

**EPN Comments on ESA Workplan Update:  
Nontarget Species Mitigation for Registration Review  
and Other FIFRA Actions**

Docket No.: EPA-HQ-OPP-2022-0908  
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The Environmental Protection Network (EPN) is composed of almost 550 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health, and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide insights into proposed regulations and policies that have an impact on public health and environmental protections.

## **I. Introduction**

In April 2022, EPA announced its strategy for ensuring its regulatory actions involving pesticides will, over time, comply with the Endangered Species Act (ESA) in a document, “Balancing Wildlife Protection and Responsible Pesticide Use: How EPA’s Pesticide Program will Meet its Endangered Species Act Obligations” (Workplan).<sup>1</sup> The Workplan explained that, because EPA cannot immediately achieve ESA compliance, the agency will give priority to preparing ESA assessments for two categories of pesticides: those subject to court-ordered deadlines and all applications for registration of a pesticide containing a new conventional active ingredient. In addition, the Workplan described EPA’s goal of finding ways to identify and implement protections for threatened and endangered (listed) species, particularly those at greatest risk, at earlier points in its registration review process. Finally, the Workplan contained commitments to engage stakeholders and to enhance collaboration with federal agency partners.

On November 16, 2022, EPA issued for public comment a second document titled “ESA Workplan Update: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions” (Update).<sup>2</sup> The Update builds on the Workplan and explains steps EPA is and will be taking to better protect non-target species, including listed species, earlier in the pesticide registration review process and through other actions. The Update provides greater detail both about the agency’s intended processes for identifying additional protections and the range of protective measures EPA is considering.

EPN welcomes the new efforts that EPA is proposing to improve compliance of its regulatory decisions for pesticides with the ESA. Historically, EPA’s pesticide regulatory program has been unable to identify and implement measures needed to protect listed species and their designated critical habitats from harm. EPN commends EPA for its continued focus on fulfilling its ESA responsibilities. EPN generally supports the actions described in EPA’s updated Workplan and their quick implementation; however, EPN believes there are additional opportunities to improve and extend the efforts needed to protect listed species.

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<sup>1</sup> [https://www.epa.gov/system/files/documents/2022-04/balancing-wildlife-protection-and-responsible-pesticide-use\\_final.pdf](https://www.epa.gov/system/files/documents/2022-04/balancing-wildlife-protection-and-responsible-pesticide-use_final.pdf)

<sup>2</sup> <https://www.epa.gov/system/files/documents/2022-11/esa-workplan-update.pdf>

EPN's comments are structured as follows:

We first address the two areas specifically identified by the agency in its requests for public comments. In Part II below, EPN offers its thoughts about the wording and placement of the label statement that would direct users to obtain, in a timely manner, a copy of the Bulletin governing their intended use of a pesticide and to follow all applicable restrictions on such use. These ESA Bulletins would be available on the [Bulletins Live! Two website](#) (BLT) and through other means. In Part III, EPN provides suggestions related to the Protection Statements and Conservation Measures (CMs) listed in the Update Appendix.

In addition, EPN provides recommendations in Part IV addressing a number of topics beyond the scope of EPA's request for public comment. Although EPN regards the new approaches contained in the Update as necessary, directionally correct ways to address the dangers pesticides may be posing to listed species, there will be no real improvement in the protections for listed species unless registrants make necessary changes to pesticide labels and pesticide users understand and widely adopt the new practices envisioned in the Update. In order to improve the chances of successful, timely implementation, EPN has submitted recommendations that EPA:

- Clarify the scope of the Update. It is not clear whether the agency's focus is on mitigating risk to non-target organisms generally or on mitigating risk to listed species specifically. While EPN certainly supports efforts intended to reduce the risks that pesticides can pose to non-target organisms generally, EPN is concerned that these broader efforts will require more extensive scientific and regulatory analyses that could slow down the implementation of measures to protect endangered species. EPN therefore recommends that the agency focus on listed species.
- Prioritize chemicals for ESA reviews in order to provide better, quicker protection for listed species at greatest risk.
- Make use of existing Biological Opinions that address the use of pesticides and their impact on listed species.
- Clarify how and when label statements will be added to pesticide products, and how directions for use will be added to Bulletins Live.
- Consider EPN's suggestions for improving timely and effective compliance with agency decisions to require protections for endangered species.
- Use web-distributed labeling to more effectively communicate with pesticide users.
- Collaborate with partners to develop a robust plan to communicate with, educate, and train pesticide users, extension personnel, and other key groups on protecting endangered species when using pesticides.

