

previously registered active ingredients, and processed over 500 emergency exemption requests in FY 2002.

Numbers of actions in most of these categories have risen since FY 2000. The combination of the number and variety of pesticide regulatory decisions EPA makes each year, together with the possible use of pesticide products on multiple sites located in different parts of the country, means that the potential number of consultations about the effects of EPA actions could be far greater than result from any other single Federal regulatory program.

The implementation of a number of the changes discussed in Unit III. would require modification of the existing consultation regulations and FIFRA procedures. We are interested in public comment on all potential changes to the current approach to consultation that could be put into effect through rulemaking or without rulemaking, such as through interagency agreements.

III. Request for Comment

This unit of the ANPR invites public comment on a number of ways in which the current regulations, policies, and practices of the Services and EPA regarding ESA consultations about decisions in the pesticide regulatory program could be modified. Unit III.A. focuses on possible approaches to identifying types of actions that would not require case-by-case consultation between EPA and the Services. Unit III.B. asks for comments on possible changes to the existing framework, while retaining the basic approach of requiring consultation whenever EPA determines that use of a pesticide “may affect” protected species. Unit III.C. invites public comment on certain other aspects of the operational relationship between EPA and the Services. The agencies note that the specific approaches described below do not exhaust all of the possible changes that might improve the effectiveness and efficiency of the consultation process. Thus, the agencies invite the public to include comments on other ways to modify the regulations, policies and practices of EPA, FWS, or NMFS to achieve our mutual goals.

Finally, the agencies emphasize that they have made no decisions with respect to pursuing any specific modification discussed below. The agencies will consider public comments about a particular proposed change in light of the following factors, among others: The consistency of the approach with the requirements of ESA and FIFRA; the scientific soundness of the approach; and the impact of the

approach on government resources, pesticide users, and others.

A. *The Scope of EPA’s Consultations on FIFRA Actions Under ESA*

1. *Programmatic consultation.* Under existing Service regulations at 50 CFR part 402, the Services and Federal agencies can engage in consultations that address major national programs. There is potential to use this authority to develop a “programmatic” approach to consultation on the pesticide registration program. In regulating pesticides under FIFRA, EPA does not develop overall pesticide registration and reregistration programs as, for instance, the Forest Service might develop a forest plan; rather, EPA makes decisions about new and existing pesticide uses on a case-by-case basis, subject to the standards of FIFRA described above. While these decisions are made on a case-by-case basis, in many circumstances these individual registration decisions share common elements. For example, EPA receives hundreds of applications per year for so called “me-too” pesticide products that are identical or nearly identical to currently registered pesticides. In addition, some classes of pesticides that are not identical may nonetheless share common exposure or toxicological profiles. Even where pesticides may not share common characteristics, there may be approaches to risk assessment and risk management that are appropriate for identifying and addressing risk concerns to listed species across broad classes of pesticides.

Thus, in circumstances where such commonalities exist, it may be possible for EPA to satisfy some or all of its ESA section 7(a)(2) consultation obligations for individual registration actions by completing what could be described as “programmatic” consultations affecting numerous registration and reregistration actions simultaneously. In addition, even where such programmatic consultations are not sufficient to complete the consultation process for certain individual actions, they may serve to improve the consultation process on such actions through the standardization of risk assessment methodologies and alternatives for species protections.

While the Services’ current section 7 regulations provide authority for agencies to consult on a group of related actions in this fashion, there may be benefits to using counterpart regulations to establish criteria that would delineate the circumstances under which EPA would be expected to consult with the Services and the circumstances where

consultation would not be necessary. Such regulations could identify those practices that EPA would follow to identify and delineate potential adverse effects on listed species and their habitat, as well as the data standards for such evaluations. Such regulations could lead to more efficient use of resources by both the Services and EPA, while at the same time providing the public with an opportunity to participate more fully in the process of protecting listed species.

EPA and the Services welcome comments on this approach and specifically request that commenters consider the following questions in developing their submissions:

- What are the administrative and programmatic advantages and disadvantages of this approach?
- What elements of EPA’s pesticide program are particularly amenable to programmatic consultation?
- To what extent, if any, could or should this approach change the consultation process for specific regulatory actions under FIFRA?
- To what extent would it be appropriate to change any of EPA’s data requirements, risk assessment methods, or criteria for evaluating potential risks to listed species in connection with such a “programmatic” consultation?
- What are the advantages or disadvantages to implementing this approach through rulemaking?
- What are the advantages or disadvantages to implementing this approach under the Services’ existing consultation regulations?
- What would be the appropriate method for addressing issues associated with incidental take under this approach?

2. *Changes to the informal consultation process.* As described in Unit II.D., ESA requires Federal agencies to consult with the Services in meeting their section 7(a)(2) obligations to ensure that agency actions are not likely to jeopardize listed species or destroy or adversely modify any critical habitat of such species. The current consultation regulations at 50 CFR part 402 provide that in circumstances where a Federal agency determines that its actions “may affect” a listed species or critical habitat it must engage in consultation with the Services. In circumstances where an agency concludes that an action will have “no effect” on listed species or critical habitat, no further consultation is required, and the Federal agency, under such circumstances, has satisfied its section 7(a)(2) obligations regarding such action.