



CAST WEBINAR SERIES ON
FIFRA AND ESA

#2

A Legal Discussion of the FIFRA/ESA Consultation Process Over Time

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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





The Science Source for Food,
Agricultural, and Environmental Issues

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.

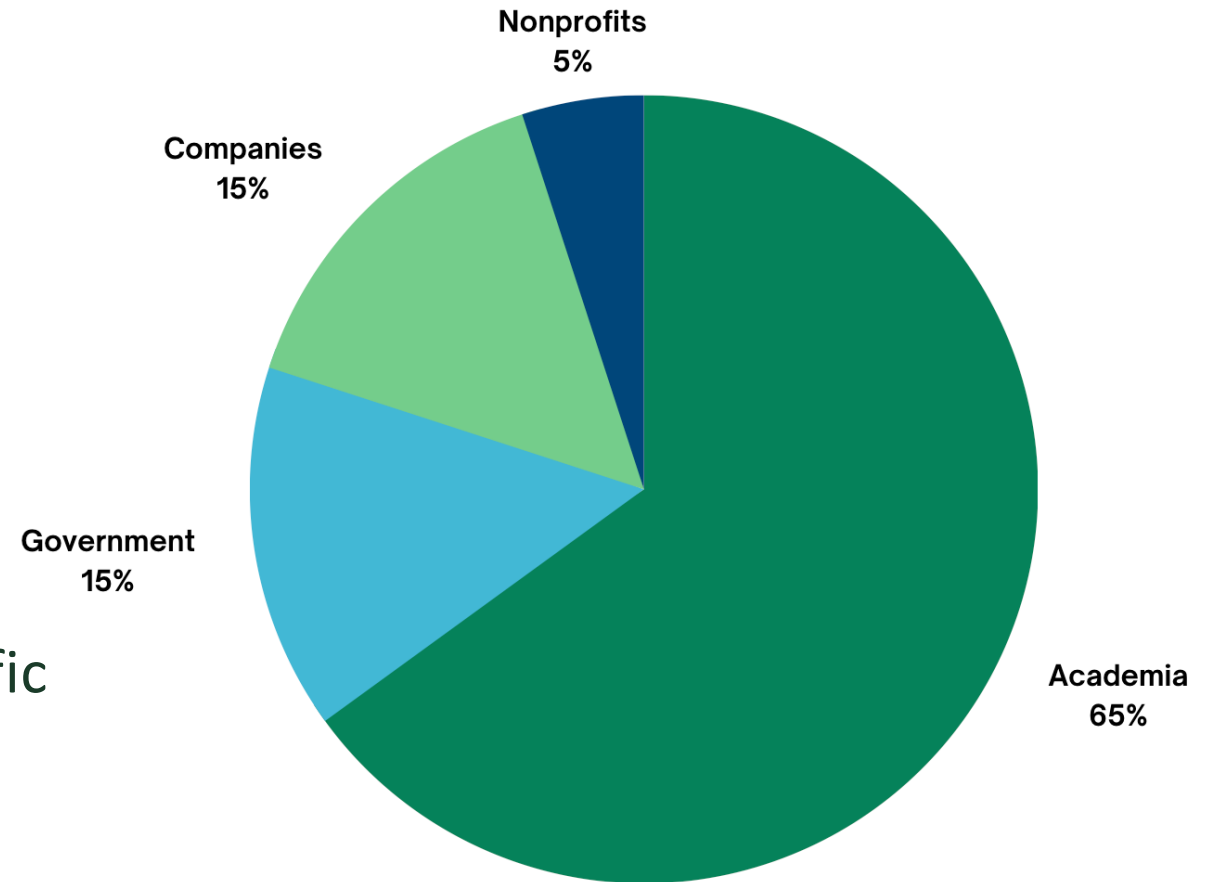
Vision

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



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About the National Agricultural Law Center

Created in 1987, the National Agricultural Law Center serves as the nation's leading source for agricultural and food law research and information

- A standalone unit of the University of Arkansas System Division of Agriculture, within the Agricultural Experiment Station
- In close partnership with the USDA Agricultural Research Service, National Agricultural Library

Objective, non-partisan research and information regarding laws and regulations affecting agriculture

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What's Going On?