## II. Comments on Bulletins Live! Two Label Statement Revisions

The Update states that most pesticide product labels should bear label text reading:

### **“ENDANGERED AND THREATENED SPECIES PROTECTION**

**REQUIREMENTS:** It is a Federal offense to use any pesticide in a manner that results in an unauthorized “take” (e.g., kill or otherwise harm) of an endangered species and certain

threatened species, under the Endangered Species Act section 9. When using this product, you must follow the measures, including any timing restrictions, contained in the Endangered Species Protection Bulletin for the area where you are applying the product. Before using this product, you must obtain a Bulletin at any time within six months of the day of application. To obtain Bulletins, consult <http://www.epa.gov/espp>. For general questions or technical help, call 1-844- 447-3813, or email [ESPP@epa.gov](mailto:ESPP@epa.gov).”

EPN recommends that the agency revise the proposed label text (hereafter referred to as the “ESA Label Statement”) to make it more enforceable and specify where registrants should incorporate the statement in their products’ labeling.

#### **A. Wording – Change Needed for Enforceability**

The proposed wording of the ESA Label Statement is generally good but we recommend it be changed to improve its enforceability. The next-to-last sentence of the Statement could direct the user in the following way: “Before using this product, you must keep a printed or electronic version of the relevant Bulletin obtained no more than six months before the day of application.” Without such wording, it will not be possible to determine whether the user complied with the requirement, and knowing when the Bulletin was obtained could be important in assessing compliance, particularly if the requirements in Bulletins change over time.

#### **B. Placement of ESA Label Statement**

The Update indicates that the ESA Label Statement, when required, will be included with the Directions for Use for pesticide products. While EPN sees some advantage to placing the ESA Label Statement in the Directions for Use section of the labeling, EPN favors locating it with other Environmental Hazards warnings under the general heading of “Precautionary Statements.” When the ESA Label Statement is required, we recommend it appear on the container label, preferably on the front panel with other Precautionary Statements. EPN believes that putting the ESA Label Statement in this location will give it the special emphasis needed on the language to provide users with clear, unambiguous notice that they must consult the BLT website before using the product.

### **III. Comments on Surface Water Protection Statements and Conservation Measures**

#### **A. Appropriateness of Criteria that Would Trigger Application of CM Requirements**

The criteria used in determining which pesticides will need to add surface water protection statements that direct the use of conservation measures (CMs) (Interim Ecological Mitigation #1 and #2) are based primarily on pesticide mobility (Koc) and persistence (aerobic soil metabolism half-life) data. EPN recommends that EPA clarify whether the source for the Koc data is limited to registrant-submitted Subdivision N data, open-literature data, or both.

EPN feels that the criteria proposed in the Update for identifying which pesticides will need to add protection Statements to products’ labels is too narrow. As explained in more detail below, we recommend that, in making decisions on a chemical-by-chemical basis, the agency expands the criteria and considers additional environmental fate properties of each pesticide active ingredient.

The Koc sorption model used to quantify soil sorption of pesticides across different soils is most appropriate for neutral organic compounds, but it may not be appropriate for ionic organic compounds. Understanding that the proposed criteria are intended for generic application, EPN recommends that EPA consider other physicochemical pesticide data (such as dissociation constants) in assessing the need for surface water mitigation language. Such data can bolster the reason(s) for using the Koc partitioning model.

The strategy also assumes that the soil half-life of compound is an adequate predictor of pesticide persistence in soil, but does not consider differences in degradation with soil temperature differences.

EPN suggests that EPA not restrict the proposed language to “non-persistent” pesticides. Persistent pesticides with the same mobility will be just as likely to move with runoff. Although EPA expects that prohibiting applications within 48 hours of a rain event would be less effective for persistent and immobile pesticides, such a policy might have the unintended consequence of having users opt for a more persistent, mobile pesticide to get around the 48-hour period.

The language regarding applying before a storm appears to be confined to “mobile or highly mobile” pesticides, later defined as a Koc of < 100 L/kg. These highly mobile pesticides may also move by leaching below the surface, depending on the intensity of the rainfall and the permeability of the soil. Did the modeling allow for leaching? Previous modeling efforts by EPA have shown that runoff loadings are higher for pesticides with Kocs in the range of 400-500 L/kg because of the competing processes. EPA has not made a convincing case for this narrower restriction (Koc < 100 L/kg, “non-persistent”) in this particular instance. EPN recommends using a Koc of 400-500 L/kg, or to keep things simple in line with other criteria on the Surface Water Protection Statements, keep the < 1000 L/kg criteria.

## **B. Toxic Degradation Products Should Be Addressed in the Strategy**

The Update strategy does not appear to consider potentially toxic degradation products. This issue is particularly important for non-persistent pesticides. Typically, non-persistent parent pesticides are a carrier of toxic degradation products. The Update should contain language acknowledging the importance of mitigating potential effects of toxic degradation products.

