

American Society of Mammalogists

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Attention: Docket ID #OPP-2003-0011

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Dear EPA Administrator:

The American Society of Mammalogists (ASM) is a non-profit, professional scientific society consisting of over 4,000 members from the United States and 60 other countries worldwide. It was founded in 1919 and is the world's oldest and largest organization devoted to the study of mammals. In addition to its scientific pursuits, the ASM is deeply concerned about the future of mammals worldwide, and thus strongly supports mammalian conservation. The ASM seeks to support decisions that ensure sound conservation planning based on quality research and accurate science.

The ASM is taking the opportunity to provide comments to you regarding the proposed changes outlined in your Advance Notice of Proposed Rulemaking (ANPR) on Endangered Species and Pesticide Regulation published in the 24 January 2003 Federal Register (Vol. 68[16]:3786-3795). With regard to the pesticide registration/re-registration process, this proposal would amend the EPA's implementation of Section 7 of the Endangered Species Act (ESA), which requires that all federal agencies consult with the two federal "Services" (US Fish and Wildlife Service and National Marine Fisheries Service) responsible for all endangered and threatened species matters to ensure that any action they undertake is unlikely to jeopardize the continued existence of any endangered or threatened species.

After reviewing this ANPR, we conclude that it is seriously flawed and would significantly undermine the intent of the ESA—therefore, we are strongly opposed to the proposed changes for reasons outlined below:

- (1) The ANPR contains no coherent explanation for changes to the existing ESA Section 7 regulations, which seem utterly unnecessary. The ANPR indicates that the Bush Administration is seeking to “better integrate the pesticide registration and ESA process and to improve the efficiency and effectiveness of consultations on pesticide actions to enhance protections on endangered and threatened species and their designated critical habitat.” However, the ANPR fails to make the case that these goals cannot be attained under the existing ESA Section 7 regulatory framework. In reality, EPA’s failure to adequately integrate its pesticide registration program with its ESA responsibilities and to adequately protect listed species from the harmful effects of pesticides has nothing to do with the existing Section 7 regulations. Instead it is the result of EPA’s systematic failure to comply with these regulations.
- (2) The ANPR would assign the EPA, rather than the Services, to determine whether the registration and use of a pesticide is likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. Specifically, the EPA would be authorized to complete an “effects analysis” forming the basis of any biological opinion issued in connection with the registration of any pesticide. Further, the Services would be required to accept EPA’s analysis unless they determined, based on some unspecified burden of proof, that EPA’s analysis was inadequate. We strongly disagree with this proposed change in Section 7 ESA regulations. In the United States, pesticides kill millions of vertebrates annually, which includes endangered/threatened mammalian species. For example, brodifacoum, an anti-coagulant rodenticide, is responsible for the death of a number of the endangered San Joaquin kit foxes (*Vulpes macrotis mutica*) in California in recent years as well as countless other non-listed mammals. Another similar example is provided by diphacinone, another anti-coagulant rodenticide, which is responsible for the death of a number of endangered giant kangaroo rats (*Dipodomys ingens*) in California in recent years. Other mammalian examples include mortalities caused by various pesticides in endangered/threatened gray wolves (*Canis lupus*) and Canada lynx (*Lynx canadensis*). Pesticides are ubiquitous in the environment and pose an insidious hazard to mammals and many other non-target organisms. Environmental contaminant biologists, working in conjunction with endangered species biologists, should always be the ones who assess potential hazard of a pesticide on an endangered or threatened species. This type of assessment should never be left to persons that are non-biologists or are otherwise unqualified to make such important biological judgments. This is the basis for Section 7(a)(2) of the ESA, and in passing into law the ESA in 1973, Congress clearly intended that the EPA and other federal agencies have a responsibility to consult with professional biologists such as those in the USFWS and NMFS, the two agencies mandated to carry out the provisions of the ESA, when their activities may impact endangered and threatened species. The ANPR would waive current requirements for written concurrence of the Services to satisfy Section 7(a)(2) obligations and would remove the Service’s independent evaluations of a pesticide’s potential impact to listed species and substitute the EPA’s assessment of effects. The ANPR suggests changes to the consultation process that would allow EPA to satisfy its Section 7 obligations either without consulting at all with the

Services or without obtaining the Service's written concurrence that its actions are "not likely to adversely affect" endangered species. Both of these alternatives, the "no consultation" approach and the "no written concurrence" approach, are clearly inconsistent with Section 7 of the ESA and would undermine rather than improve protections for listed species. This, in effect, takes the professional trained biologist out of the picture and substitutes EPA's largely non-biologist employees to make the call on possible pesticide effects on listed species. To allow the EPA to make biological judgments and decisions affecting America's rarest species without input from the very biologists mandated to protect them is completely unacceptable and should not be allowed under any circumstances.

- (3) The ANPR proposes to change the longstanding ESA definitions of "best scientific and commercial data available" and "cumulative impacts." The proposed changes in these definitions would significantly weaken existing protections for listed species at risk from pesticides and are entirely inconsistent with regulations that have been in place protecting our nation's most imperiled wildlife species for more than 15 years.
- (4) We are aware that, over the past 10 years, EPA has failed to complete a single Section 7 consultation on a pesticide that it has registered or re-registered, despite repeated formal requests from the US Fish and Wildlife Service. As a recent example, USFWS Director Steve Williams sent a letter to the EPA on 17 June 2002 requesting cancellation or consultation on the organophosphate insecticide fenthion due to continuing wildlife mortality incidents, which included endangered species. Almost a year later, the EPA has failed to even respond to the letter, and no consultation or changes in the registration or labeling of fenthion has occurred. In the past few years, similar letters requesting consultation were sent from the USFWS to the EPA on diazinon, chlorpyrifos, chlorfenapyr, and parathion. These letters also went unanswered. Further, the ANPR contains proposals that would legitimize and institutionalize these historical and current violations of the ESA by the EPA. In view of EPA's poor track-record for compliance with its ESA obligations, it is unthinkable to provide this agency with additional authority to address the harmful impacts of pesticides on our rarest species. This repeated failure of the EPA to comply with Section 7 of the ESA has not gone unnoticed and has resulted in a number of recent lawsuits to force compliance of the EPA with Section 7 of the ESA. This ANPR appears to be an attempt by the EPA to rectify the ever-growing number of lawsuits brought from its continuing failure to consult with the Services under Section 7 of the ESA. Such innovation and energy would be far better directed at assuring the EPA's compliance with wildlife protection laws.
- (5) The ANPR is purportedly proposed to "improve the efficiency and effectiveness of consultations on pesticide actions to enhance protection of species" that are federally listed. In reality, this proposal serves only the interests of the pesticide manufacturers and users who benefit from the current and past failures of the EPA to comply with the ESA by consulting with the Services under Section 7 of the ESA.

In closing, we firmly believe this proposed action to be greatly flawed, would needlessly place endangered and threatened mammals and other organisms at a higher risk of mortality due to pesticide exposure, and would only serve to significantly weaken the Endangered Species Act. Further, we call on your agency to honor your Section 7 obligations for consulting with the USFWS and NMFS on endangered and threatened species in your pesticide registration/re-registration activities. Thank you very much for the opportunity to provide comments to you on this important issue.

Sincerely,

Bruce Patterson, Ph.D.
President
American Society of Mammalogists