

Lawyer Insights

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold
Published in Growing Produce | January 25, 2024



Over the years, the U.S. EPA's pesticide program has been unable to meet requirements under the [Endangered Species Act](#) (ESA) to evaluate impacts to listed species associated with pesticide

registrations. This is due largely to the Federal Insecticide, Fungicide, and Rodenticide Act's (FIFRA's) requirement that EPA reevaluate every pesticide every 15 years, including the hundreds of pesticides that affect federally listed species. As a result, EPA has faced more than 20 lawsuits, covering over 1,000 pesticide products, challenging the Agency's failure to meet ESA obligations, some of which have resulted in the vacatur of the pesticide registrations, creating significant uncertainty for growers and pesticide users. To address this problem, EPA's Office of Pesticide Programs (OPP) recently developed a number of ambitious plans, strategies, draft and final guidance documents, and pilot programs to facilitate the ESA review process. EPA has committed to execute these initiatives by dates established in a Sept.2023 settlement agreement. EPA's new initiatives, outlined below, will have substantial impacts on the pesticide industry, as well as growers and other pesticide users. In particular, many of the proposed mitigations will restrict pesticide use in areas that overlap with listed species ranges or require growers to implement measures to reduce species exposure via spray drift or runoff/erosion.

Background

ESA section 7 requires EPA to ensure through consultation with the U.S. Fish and Wildlife Service (FWS) and, when appropriate, the National Marine Fisheries Service (NMFS) (together, the Services) that their FIFRA actions – including registration of new pesticides, registration review of existing pesticides, and the approval of new uses and pesticide label amendments – are not likely to jeopardize the continued existence of federally listed species or destroy or adversely modify designated critical habitat.

This requirement is difficult for EPA to satisfy, given the realities of the FIFRA program. For example, there are more than 17,000 registered pesticide products containing more than 1,200 active ingredients, with uses including insect repellents, household cleaners, lawn and garden chemicals, hospital disinfectants, biotech products, and a wide range of agricultural chemicals. Because EPA must reevaluate all existing registered pesticides every 15 years, this amounts to hundreds of registration review cases each year. Furthermore, FIFRA registrations are often geographically broad, covering many pesticide uses, and affecting dozens, if not hundreds, of listed species, complicating the analysis of potential impacts on species.

This article presents the views of the authors, which do not necessarily reflect those of Hunton Andrews Kurth LLP or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article. Receipt of this article does not constitute an attorney-client relationship. Prior results do not guarantee a similar outcome. Attorney advertising.

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold

Published in Growing Produce | January 25, 2024

To address these challenges, OPP has developed a number of initiatives, described in more detail below.

ESA Workplan

On April 12, 2022, OPP released a report, entitled *Balancing Wildlife Protection and Responsible Pesticide Use: How EPA's Pesticide Program Will Meet its Endangered Species Act Obligations (Workplan)*, describing how the Agency plans to satisfy its ESA requirements. The Workplan identifies four key strategies:

- **Prioritizing Certain ESA Reviews.** After first addressing actions with court-enforceable deadlines, EPA will focus on conducting ESA evaluations for new conventional active ingredients. The next tier will be the remaining conventional pesticides in registration review. The final tier will include all other FIFRA actions for conventional and non-conventional pesticides.
- **Improving Approaches to ESA Mitigation.** Identifying and incorporating protections for listed species earlier in the FIFRA process, especially for species facing the greatest risk from pesticides. EPA intends to focus more of its time and resources on implementing conservation measures needed to meet its ESA obligations, and less time on data, methodology, or modeling issues that have limited bearing on the outcome of ESA consultations. For example, developing pilot projects to identify compensatory mitigations (offsets) for specific pesticides and species (e.g., Vulnerable Species Pilot, Herbicide Strategy, etc., discussed below).
- **Improving Consultation Process.** Improving the efficiency and timeliness of the ESA consultation process in collaboration with the Services. For example, EPA and the Services may conduct programmatic consultations for categories of pesticides that share similar use patterns to enable mitigations to be identified together, not case by case. EPA will also consider consulting with the Services' regional or field offices (instead of or in addition to headquarters) for pesticides that have specific regional uses.
- **Improving Stakeholder Engagement.** Engaging stakeholders more effectively to better understand their pest control practices and implement species protection measures. For example, seeking help on obtaining better data for ESA assessments and expanding engagement with non-agricultural organizations.

Pursuant to court-approved settlement agreements, EPA established a schedule within the Workplan to complete ESA determinations and Biological Evaluations for 18 pesticides through 2027. According to the Workplan, this is the most EPA can accomplish based on current processes and staffing. As such, EPA has not provided a schedule beyond these 18 pesticides, but expects Agency learning, process improvements, and program capacity (including staffing and budgets), to inform future timelines.