Additionally, the level of risk reduction from better controlling pesticide transport to water will depend on the toxicity of the pesticide (and its transformation products).

## **C. Factors That Influence Users’ Choice of Surface Water Protection Statements and Conservation Measures (CMs)**

The Update appears to assume that farmers will modify or employ certain soil conservation practices in order to use a pesticide. Most of the soil CMs, however, are costly and require specific engineering and agronomic modifications. It is likely that cost, rather than effectiveness in reducing ecological risks, will be the primary consideration in selecting a mitigation measure. If EPA intends for users to select the CM (or CMs) that best control pesticide transport, the agency should make the Prevention Statements more directive about how to make the choices.

The Update clearly indicates that, in selecting a mitigation practice, the user should consider multiple variables, such as type of soil, rainfall intensity and duration, slope, field length, and buffer stability to restrict concentrated flow. EPA should provide guidance on how a user should weigh the different variables to pick the most appropriate CMs. EPN understands that the guidance cannot address every combination of site-specific conditions and constraints. Nonetheless, EPA could include additional references that broadly address how to make the choices.

#### **D. Clarity of Proposed CM Descriptions**

The documents cited in the description of the pick list options – the National Pollutant Discharge Elimination System (NPDES) Permit Writers’ Manual for Concentrated Animal Feed Operations (CAFOs) and the Chapter 4b (Pesticides) National Management Measures to Control Nonpoint Pollution from Agriculture –do not provide recommendations for buffer sizes, lengths, etc., for effective removal of pesticides. The NPDES document pertains to CAFOs, which are point sources of pollution. EPN used additional USDA/NRCS documents<sup>3</sup> to confirm the source of the information for each soil conservation practice cited by EPA in the Runoff and Erosion Mitigation Pick List. While design specifics necessary for implementing the measures are beyond the scope of this document, these may be useful additional references to add to the descriptions.

The proposed pick list of CMs does not include soil incorporation, which is a viable mitigation option to reduce pesticide runoff or erosion on suspended sediments. Soil incorporation has been shown to reduce pesticide loading from runoff/erosion by 7 to 75%.<sup>4</sup> While not the only source of information on CM specifications, USDA/NRDC’s Conservation Practice Standards web page<sup>3</sup> is a good source for documents describing details required for creating and managing various soil conservation practices to reduce erosion and surface water runoff.

#### **E. Compliance and Enforcement**

The practicality of mandating various soil conservation measures on pesticide labels is questionable because most of these measures require very specific engineering and agronomic modifications. It is unlikely that a farmer will modify soil conservation practices solely in order to use a specific pesticide. When the pesticide user/grower is renting land from another person, it seems even less likely that the land owner will agree to large, potentially expensive changes to the property in order to allow the renter to use a pesticide subject to CM requirements. Thus, EPA should consider potential unintended consequences of this approach: e.g., whether imposition of these requirements would lead users to ignore the requirements or to shift to using pesticides for which these measures were not required but which might pose different, greater risks.

The practicality and enforceability of a label restriction stating “Do not apply within 48 hours of a storm event” is also questionable. This could prohibit any use in certain regions. In some parts of the country, such as Florida, daily rainfall is expected during certain times of the year. Additionally, there is a high probability for stray rainfall events in the Midwest. Further, there are enforceability issues. How much precipitation constitutes a “storm event?” Is this language intended to create strict liability, i.e., does any storm event occurring within 48 hours of application make the application illegal? Or can a user legally rely on weather forecasts to determine whether to make an application,

<sup>3</sup> <https://www.nrcs.usda.gov/resources/guides-and-instructions/conservation-practice-standards>

<sup>4</sup> <https://www.epa.gov/sites/default/files/2015-10/documents/chap4b.pdf>

such that the user would not be found in violation for applying a pesticide within 48 hours of an unexpected storm event? EPN recommends that the label language regarding applications and rainfall events be clarified.

Whether the language is enforceable or not, it does not provide the well-intentioned pesticide user with sufficient information about how to make legal applications. EPN appreciates that many site-specific factors – including soil type, quality and quantity of ground cover, slope (steepness, length, shape), previous rainfall, soil moisture at the time of the rainfall, and whether plants are dormant or actively growing – influence the amount of runoff that will occur. However, most users would not be prepared to weigh these factors in determining how much rainfall would pose a potential runoff problem. Therefore, EPN recommends that EPA include language telling users what they should (or must) do before applying a pesticide, perhaps by identifying what information a user must access (and what forecast parameters must be met) before applying a pesticide. For example, the prohibition could prohibit application if the weather forecast for the area predicts, with more than 25% likelihood, greater than a certain amount of rainfall within 48 hours after the end of the application period.

