

# Endangered Species Act Consultation: EPA Releases the Revised Method for Biological Evaluations of Conventional Pesticides



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On March 12, 2020, the U.S. Environmental Protection Agency (EPA) published the Revised Method for National Level Species Biological Evaluations of Conventional Pesticides (the “Revised Method”).

The Revised Method guides EPA’s Section 7 Consultation requirements for the registration or reregistration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Though identified as an “iterative” guidance document, EPA’s action finalizes a proposal put forth to the public in May 2019.

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) in order to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical habitat].” Id. § 1536(a)(2); 50 C.F.R. Part 402. This is commonly referred to as “Section 7 Consultation.”

FIFRA, which is found at 7 U.S.C. §§ 136 et seq., provides for the federal regulation of pesticide distribution, sale, and use. EPA must register each pesticide that is distributed, sold, and ultimately used in the United States. During the initial registration or in reregistration, applicants must demonstrate, and EPA must determine, that the pesticide’s approved uses will not “cause unreasonable adverse effects on the environment.” Id. §136a. EPA’s registration and reregistration actions are “agency action” that triggers the ESA’s Section 7 Consultation requirement.

Accordingly, the Revised Method documents EPA’s process for completing a biological evaluation (BE) in order to “assess the effects of the [registration or reregistration of a pesticide] on listed species and designated critical habitat.” Revised Method at p. 6. In short, the BE is an effects determination under Section 7 Consultation. EPA’s biological evaluation process is set forth in two steps:

Step 1 – Step 1 of the BE is focused on a pesticide’s “approved uses,” as defined on the product label of the pesticide’s active ingredient. During Step 1, EPA will identify which listed threatened or endangered species, and designated critical habitat, may be affected by the pesticide at the level of the individual and whether it warrants a “may effect” or “no effect” determination. Id. at pp. 10-11. Any product triggering a “may effect” determination for impacts to a species or critical habitat must continue through Step 2 of the biological evaluation.

Step 2 – In Step 2 EPA determines whether an active ingredient’s approved uses is: “not likely to adversely affect” (NLAA) or “likely to adversely affect” (LAA) an individual of the listed species or designated critical habitat. *Id.* at p. 11. An NLAA determination can be made if the pesticide’s effects on an individual of the listed species or habitat is “insignificant,” “discountable,” or “completely beneficial.” Each term is defined in the Revised Method. In contrast, an LAA determination is appropriate when “it is reasonable to conclude, based on the weight of the evidence, that an individual is likely to be adversely effected.” *Id.*

An NLAA determination by EPA requires concurrence from USFWS or NMFS, as appropriate. An LAA determination by EPA triggers formal consultation with the relevant Service. This formal consultation process requires more in-depth landscape level analysis by the Service entity.

EPA notes explicitly that “[t]he Revised Method for conducting BEs are not a regulation and, therefore, do not add, eliminate or change any existing regulatory requirements.” Moreover, “[t]he guidance is not binding on either EPA or any outside party, and the EPA may depart from the guidance on a case-by-case bases where circumstances warrant without prior notice.” *Id.* at p. 8. Despite the disclaimer, the new method is sure to draw much scrutiny and, perhaps, a legal challenge. The battle lines around consultations for pesticide registrations are long and well-marked.

A copy of EPA’s final Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides can be found [here](#).

<https://www3.epa.gov/pesticides/nas/revised/revised-method-march2020.pdf>