ESA Workplan Update

On Nov. 16, 2022, OPP released their *ESA Workplan Update: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions (Workplan Update)*. The Workplan Update describes EPA's overall approach to mitigating ecological risks in registration review; provides a menu of mitigation measures the Agency intends to use across a range of pesticides to reduce exposure to nontarget species; explains how EPA will use its web-based system *Bulletins Live! Two (BLT)* to post

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold
Published in Growing Produce | January 25, 2024

geographically specific mitigations for species; and updates other existing strategies EPA is using to expedite ESA implementation. Importantly, unlike mitigations to further EPA's FIFRA obligations, mitigations to further its ESA obligations are governed by the ESA standard, which does not include a risk-benefit analysis. For additional details on the Workplan Update, a summary is available [here](#).

Vulnerable Species Pilot Project

On June 22, 2023, OPP released the Vulnerable Listed Species Pilot Project: Proposed Mitigations, Implementation Plan, and Possible Expansion (VSPP). The VSPP identifies mitigation measures for 27 federally threatened and endangered species with limited ranges that are particularly vulnerable to pesticide exposure. EPA developed geographically-specific mitigation for these species that would be incorporated into BLT and accessed via an interactive format (StoryMaps) that provides geospatial information about the location of each of the 27 pilot species. EPA seeks to expand the VSPP to include additional species, and to consider how similarities and differences among species may affect the mitigation.

For the VSPP, EPA provided mitigations to avoid pesticide exposures in areas where the pilot species occur and to minimize pesticide transport via spray drift and runoff/erosion from the application site to those areas. EPA's goal is to reduce the pilot species' exposures to conventional pesticides from non-residential outdoor uses of those pesticides. The VSPP focuses on implementing early protections, before EPA has made effects determinations or completed ESA consultations with the Services.

EPA intends the mitigations to apply to the majority of conventional outdoor-use pesticides, except for rodenticides and avicides. Therefore, EPA proposed one set of mitigations that would apply to all of these outdoor-use pesticides, "regardless of their differences in exposure or potential effects." VSPP at 4. This "simpler" approach, according to EPA, improves EPA's confidence that the mitigations could potentially reduce the likelihood of future jeopardy or adverse modification determinations for the majority of conventional-use pesticide applications. EPA intends to release an amended version of the VSPP in September 2024.

Herbicide Strategy

On July 24, 2023, EPA released the Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides (Herbicide Strategy). The Strategy describes proposed early mitigations for approximately 400 listed plants and 500 listed animal species, as well as designated critical habitats, to reduce potential impacts from the agricultural use of conventional herbicides. Herbicides are an important tool used by growers to [prevent or eliminate weeds](#) that would otherwise compete with crops for light, moisture, and nutrients, affecting the quality and quantity of produce.

The draft Herbicide Strategy was developed to identify protections for hundreds of endangered species at once and to do so much earlier in the pesticide registration process using an approach that EPA believes is more efficient for them to implement. The Herbicide Strategy will likely serve as a model for future strategies for different classes of products (insecticides, fungicides, etc.). The general decision framework for a particular herbicide involves the following steps:

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold

Published in Growing Produce | January 25, 2024

- **Identify population-level impacts:** Determine which groups of plant species are expected to have the potential for population-level impacts from direct exposure to herbicides, and which groups of animals could be affected because they rely on listed plants for their diet or habitat. If at least one group of listed species is potentially impacted, then proceed to the next step to identify mitigations that would apply.
- **Identify type and level of mitigation:** Determine the level of mitigation measures that would apply to reduce exposure via drift and/or runoff/erosion. Mitigation measures are identified specific to an herbicide active ingredient, formulations, use site, application parameters, and maximum use rates.
- **Identify geographic extent of mitigation:** Determine the spatial extent of the mitigation measures that would apply. In some situations, mitigation would apply to target the areas where groups of listed species occur. In those situations, EPA expects to use its web-based system, BLT, to post geographically specific mitigation for listed species.

The Herbicide Strategy includes a menu of potential mitigation measures to reduce listed species' exposure to [spray drift](#) (e.g., downwind buffers, larger spray droplet size, maximum windspeed cutoff) and runoff and erosion (e.g., contour farming, cover crops, terracing, mulching, residue and tillage management, grassed waterways, vegetative filter strips) from agricultural uses of conventional herbicides. A points system is proposed and more points (equating to necessary mitigations) are needed when crops are grown closer to endangered species.