#### **F. Efficacy of Proposed CMs: Difficulty in Quantifying the Impact of Adopting a BMP and Accounting for It in a Risk Assessment**

If the proposed interim conservation measures are eventually to be required on labels and adopted by users, EPN recommends that EPA address the question of how effective those measures will be in protecting listed species. The proposed label language recommends a list of site-specific soil conservation measures such as vegetative buffer strip, field border, contour farming, etc. Although these soil conservation practices are directionally correct (and EPN supports them), there is little or no discussion of the effectiveness of each soil conservation practice on pesticide removal. If EPA cannot quantify the impact of the CMs, how will EPA determine whether they are adequate to protect listed species? Conversely, how will EPA determine whether a costly CM is actually necessary to reduce the risk to listed species? Quantifying the effectiveness of the mitigation measures under a range of locations and conditions could be very helpful not only in expediting future consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services), but also in strengthening the rationale imposing the CMs as a regulatory requirement.

The Update should incorporate more recent studies on the pesticide removal effectiveness of the various soil conservation measures. We recommend that EPA conduct an updated literature review to evaluate the range in pesticide trapping efficiencies for the various soil conservation practices according to pesticide fate properties, site conditions, etc. The absence of these data limits the ability to quantify the implementation of the proposed mitigation options in the pick list.

In addition, EPN recommends that EPA initiate discussions with the Services to identify whether there are opportunities for monitoring (or studies) that might increase the Services' confidence in the effectiveness of the interim measures. Where appropriate, such monitoring (or studies) could be required under section 3(c)(2)(B) of FIFRA.

## **G. User Impacts: Consideration of Costs and Feasibility That Will Influence a User's Choice of a CM**

**Surface Water Protection Practices:** In an ideal world, the farmer would be working with USDA/NRCS to have a farm plan in place with appropriate measures (for the area, soils, and farm) to reduce impacts of runoff and erosion. The success with which farm plans are adopted depends on willingness of the farmer to work with USDA/NRCS, as well as availability of cost-share funding. Thus, EPN thinks that making a farm plan a requirement for pesticide application may be counterproductive. EPN notes that, in many cases, the practices which are implemented as part of a cooperative agreement with USDA NRCS include the CMs that EPA proposes to require. While EPN does not recommend that an agreement be a condition for use of certain pesticides, EPN suggests that the presence of listed mitigation measures under such an agreement could constitute compliance with the label language.

**Spray Drift Reductions:** The use of [AgDrift](#)<sup>5</sup> for estimating unidirectional spray drift potential on estimated exposure is consistent with the standard EPA ecological risk assessment process. However, the use of wind directional buffers is problematic because wind direction can change in a short period of time. EPN believes that adoption of wind directional buffers is difficult to enforce and defend because of variable wind directions.

**Reducing Risks from Seed Treatments:** The use of treated seed incorporation in soil is a reasonable mitigation approach for limiting exposure to seed-eating mammals and birds. However, requiring a two-foot depth incorporation of spilled treated seed doesn't seem reasonable and consistent with typical agronomic practices. Seed incorporation to a two-foot depth essentially requires a chisel plowing rather than conventional tillage incorporation.

## **IV. Additional Comments Regarding Implementation**

EPN recognizes that the agency only asked for public comments on certain aspects of the Update; we addressed those topics in sections II and III of these comments. However, EPN offers the following additional comments because there are many important issues that EPA should address if the agency is to implement the proposals in the Update successfully.

### **A. Focus Protections for Listed Species and Designated Critical Habitat**

EPA recognizes that it needs to take a more active approach to carrying out its obligation to implement the ESA. It appears, however, that the proposed new approach could go well beyond regulatory measures needed to protect listed species and designated critical habitat. Specifically, it appears the new regulatory requirements discussed in the Update would be applied nationally, regardless of whether any listed species or protected habitat is present and would benefit. EPN recommends that EPA clarify that the regulatory restrictions being proposed in the Update would apply only to areas where they would enhance the protections for listed species or critical habitat.

While imposing nationwide requirements to use CMs may lower pesticide exposure to all non-target species, including listed species, EPA should carefully consider whether actions with such broad

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<sup>5</sup> <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/models-pesticide-risk-assessment/#AgDrift>



geographic applicability could be justified. EPA has already finalized many “Interim Decisions” that considered the pesticides’ risks to non-target species and found them to be in compliance with FIFRA. These Interim Decisions specified the changes needed such that the continued use of the pesticides will satisfy the FIFRA risk / benefit standard. While lowering pesticide exposure even farther is an admirable goal, lowering it to a level below what is already considered to be “safe” (either because the level would not be expected to result in harm or injury or the pesticide’s benefits outweigh the risks) is not consistent with the legal requirements of FIFRA. Thus, if EPA intends to apply the regulatory requirements to areas where there is no potential ESA benefit, the agency should be prepared to explain why new information has changed the decisions it reached in previously-issued Interim Decisions. This could involve substantial additional scientific and legal analysis – work that would not directly benefit listed species.

