



# ENDANGERED SPECIES ACT CONSIDERATIONS AND MOSQUITO CONTROL

**ISSUE:** Decisions on how pesticides should be used near sensitive or listed species are not being developed in a transparent, scientific manner.

**Background:** The Endangered Species Act (ESA) is intended to protect species that are threatened with extinction and maintain their critical habitat. However, its implementation can impede mosquito control programs from protecting the public and wildlife from nuisance and disease-carrying mosquitoes.

During the pesticide registration process, the Environmental Protection Agency (EPA) provides its analysis of a pesticide's potential environmental effects-including effects involving endangered or threatened species-to the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services), which are charged with administering the ESA. If the preliminary decision is that the use of the pesticide 'may affect' listed species, the Services then develop and issue Biological Opinions (BiOps), reflecting their conclusions of potential impacts to species and habitats from pesticide use. In developing BiOps, the Services are required to use the "best available data" to determine potential impacts on species, and where necessary, recommend measures to mitigate those impacts.

Historically, the "best available data" relied upon by the Services was not validated, and could be more appropriately classified as unsubstantiated opinion. The Services' process was not transparent or subject to peer review. In 2013, the U.S. Court of Appeals for the Fourth Circuit vacated and remanded the National Marine Fisheries Service's 2008 BiOp on certain organophosphates and their potential effects on salmonids on the grounds that the document was "arbitrary and capricious". As a consequence, the Services were forced to work with the EPA to identify appropriate, science-based approaches in analyzing the potential impacts of pesticide products, including public health pesticides, on endangered and threatened species. The development of these approaches is still underway.

**Discussion:** There is a concern that ESA regulatory decisions, which may adversely affect the ability to use pesticides to protect public health, will be made before the approaches being considered have been subjected to peer review and public comment, and where appropriate, modified before they are finalized. A more prudent approach would be to make pesticide regulatory decisions only after the appropriate public review of the approaches has been completed. This would confirm that the potential regulatory decisions are more robust and help to avoid the potential for unnecessary restrictions on public health pesticides.

**CURRENT STATUS:** Given the dynamics of the new Congress and the complexity of the issue, it is unlikely any substantive ESA reform could take place in the 116<sup>th</sup> Congress. Any modifications relating to ESA, if any, would be modest in nature and most likely relate to methodologies or processes under ESA, rather than substantive measures.

The recently-enacted 2018 Farm Bill requires the establishment of a FIFRA Interagency Working Group to provide recommendations and develop a strategy for improving the pesticide consultation process under Section 7 of the ESA. The Working Group, consisting of representatives from the Department of Agriculture, the Department of Commerce, the Department of the Interior, the Council on Environmental Quality, and the EPA, will be required to periodically report to Congress on its progress in developing and implementing its recommendations for improving the ESA Section 7 consultation process.

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## **NEEDED ACTION:**

**Congress should direct the Services to implement measures that ensure ESA decisions are based upon transparency, peer-reviewed science, and the rule of law. Further restrictions on the use of public health pesticides should not be imposed until proper science-based approaches have been finalized.**

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