

**ALTERNATIVE CONSULTATION AGREEMENT
FOR IMPLEMENTATION OF OPTIONAL ALTERNATIVE CONSULTATION
PROCEDURES**

**U.S. ENVIRONMENTAL PROTECTION AGENCY
U.S.D.I. FISH AND WILDLIFE SERVICE
U.S.D.C. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:
NATIONAL MARINE FISHERIES SERVICE**

I. Purpose

This agreement is designed (1) to support implementation of the counterpart regulations found at 50 CFR section 402.45 which set forth circumstances under which it is appropriate for the Environmental Protection Agency (EPA) to make the determination that an action under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is not likely to adversely affect (NLAA) listed species or designated critical habitat, as these terms are used within the context of the Endangered Species Act (ESA), without additional informal consultation with the Services or written concurrence from the Services; and (2) to ensure that EPA's ecological risk assessment approach will produce effects determinations that reliably assess the effects of pesticides on endangered and threatened species (listed species) and critical habitat pursuant to section 7 of the ESA and implementing regulations, that appropriately identify actions that are not likely to adversely affect listed species or critical habitat, and that are consistent with effects determinations that otherwise would be made by the Services. Throughout this agreement, "Service" or "Services" shall refer to the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), as appropriate. This agreement only applies to EPA's approach to assessing the possible ecological risks of pesticide use to listed species and critical habitat under 50 CFR section 402.45, and does not limit EPA's discretion with respect to assessing the possible ecological risks of pesticide use to other species.

II. Goals and Objectives

This agreement is intended to accomplish the following:

- Establish an alternative consultation agreement that satisfies the requirements of 50 CFR section 402.45, so that EPA may fulfill its obligations under the ESA using the authorities in that section;
- Establish detailed procedures for the effective implementation of the authorities provided in the counterpart regulations found at 50 CFR section 402.45;
- Streamline the consultation process by reducing workload and paperwork currently

required for those FIFRA actions that are not likely to adversely affect listed species or critical habitat while maintaining the species protections afforded by regulations in subparts A and B of part 402;

- Ensure a nationally consistent process that allows flexibility to deal with site-specific issues.

III. Guiding Principles

The ESA sets forth the goal of protecting and recovering threatened and endangered species and the ecosystems upon which they depend. It places responsibility on all Federal agencies, including the EPA and the Services, to meet that goal. FIFRA is intended to insure that the use of any pesticide will not result in unreasonable adverse effects on the environment. The Services and EPA are entering into this agreement to affirm a partnership to enhance the realization of the goals of both Acts. This partnership will also seek to efficiently and effectively fulfill the requirements of section 7 of the ESA.

The primary principle underlying this agreement is cooperative partnership. The ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's biological diversity.

IV. Authorities

(A) Fish and Wildlife Service and National Marine Fisheries Service Authorities

This agreement relates to the following authorities of the Services: the Endangered Species Act of 1973, as amended (16 U.S.C. §1531 *et. seq.*).

(B) Environmental Protection Agency Authorities

This agreement relates to the following authorities of EPA: the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §136 *et. seq.*).

V. Provisions and Understandings

(A) Procedures to Ensure the Adequacy of EPA's Not Likely to Adversely Affect Determinations Under the Endangered Species Act.

The Services and EPA have carefully reviewed the approach EPA uses to assess the potential impacts of pesticide use on listed species and designated critical habitat, including the manner in which EPA will make NLAA determinations. The Services have made suggestions for changes to EPA's approach, which EPA has adopted to the satisfaction of the Services. Based on this programmatic evaluation of EPA's methodologies, EPA prepared a document entitled "Overview of the Ecological Risk Assessment Process in the Office of Pesticide