The implementation of the requirements of ESA is a joint responsibility of EPA and the Services. One important piece of being able to successfully protect species and their habitat is knowing where, with as much geographical resolution as possible, listed species are likely to be present. Until the time that EPA and the Services have concluded consultation on a pesticide and the Biological Opinion (BiOp) is issued and implemented, reducing pesticide exposure through the use of the “Interim Ecological Mitigation” measures in those areas would make sense. Accordingly, EPN recommends EPA obtain the location and range of listed species from the Services and then determine where pesticide use overlaps for each pesticide under evaluation. EPA would then be in a position to require users, through the BLT website, to follow the “Interim Ecological Mitigation” measures in those areas of overlap.

## **B. Prioritizing Chemicals for Review**

EPN strongly recommends that the agency establish a risk-based priority for all currently registered pesticides and then allocate its resources to the highest priority pesticides (or groups of pesticides), consistent with its court-imposed obligations. The agency needs such a scheme to reduce the chance of unintended adverse consequences from its regulatory decisions.

Timing-related factors can significantly complicate EPA’s efforts to mitigate risks to listed species. In situations where competing pesticide active ingredients can be used on a particular crop, issuing an Interim Decision on one active ingredient could result in some users “deselecting” the reviewed ingredient (whose products would now require some ESA-related mitigation measures) in favor of products that have not yet been reviewed. To the extent that users choose to purchase un-reviewed products, the impact of EPA’s Interim Decision will be limited to the comparative effects of the competing products on listed species. If the unreviewed products pose more risk to endangered species than the reviewed ingredient, EPA’s action could actually increase risk to listed species by encouraging users to purchase products more hazardous to listed species. Alternatives to this scenario include dealing with all competitive products on a particular crop at the same time, and delaying the effective date of earlier decisions until the last ingredient has been reviewed. Both of these scenarios can significantly delay the provision of relief to endangered species, and both may result in continued litigation directed at EPA’s compliance with the ESA.



While we recognize that no solution here is perfect, EPN recommends that EPA rate chemicals for their likely risk to listed species and then prioritize the more risky chemicals for Interim Decisions. In this way, EPA can expedite the adoption of interim mitigation measures, without providing incentives to users to make choices that could actually increase risks to endangered species.

### **C. Using BiOps Already Implemented by Other Federal Agencies<sup>6</sup>**

EPN recommends that the agency extend to pesticide users the same protections required for listed species in BiOps issued to other federal agencies. Many federal agencies are responsible for managing and coordinating the proper use of pesticides in order to carry out their mandates. For example, the U.S. Forest Service of USDA uses pesticides to thin or control vegetation to promote the growth of desirable species, prepare a site to plant trees, and reduce fire fuel; control public health pests to protect the public; and manage invasive terrestrial or aquatic plant species. Other federal agencies, including the Department of Defense, the National Park Service, the Bureau of Land Management, and other Services in the Department of Agriculture, also routinely use pesticides to carry out their legal responsibilities.

In order to meet requirements under the ESA, federal agencies who apply pesticides have consulted with the Services to determine whether any listed species may occur on lands where they will apply pesticides, and if so, what, if any, reasonable and prudent measures or reasonable and prudent alternatives would be required to protect these species and their critical habitats. The measures are specified in the BiOps issued by the Services following the consultation. These measures have been deemed to be adequate to protect listed species or critical habitat from pesticide exposure when the pesticide is applied on the area or region for which the consultation occurred, by or under contract of a federal agency. However, these same measures have not been required under the same circumstances when the same pesticides are applied by non-government/private pesticide users. For example, if the Forest Service is applying a pesticide to control the gypsy moth, a non-native, invasive species, in a particular region and is required, after consultation with the Services and issuance of a BiOp, to implement certain restrictions and/or measures, it would be logical that these same measures should be required for non-government users if the listed species is also present or their pesticide use would be expected to harm critical habitat.

EPN recommends that EPA request that the Services identify other areas/regions of the country where the endangered species named in previously issued BiOps for other federal agencies exist. EPA could then identify where there is overlap in similar use of the pesticides and require, through BLT, the same measures of protection for non-government pesticide users that are required for the federal agency.