- In early 2022, EPA announced that it was developing a new policy to increase its compliance with the ESA when taking actions under FIFRA
- The work plan released later that year outlined a series of “early mitigations” that EPA would develop to reduce pesticide impacts to species listed under the ESA
- If implemented as proposed, this new policy is likely to impact all pesticide users

ESA: The Basics

The ESA was enacted in 1973 for the purpose of conserving threatened and endangered species and the ecosystems on which they depend

The ESA is administered by FWS and NMFS who are responsible for identifying and listing threatened and endangered species, and designating critical habitat

Listed species and designated critical habitat receive ESA protections

Federal agencies are required to consult with FWS and NMFS to ensure that the actions they carry out will not “jeopardize” listed species, or destroy critical habitat

ESA: Section 7 Consultation

- ESA Section 7 requires all federal agencies to ensure that any actions they take will not jeopardize listed species or destroy critical habitat
 - “Action” = any action an agency has “authorized, funded, or carried out”
 - “Jeopardy” = an action that is reasonably expected to “reduce appreciably the likelihood of both the survival and recovery of a listed species”
- Informal consultation is the first step – here, the action agency determines whether its action “may affect” any listed species or critical habitat
 - Low threshold to clear, includes actions that are “not likely to adversely affect” and actions that are “likely to adversely affect”
- If the action agency finds that its action is “likely to adversely affect” listed species or critical habitat, then it should proceed to formal consultation

ESA: Formal Consultation

Formal consultation involves the creation of a Biological Opinion (“BiOp”) issued by the consulting Service. The BiOp will:

- Detail expected impact to listed species and critical habitat
- Identify “reasonable and prudent alternatives” if the proposed action is likely to result in jeopardy
- Provide levels of “incidental take”
- Provide mandatory “reasonable and prudent measures” to minimize impacts of incidental take
- Identify ways the action agency can conserve species or critical habitat
- Provide an administrative record to establish an environmental baseline for future BiOps

Once the BiOp is issued, consultation is complete

- The agency may decide to adopt the BiOp’s recommendations, move forward without them, reinitiate consultation, or take other steps to reduce harm to species

FIFRA: The Basics

- Before a pesticide can be sold or used, EPA must register the product under FIFRA
- To register a pesticide, EPA must determine that the product will not have “unreasonable adverse effects on the environment” when used as intended
 - “Unreasonable adverse effects on the environment” = “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide”
 - This standard is a balancing test, very different from the ESA’s yes/no “may affect” standard
- Registering a pesticide under FIFRA is an “agency action”

FIFRA: Agency Actions



- Other FIFRA agency actions include:
 - Modifying a pesticide label by adding a new use
 - Registering a new pesticide active ingredient
 - Reregistering a pesticide
 - Carrying out registration review
- Each action would require ESA consultation

How Did We Get Here?

For decades, EPA has failed to fully consult over its FIFRA actions

This resulted in a mounting series of lawsuits, typically resulting in outcomes favorable to the plaintiffs

- Currently, EPA expects its court-ordered consultation schedule to take it into 2030 and beyond

To reduce lawsuits and come into full ESA compliance, EPA is launching a new ESA-FIFRA policy

Previous Attempts

- EPA has made previous attempts to come into ESA compliance for its FIFRA actions:
- In 1982, EPA developed the “cluster approach” where it would group together pesticides with the same use pattern and conduct one Section 7 consultation for the whole group
- During the 1980s, EPA also issued the first ESA bulletins that would be incorporated into pesticide labels with language telling users to check if there were any active bulletins in their area
- In 1989, EPA launched the Endangered Species Protection Program that would help the agency come into ESA compliance by identifying species that were “most vulnerable” to pesticide impacts and work with FWS to identify the counties where those species were located and develop geographically-specific restrictions
- In 2005, EPA switched to carrying out Section 7 consultation on an action-by-action approach

Draft Herbicide Strategy

Outlines early mitigations that EPA expects to include on all herbicide labels

Early mitigations fall into two main categories – reducing pesticide spray drift, and reducing pesticide runoff/erosion

