

# THE NATIONAL LAW REVIEW

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## EPA Signs MOA on ESA; Establishes Interagency Working Group

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Friday, February 2, 2018

On January 31, 2018, Scott Pruitt, the Administrator of the U.S. Environmental Protection Agency (EPA), announced the establishment of an Interagency Working Group to Coordinate Endangered Species Act (ESA) Consultations for Pesticide Registrations and Registration Review. EPA, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service (NMFS) (the Services) signed a Memorandum of Agreement (MOA) on the establishment of the working group. The stated purpose of the working group is that it “will provide recommendations to EPA, FWS, and NMFS leadership on improving the [ESA] consultation process for pesticide registration and registration review (‘pesticide consultation process’) and will ensure that the new process is recorded and formalized as appropriate.” The working group’s action plan includes the following:

1. Analyze relevant statutes, regulations, and case law. The Working Group will review the statutory requirements under ESA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the case law that has developed on the intersection of ESA and FIFRA; and existing regulations for the pesticide consultation process.
2. Review past ESA pesticide consultation practices to learn lessons from recent experience and review current and previous pesticide consultation practices to identify problems and areas for improvement, as well as best practices that should be used in future pesticide consultations.
3. Prepare recommendations to improve scientific and policy approaches to ESA pesticide consultations. For example, the Working Group will develop a streamlined process for identifying which actions require no consultation, informal consultation, or formal consultation. The Working Group will also help provide clarity as to what constitutes the “best scientific and commercial data available” in the fields of pesticide use and ecological risk assessment, which EPA and the Services are required to use under ESA section 7(a)(2).
4. To the extent that current authorities and practices do not allow for the timely and accurate review of pesticides consistent with governing authorities, the Working Group may memorialize its recommendations for a revised regulatory framework, including addressing agency responsibilities, recommended technical approaches, and recommendations for new regulations, a memorandum of understanding, or other appropriate documentation.



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### Commentary

Like others before them, the Trump Administration is embarking on a journey to address the problem of how to integrate ESA assessment and consultation requirements with the FIFRA registration process. This directive will help organize a senior level effort to coordinate activities of EPA and the Services and, like past efforts, at the senior management level there will likely be at least a recognition that something needs to be done to fashion a

more efficient and predictable process. Currently ESA reviews add months and years to the registration review process and, to date, that process is followed by seemingly inevitable litigation challenging the EPA decision as not sufficient to meet ESA requirements.

The result has been an exhaustive, time and resource intensive [initial set of "pilot" biological opinions](#), and a very long list of promised consultations resulting from past litigation cases. Currently, the workload already committed will be virtually unattainable for a number of years, and as EPA plans to have ESA assessments as part of the registration review process for older pesticides (as well as for future new product applications), the budget and staffing implications are staggering. Meantime, agricultural stakeholders, including pesticide manufacturers and grower groups who use pesticides, fear that the current process might result in the loss or delay in the introduction of needed pest control products.

This is the context for the current attempt to devise an integrated, more efficient process to have any realistic chance to fashion a process which meets the requirements of both statutes. We wish any and all participants good luck and constant senior political level involvement -- they will likely need much of it.

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**Source URL:** <https://www.natlawreview.com/article/epa-signs-moa-esa-establishes-interagency-working-group>