### **D. Processes for Imposing Restrictions to Protect Listed Species**

#### **1. Process for Imposing the Requirement for an ESA Label Statement**

EPN finds the Update unclear with respect to how EPA intends to implement a requirement for product labels to bear the ESA Label Statement that directs users to consult the BLT website or

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<sup>6</sup> The status of currently available EPA pesticide BiOps can be found at <https://www.epa.gov/endangered-species/biological-opinions-available-public-comment-and-links-final-opinions>.

otherwise obtain access to relevant ESA bulletins. Recognizing that changing physical labels on pesticide products is a slow process and that increasing protections for listed species is an urgent need, EPN recommends that the agency choose a process that gets the ESA Label Statement in users' hands as quickly as possible.

The time required for revised labels to reach users has two elements. First, registrants need adequate time to add the ESA Label Statement to their existing products' labels. Once EPA has approved the incorporation of the new label text, registrants need time to reprint labels and incorporate the revised label into their production processes. Then it will take additional time before the newly labeled products will have made their way into users' hands. This whole process typically takes 1-2 years depending on the market for the product.

EPA can make regulatory choices that will speed this process. First, EPN recommends that the initial step of that process – whereby registrants secure EPA's approval for the addition of the ESA Label Statement – be accomplished using the existing Notification process, rather than the slower amendment process. Second, EPN recommends that EPA require the addition of the ESA Label Statement immediately, together with requirements for when the revised statement needs to appear on the labels of products released for shipment and on all products in channels of trade. (See section IV. E. 2.) By starting the label revision process immediately, EPA increases the likelihood that most, if not all, users will have products requiring them to consult the BLT before EPA starts to populate that website with Bulletins containing substantive restrictions on use. (EPN recognizes that this recommendation has a potential disadvantage. Requiring the addition of the ESA Label Statement to a product's label before there are any restrictions applicable to the product could create a "cry wolf" problem. Diligent users who follow the direction to consult the BLT website would find no restrictions affecting the product and might eventually decide it was useless to consult the BLT. In the long run that could undermine confidence in the BLT-based system. Obviously, if EPA quickly completes and makes ESA Bulletins available through the BLT system, the "cry wolf" problem will be greatly reduced.)

## 2. Process for Imposing Restrictions via ESA Bulletins

In addition, the agency should clarify the process by which an affected registrant could interpose an objection to the imposition of restrictions on its product via EPA's addition of a Bulletin to the BLT website. The registrant community has made clear that they would object strongly to any approach that would allow EPA to restrict their products' uses without first giving the registrant an opportunity to contest restrictions as being unnecessary.

## **E. Ensuring Timely, Comprehensive Compliance**

EPA's proposed strategy could result in a number of potentially important improvements to the current situation involving pesticides and compliance with the ESA. However, EPA will not be able to achieve these improvements by itself; many stakeholders will need to "buy in." There are a number of important steps EPA could take to increase the likelihood of success of the strategy. To that end, EPN recommends that EPA take the actions discussed below.

### 1. Verify Registrant Compliance

In order for the mitigation efforts to become effective (and enforceable), registrants will have to make modifications to their pesticide labels, either by including specific mitigation language on labels or language requiring users to access (and follow) certain “directions for use” on an internet site (or sites) specified on the label. It is unrealistic to expect that many users will follow such directions for use unless and until the appropriate language appears on the labels of pesticide products purchased by the user. It is thus critical that registrants make the required changes to their labels in a timely manner. EPN recommends that EPA develop a publicly-accessible database that identifies for each registered product the date by which EPA directed registrants to submit revised labels; the date when the notification of having made (or application for amended registration to make) the appropriate label change was received by EPA; the date when the label change was made; and the dates when the label must appear on products released for shipment and in channels of trade. This database could provide added confidence that the strategy is being implemented on the ground.

### 2. Establish a New Label Date for Products in the Channels of Trade

Once a product’s label has been amended, EPA should identify dates by which a product released for shipment by a registrant and a product sold or distributed by any other person must bear the new label. Because of the importance of implementing protections for listed species and protected habitat, EPN recommends that the agency use its authority in 40 CFR 152.130(d) to require registrants to implement label changes more swiftly than is the default position in EPA’s pesticide regulations at 40 CFR §152.130, and that the agency establish dates by which other persons may only sell or distribute product bearing the new labeling. (Otherwise, the rule allows for products bearing old labels to continue to be sold by registrants for 18 months, and to be sold by others indefinitely.) Use of this discretionary authority will benefit endangered species by getting products with improved labels into users’ hands more quickly.

### 3. Using the Misbranding Authority to Take Timely and Effective Action Against Non-Complying Registrants

Use of its misbranding authority could be a very effective and timely way for EPA to discourage registrants from non-compliance with ESA mitigation measures, and especially so in circumstances where many registrants comply, but some do not.

