlement at “some cost” was not ideal, but likely the best option

• The Stipulated Agreement was finalized on September 12, 2023
  • Because the settlement process is highly confidential, the details of the settlement seemed a surprise when the agreement was announced in July – but the consequence is that those details are tied to commitments already made or contemplated by EPA (the last part of the timeline we just reviewed)
As the Timeline Moves on . . .

• Commitments made in the settlement are
  • Organophosphate Consultations – two alternatives
    • Track 1 – Organophosphates completed as one group (8 products) with a final EPA BE due 9/30/27 (drafts due 3/31/27, with a 60-day comment period)
    • Track 2 – Organophosphates completed as two groups, with Group 1 (4 BEs) due on 9/30/26 (drafts due 3/31/26, with a 60-day comment period) and Group 2 per Track 1 schedule
  • Rodenticide Consultations (11 products, draft BEs already issued)
    • Some confusing language here but final BEs are due 11/12/24
    • Allowance for comment extensions
  • Development of mitigation strategies for certain pesticide groups and the expansion of the VSPP
In Summary - Mitigation Strategies are

• Herbicide Strategy
• Insecticide Strategy
• Rodenticide Strategy
• Fungicide Strategy
• And, separately, and expansion of the VSPP
The Mood of the Courts, Agencies and Industry . . .
EPA’s Commitment to Other Strategies in the Settlement Agreement

• Herbicide Strategy – Final by March 30, 2024?
  • “No later than May 30, 2024, EPA shall issue a final Herbicide Strategy based on an analysis of representative active ingredients including, at a minimum” 12 herbicides in the claim: 2,4-D and its salts and esters, Dicamba and its salts, Diuron, MCPA and its salts and esters, Metolachlor and its isomer S-metolachlor, Metribuzin, Oxyfluorfen, Paraquat Dichloride, Pendimethalin, Propanil, Thiobencarb, and Trifluralin
  • “No later than 60 days before May 30, 2024, EPA shall provide a status report to the Court and other Parties on its progress toward completing the final Herbicide Strategy by May 30, 2024 and whether it expects to meet that commitment.”
  • Once EPA issues the final Herbicide Strategy, EPA shall consider incorporating and expects to incorporate the mitigation measures identified in the Herbicide Strategy into PIDs issued under EPA’s registration review program.
  • Where EPA finds that groups of herbicides should receive the same mitigation measures, EPA plans to issue group PIDs, instead of chemical-specific ones, where appropriate.
EPA’s Commitment to Other Strategies in the Settlement Agreement

• Rodenticide Strategy
  • “In November 2023, EPA expects to issue the draft Rodenticide Biological Evaluation”
  • “EPA plans to complete Rodenticide Biological Evaluation by no later than November 12, 2024 and will initiate consultation as necessary”
  • “Another goal of the strategy is to develop a suite of mitigation measures that will reduce the likelihood of jeopardy to species potentially affected by rodenticides and of adverse modification to designated critical habitat potentially affected by rodenticides, as well as to minimize take for approximately 90 ESA-listed species”
EPA’s Commitment to Other Strategies in the Settlement Agreement

- Insecticides Strategy
  - “EPA will complete Biological Evaluations for . . . Eight Organophosphates ("Organophosphates Biological Evaluations") no later than September 30, 2027”
  - “EPA may identify mitigation measures that are developed through its Insecticide Strategy that could be relevant to the Organophosphate Biological Evaluations, and include those measures in the Biological Evaluations, as appropriate
  - “EPA will use its best efforts to issue a final Insecticide Strategy by January 17, 2025, and in no event shall issue it later than March 31, 2025”
  - “No later than 60 days before January 17, 2025 (i.e. by November 18, 2024), the Parties shall meet and confer to discuss whether EPA expects to issue a final Insecticide Strategy by January 17, 2025”
  - “No later than July 30, 2024, EPA commits to provide the draft Insecticide Strategy for a 60-day public comment period.”
  - “Once EPA issues the final Insecticide Strategy, EPA . . . expects to incorporate the mitigation measures . . . into PIDs issued under EPA’s registration review program.”
  - “EPA may issue group PIDs, instead of chemical-specific ones, where appropriate.”
EPA’s Commitment to Other Strategies in the Settlement Agreement

• Fungicides Strategy
  • “EPA intends to develop a strategy to address vulnerable species that may be affected by fungicides (‘Fungicides Strategy’) including, inter alia, the fungicides at issue”
  • “Before finalizing a Fungicides Strategy, EPA will consider input from stakeholders”
  • “EPA cannot currently commit to a date certain to complete its final Fungicides Strategy”
  • “The Parties agree to meet and confer no later than August 31, 2024 to discuss the development of a Fungicides Strategy and attempt to agree upon a date for completion of EPA’s final Fungicides Strategy.”
Vulnerable Species Pilot Program

• Two separate pilot efforts, the Federal Pilot and the Vulnerable Species Pilot, that have different objectives but overlap in their intention to identify mitigation measures that can be applied to protect ESA-listed species

• EPA expects to provide updates on its progress on the efforts set forth in the Work Plan by updating its websites – “at least quarterly”

• In addition to the 25 species already identified, EPA expects to begin to expand the VSPP to include additional species

• No later than December 30, 2023, after the completion of its public outreach, EPA shall determine whether any mitigation measures identified by the Vulnerable Species Pilot should be revised or whether more should be added

• No later than September 30, 2024, EPA shall determine how it could expand the approach used in the Vulnerable Species Pilot to other selected vulnerable species
Compensatory Mitigation Options Development

• EPA intends to consider the use of compensatory mitigation (also known as offsets) to address the effects of pesticide registrations on ESA-listed species

• Offsets could include, without limitation, measures intended to replace or provide substitute resources or environments for ESA-listed species through the restoration, establishment, enhancement, or preservation of resources or environments

• CLA Intervenors will organize and fund a workshop for interested stakeholders, comparable to the workshop held in August of 2021 to be held within 24 months of the date of the settlement agreement
But “Can it work?”

- The current updated method is far from mature operationally
- “Offspring products” of the method are currently moving targets

– but we won’t get out of the repeating cycle if we don’t try to make it work – rather than just saying why it won’t.
Consider the Views . . .

- Informed by
  A. Registrant research
  B. EPA science review
  C. EPA cost benefit
  D. Docketed public opinion
  
- Additional informed by
  H-J. Federal programs
  K-L. State Programs
  M-N. Conservation actions
  O-Q. Economic drivers
  R-S. Operational constraints
  T-U. Environmental conditions

Our subsequent papers will explore this “land between views” to examine how we might move from the national registration action to the local use action under FIFRA/ESA consultation – in a way that protects endangered species but allows robust agricultural production.

We still need to answer the question:

How do you get from HERE to HERE?
Thank you for your participation!

Questions?
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<td>A Legal Discussion of the FIFRA/ESA Consultation Process Over Time</td>
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<td>Improving the Science Behind the Process: Implementing Better Data and Tools to Streamline the FIFRA/ESA Process</td>
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<td>Developing and Adopting Economically Effective Mitigation Strategies: Critical to the Survival of Agriculture and Endangered Species</td>
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<td>The topic of this webinar is the role of states in the implementation and regulation of FIFRA. Exact content will be announced later.</td>
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Contact Us

Website
www.cast-science.org

Phone Number
515-292-2125

Email Address
cast@cast-science.org

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