Mitigation measures EPA finds are necessary across the entire pesticide use area will be included in the product's general label

Mitigation measures only necessary in specific geographic areas will be posted to EPA's website Bulletins Live! Two

New ESA-FIFRA Policy

- Broadly, EPA’s new ESA-FIFRA Policy focuses on “early mitigations”
 - These are new restrictions that will be added to pesticide labels to reduce impacts to listed species and critical habitat
- The goal of introducing early mitigations is to reduce the number of future consultations that result in findings of “jeopardy” or “adverse modification”
- EPA is developing these early mitigations in two ways:
 - Broadly across different groupings of pesticides (herbicides, insecticides, rodenticides, etc.)
 - Tailored to address species that are considered particularly vulnerable to pesticides

Draft Herbicide Strategy: Mitigations

Spray Drift Mitigations

- Additional buffer requirements in the form of windbreaks, hedgerows, hooded sprayers, and application rate reduction depending on level of risk

Runoff/Erosion Mitigations

- A “mitigation menu” of limitations – applicators choose which methods are right for them to achieve the necessary number of “points”
- Includes: weather-based restrictions; methods of application; in-field management activities to reduce runoff; management adjacent to sprayed fields; activities to increase water retention

Vulnerable Species Pilot Program

Introduces early mitigation measures targeted at “vulnerable species” which EPA has identified as being at the greatest risk of pesticide exposure

These mitigations would apply broadly to conventional pesticide active ingredients and fall into two broad categories – avoidance and minimization

Avoidance mitigation refers to areas where pesticide applications would be prohibited

Minimization mitigations focus on reducing spray drift, and runoff/erosion

Because VSPP mitigations are geographically specific, they will be posted to Bulletins Live! Two

VSPP: Mitigations

Spray Drift Mitigations

- Spray drift buffers
- Prohibition of application methods or droplet sizes

Runoff/Erosion Mitigations

- No applications when soil is saturated
- No applications when rain is in the forecast
- Requirement of land use practices designed to reduce runoff or erosion

VSPP: November 2023 Updates

- In November 2023, EPA released a brief update to the VSPP primarily to address comments received on the draft version of the program and outline next steps
- Primary takeaways from the update include:
 - EPA is planning to improve species maps for species included in the VSPP to better identify geographic areas where VSPP mitigation measures will apply
 - EPA will clarify potential exemptions to the VSPP, revisit how vulnerable species are identified and selected, and develop a consistent approach to the strategies used to reduce pesticide exposure
- EPA plans to provide further updates by fall 2024

Next Steps

A comment period for the draft Herbicide Strategy closed in October and a finalized version is expected next year

EPA plans to issue a draft Insecticide Strategy sometime in 2024

EPA intends to continue developing bulletins for the original 27 species included in the VSPP while expanding the program to include more species

Currently unclear when these mitigation measures will begin appearing on pesticide labels

Final Thoughts

Various practical and legal questions remain:

Does the new ESA-FIFRA policy satisfy EPA's section 7 consultation duties?

Does the policy meet FIFRA's "unreasonable adverse effects" standard?

What happens to conflicting state law?

Are currently available listed species maps sufficient?

Who is liable for policy violations?

Are farmers more vulnerable to ESA lawsuits?

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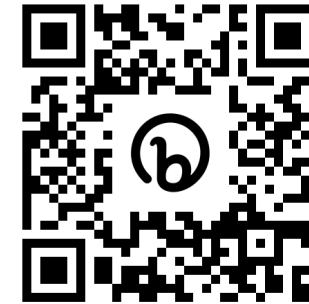
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Thank you for your participation!

Questions?

Upcoming Webinars

January 9

Improving the Science Behind the Process: Implementing Better Data and Tools to Streamline the FIFRA/ESA Process

January 30

Developing and Adopting Economically Effective Mitigation Strategies: Critical to the Survival of Agriculture and Endangered Species

February 20

FIFRA, ESA and Pesticide Consultation: Understanding and Addressing the Complexities

March 12

The topic of this webinar is the role of states in the implementation and regulation of FIFRA. Exact content will be announced later.



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