The Update strategy is (perhaps necessarily) very reliant on registrants’ compliance with instructions to make the appropriate changes to their labels, which must be followed by pesticide users. Non-compliance by a registrant will result in users not being required to apply mitigation measures, and quite possibly in users not being aware of appropriate mitigation measures. Non-compliance by a particular registrant may also provide that registrant with a competitive advantage over complying registrants; failure by EPA to effectively address this situation may encourage more registrants to delay or entirely avoid compliance. EPN recommends that EPA pursue misbranding action against registrants who fail to adopt the appropriate directions for use in a timely manner.

It is illegal under FIFRA section 12(a)(1)(E) for any person to sell or distribute a “misbranded” pesticide. Under FIFRA section 2(q)(1)(F) and (G), a pesticide is misbranded if, *inter alia*, the labeling accompanying it does not contain directions for use and a warning or caution statement which are:

necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of [FIFRA], [] adequate to protect health and the environment.

It is clear that the endangered species mitigation discussed in EPA's strategy will be implemented through changes in the precautionary statements or "directions for use" sections of a pesticide's label. And by EPA determining that the endangered species mitigation in an Interim Decision meets the applicable standard in FIFRA for requiring a label change, EPA will already have determined that the absence of the mitigation language is "not adequate to protect health and the environment," particularly by not being adequate to protect listed species. Thus the plain terms of section 2(q)(1)(F) and (G) are clearly met here.

(EPN is aware of the decision in *Reckitt Benckiser v. Jackson*, (D.D.C. 2011) (762 F.Supp.2d 34), in which a District Court made clear that EPA may not use its misbranding authority as an alternative to bringing a cancellation proceeding under section 6 of FIFRA. EPN believes that case is plainly distinguishable and does not apply to the recommended use of EPA's misbranding authority to require compliance with restrictions to protect listed species.)

#### **F. Web-Distributed Labeling**

EPN strongly recommends that EPA reconsiders the way it expects users to obtain information that establishes requirements to protect listed species. For the reasons explained below, the direction requiring users to consult the BLT website, as well as potentially two other websites, is not likely to be effective. To promote compliance, EPA should require registrants to offer users access to all labeling content – including the content of the Bulletins on the BLT website and the CM Pick Lists websites – via the Web-Distributed Labeling system described in existing agency policy.

The initiative described in the agency's Update will likely lead over time to the inclusion of many additional restrictions on the use of pesticides – new requirements that are legally enforceable only if they are part of the labeling of specific pesticide products. Because these new restrictions would compound the problem of "label clutter," EPA has wisely decided to collect these restrictions in Endangered Species Bulletins and to direct users to obtain Bulletins by contacting the agency through email or a toll-free telephone number, or by downloading the information from the BLT website. For essentially the same practical considerations, EPA's Update proposes that users will consult two different websites where CM Pick Lists appear.

EPN feels that this approach for communicating ESA restrictions to users may not be feasible. Based on many anecdotal conversations that EPN members have had with users, it appears many and possibly most users do not carefully read pesticide product labeling – especially if they are using the same product year after year. For such users, it is very unlikely that they would take the time and trouble to access potentially three, or even one, website to read about additional restrictions affecting use of a product.

Therefore, we recommend that EPA rethink and retool its approach of relying on printed pesticide labeling to convey the new ESA restrictions. Mandating the use of Web-Distributed Labeling should significantly improve the likelihood that users will actually obtain, read, and comply with the new ESA protections. As envisioned by EPA, Web-Distributed Labeling is an internet-based software application developed for specific pesticide products. Access to a Web-Distributed Labeling website would be triggered by a QR code on the pesticide product label. Once there, the site would offer a series of questions with menu-driven choices that would enable the user to specify which parts of the labeling is needed. The user would identify the type of site to be treated, as well as other pertinent details such as the application method, the geographic location, and date of application. The software would then render labeling that contained everything that was relevant to meet the user's specifications, including any geographic-specific ESA restrictions that came from the BLT website and the CMs that the user elected to follow. (EPA already has a well-developed set of policies to govern Web-Distributed Labeling.<sup>7</sup>)

Compared to the current paper-based labeling construct, the use of Web-Distributed Labeling would have many other benefits beyond simplifying access to ESA restrictions. First, Web-Distributed Labeling would eliminate the need both to read the product label, the booklet accompanying the product, and consultation of one, two, or even three websites to assemble all EPA-required instructions, requirements, warnings, and ancillary material. Instead, by scanning a QR code and entering answers to several simple questions, the software program will capture and render to the user everything that they need to know. Second, Web-Distributed Labeling would reduce the length of labeling by providing users only the portions of EPA's approved labeling that are relevant to the specific use. In many cases, the relevant labeling will be dramatically shorter, making it more likely to be read. Finally, the rendered labeling could be displayed in larger font sizes that are more easily readable by an aging user population.