EPA and FWS are considering whether a pesticide programmatic consultation, or other efficiency measure similar to the proposed Herbicide Strategy can be used in the development of a programmatic consultation process. A programmatic approach, according to EPA, would protect the listed species most impacted by herbicides more quickly, accelerate the agency's ability to meet its ESA obligations, and, thus, reduce the legal vulnerability of EPA's pesticide decisions, ensuring the continued availability of important pest management tools.

Guidance for Registrants for New Actives, New Outdoor Uses, and Registration Review

The Pesticide Registration Improvement Act of 2022 (PRIA 5) requires EPA to “develop, receive comments with respect to, and finalize guidance to registrants regarding analysis necessary to support the review of outdoor uses of pesticide products under the ESA.” The Guidance to Registrants on Activities to Improve the Efficiency of Endangered Species Act Considerations for New Active Ingredient Registrations and Registration Review provides guidance on actions that applicants can take to facilitate EPA's development of effects determinations for new active ingredients or registration review decisions. This final guidance is intended to help applicants address potential effects to listed species for new active ingredients, including proposing mitigation measures as part of the application package. EPA has released a similar draft guidance that provides similar guidance, but is intended for new uses of existing conventional pesticides and biopesticides that are intended for outdoor uses.

These guidance documents recommend actions applicants can take to better inform potential mitigation measures before submitting applications to EPA. The recommendations include: identifying the action area and routes of exposure, performing and initial spatial overlap with endangered species, proactively

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold
Published in Growing Produce | January 25, 2024

identifying mitigation measures, and addressing risks associated with all active ingredients in the proposed product.

More Actions to Protect Endangered Species Are Expected

The Pesticide Action Network North America and the Center for Biological Diversity sued EPA in 2011, alleging that EPA violated ESA section 7 by failing to consult on the effects of hundreds of pesticide products stemming from approximately 30 active ingredients. After years of litigation in this “megasuit,” on Sept. 12, 2023, the U.S. District Court for the Northern District of California approved a settlement agreement in which EPA commits to additional actions to protect endangered species.

While EPA has been quite active in releasing new guidance documents and strategies, the Agency recognizes that there is more work to be done to meet all their legal obligations. Pesticide manufacturers and growers should be prepared to adopt to the early mitigations and requirements EPA is proposing as the Agency seeks to become compliant with all its obligations.

HUNTON ANDREWS KURTH

Watch for New Substantial Pesticide Restrictions From EPA

By Brian Levey, Nancy Beck, Andrew Turner, Javaneh Tarter, Matthew Leopold

Published in Growing Produce | January 25, 2024

Brian Levey is a Counsel in the firm's Environmental group in the firm's Washington D. C. office. Brian assists clients in navigating complex permitting and compliance issues that arise under a host of federal environmental statutes and regulations. He can be reached at [+1 \(202\) 955-1629](tel:+12029551629) or blevey@HuntonAK.com.

Nancy Beck is a Director of Regulatory Science in the firm's Environmental group in the firm's Washington D. C. office. Nancy provides industry leaders with advice related to the impact of environmental policy, including chemical regulations and compliance programs, applying her in-depth knowledge and applied public health experience as a PhD toxicologist. She can be reached at +1 [202-419-2076](tel:+12024192076) or beckn@HuntonAK.com.

Andrew Turner is a Partner in the firm's Environmental group in the firm's Washington D.C. office. Andrew has significant experience in the natural resources space, focusing on wetlands, endangered species and the marine environment. He can be reached at [+1 \(202\) 955-1658](tel:+12029551658) or aturner@HuntonAK.com.

Javaneh Tarter is a Senior Attorney in the firm's Environmental group in the firm's Washington D.C. office. Javaneh draws on her experience as in-house counsel and in private practice to assist clients with chemical and environmental regulatory and compliance matters. She can be reached at +1 [\(202\) 419-2108](tel:+12024192108) or jtarter@HuntonAK.com.

Matthew Leopold is a Partner in the firm's Environmental group in the firm's Washington D.C. office. Matt advises and defends clients across industries with the strategic insights as former General Counsel for the US Environmental Protection Agency, former General Counsel for the Florida Department of Environmental Protection and a former environmental litigator at the US Department of Justice. He can be reached at +1 (202) 419-2041 or mleopold@HuntonAK.com.

Reprinted with permission from the January 25, 2024 issue of Growing Produce. https://www.growingproduce.com/crop-protection/watch-for-new-substantial-pesticide-restrictions-from-epa/?utm_source=gp&utm_medium=linkedin&utm_campaign=2401. Further duplication without permission is prohibited. All rights reserved.