### **G. Communication, Training, and Education**

While the steps EPA has taken to make the BLT system more user-friendly are necessary, EPN recommends that the agency conduct more proactive outreach to make users more aware that the Endangered Species Bulletins appearing on the BLT are essential to protecting listed species and are legally enforceable by EPA and state authorities. We also recommend that EPA develop a communications plan for this effort.

The agency faced a similar situation when it promulgated the Worker Protection Standard (WPS) rule in 1992. The WPS imposed many highly-specific new requirements on users of agricultural pesticides. Yet none of these detailed requirements appeared on product labels or in the printed materials that accompanied product containers. Rather, a label statement referring to the WPS regulation made the rule's requirements "labeling" and thus enforceable. The agency worked with partners in state agencies and commodity groups to educate users about the new requirements. EPA produced videos and a lot of helpful written material to communicate how the regulatory responsibilities of users had changed. The agency should develop and carry out a similar, aggressive communication strategy that complements the regulatory actions it will be taking to implement new

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<sup>7</sup> <https://www.epa.gov/pesticide-labels/web-distributed-labeling-pesticides>

protections for listed species.

Pesticide training and education programs help protect applicators, bystanders, and the environment, including non-target organisms, from potential harm caused by pesticide applications. The Update, however, does not discuss in detail the importance of education, training and outreach to the effort. These programs are needed to communicate with users to facilitate understanding and reinforce the importance of protecting non-target species. Moreover, it is important to communicate to users that failure to implement mitigation practices designed to protect listed species could result in court rulings that may adversely affect the availability of some pesticide products.

EPN recommends that the ESA Update describe specific activities that will be followed to tap into existing outreach, education, and training programs to further the objectives of the Update. Leveraging state programs and other resources will enhance awareness among applicators and increase the likelihood of improved protection of nontarget organisms, including listed species. EPN also recommends that EPA develop a concise overview of the Update, including mitigation practices and labeling, that can serve as a tool for growers, pesticide users, extension, crop consultants, etc. This educational tool should explain the basics of mitigation practices and the importance of using them, and how more information can be obtained. It should also provide a consistent message to the key parties that apply pesticides or directly interact with them. USDA and professional “societies” that focus on pest control (e.g., Weed Science Society of America, Entomological Society of America, and the American Phytopathological Society) are logical partners to work with EPA on developing this tool as well as helping to spread the word to growers, states, crop consultants, etc., about mitigation practices and their importance.

EPN recommends that EPA proactively explore collaboration with the following:

- USDA  
USDA should be a key partner in the communication, education, and training effort. EPA works closely with USDA's Office of Pest Management Policy (OPMP) on a wide range of pest control and pesticide issues. EPA should reach out to OPMP to determine what assistance USDA can provide in implementing the ESA strategy. For example, USDA could help develop a summary of the workplan and also work with EPA to facilitate communication with commodity groups (corn growers, soybean growers, etc.) and crop consultants on the importance of implementing mitigation practices.
- The Weed Science Society of America (WSSA), the Entomological Society of America, and the American Phytopathological Society  
EPA has already established close working relationships with these three societies. Each society, for example, has a liaison who works with EPA on scientific matters related to the control of weeds, insects, and plant pathogens. WSSA has established a committee whose objective is to “foster the protection of endangered and threatened species through developing partnerships which maximize the WSSA's ability to communicate science-based information to regulators.” EPN recommends that EPA work with these societies to develop a communications and outreach plan and to further the goals of the Update.
- State Certification and Training Programs  
EPN recommends that EPA consult with existing state pesticide training programs and attempt to include them in this effort. In these programs, states must accept basic federal standards for training, but often require standards that are more strict than the federal

standards. EPA's Office of Pesticide Programs has worked successfully with states to develop training on specific topics.

- State Cooperative Extension Programs

One of the important functions of state-level cooperative extension programs is advising farmers, public utilities, and other organizations on pest control and pesticide use.

Cooperative extension agencies have well-developed networks that may be leveraged to facilitate adoption of the ESA strategy.

- Pesticide Registrants

Registrants have historically been involved in communicating with chemical dealers, growers, utilities, cooperative extension, and others regarding pest control and pesticide use. EPA should explore ways to involve registrants in this effort.

- Other EPA Resources

Opportunities for coordination and outreach should be explored in cooperation with EPA's support of land-grant university Pesticide Safety Education Programs (PSEPs) for the education and training of certified pesticide applicators. Education, training and outreach opportunities should also be explored with the Biopesticides and Pollution Prevention Division's Environmental Stewardship Branch.

*These comments were prepared by James Hetrick, Jack Housenger, Arnet Jones, William Jordan, Tina Levine, Robert Perlis, and Nelson Thurman on behalf of EPN.*