Programs” (January 2004) (Overview). This Overview in part discusses an approach to assessing ecological risks associated with pesticide use that is being implemented within OPP. The Services and EPA agree that the procedures described in this Overview (together with future amendments to these procedures made pursuant to provisions described in section V(D) of this Agreement) will produce determinations that reliably assess the effects of pesticides on listed species and critical habitat pursuant to section 7 of the ESA and implementing regulations. The Services have further concluded that the approach used by OPP is designed to produce effects determinations that appropriately identify actions that are not likely to adversely affect listed species or critical habitat, and that are consistent with those that otherwise would be made by the Services. (Letter from S. Williams and W. Hogarth to S. Hazen, January 2004.) Since January 2004, the Services and EPA have continued to meet and discuss improvements to EPA’s ecological risk assessment process as it relates to listed species and critical habitat and the application of the process described in the Overview to specific pesticides. EPA and the Services agree that the provisions in this paragraph fulfill the requirements of 50 CFR section 402.45(b)(2)(i).

(B) Procedures to Ensure that EPA and Service Staff are Adequately Trained to Fulfill Their Responsibilities Under this Agreement.

The Services and EPA will undertake the following activities to provide training to appropriate staff in both the Services and EPA. The Services and EPA agree that the following training will be adequate to enable EPA and Service personnel to carry out their respective roles under this agreement.

(1) The Services shall provide EPA staff with ESA section 7 training deemed adequate by the Services to ensure that such EPA staff can fulfill their responsibilities under this agreement prior to making any NLAA determination under 50 CFR section 402.45;

(a) For EPA, “appropriate staff” means senior risk analysts who are responsible for ecological risk assessments for FIFRA actions;

(b) Upon completion of the training, each EPA staff person shall be certified as having received the training. Certification shall be considered current provided that certified staff receive periodic, updated training deemed necessary by the parties to this agreement.

(2) Service staff reviewing section 7 pesticide consultation packages will be encouraged to attend training to further their understanding of the processes employed by EPA in the administration of FIFRA actions;

(3) In addition to the training described above in paragraph (1), the Services and EPA may design an advanced section 7 training course to address any additional considerations associated with the evaluation of FIFRA actions.

All effects determinations made by EPA pursuant to 50 CFR section 402.45 will be reviewed and concurred on by an EPA staff member who holds a current certification as having received appropriate training. EPA and the Services agree that the provisions in this paragraph fulfill the requirements of 50 CFR section 402.45(b)(2)(ii).

(C) Procedures to ensure that EPA considers, in a timely and appropriate manner, new information relevant to its prior ESA determinations regarding pesticides.

The Services and EPA agree that new information is likely to become available that may be relevant to prior EPA NLAA determinations, and that such information should be evaluated initially by EPA. Therefore, after EPA makes an NLAA determination under 50 CFR section 402.45, the following procedures will be used to ensure that EPA considers any new information relevant to such prior determinations in a timely and appropriate manner.

(1) “New information” refers to relevant information that was not considered by EPA in making its prior ESA determination that an agency action involving a specific pesticide is not likely to adversely affect listed species or designated critical habitat. Such information could include:

(a) information revealing that use of the pesticide may affect listed species or designated critical habitat in a manner or to an extent not previously considered, including any take;

(b) modification of the prior agency action in a manner that causes an effect on listed species or designated critical habitat that was not previously considered; and

(c) listing of a new species or designation of critical habitat that may be affected by, but was not considered by EPA in connection with, the prior agency action.

(2) The Services may review the published scientific literature to identify new information relevant to prior EPA NLAA determinations under section 402.45 and provide citations or copies of such literature to EPA’s Office of Pesticide Programs.

(3) EPA will publish a notice in the Federal Register describing how the public may bring new information that may be relevant to prior EPA NLAA determinations to EPA’s attention. In addition, the Notice will remind pesticide registrants of their obligations under FIFRA section 6(a)(2).

(4) EPA will review all new information, together with other available, relevant information, to reassess the potential effects of the pesticide on listed species and designated critical habitat. If EPA determines the pesticide is likely to adversely affect any listed species or designated critical habitat, EPA shall initiate formal consultation with the appropriate Service, using the appropriate procedures of either subpart B or subpart D of 50 CFR part 402.

(5) EPA will provide an annual report to the Services identifying all “new information” that EPA received relating to a prior NLAA determination and summarizing EPA’s

evaluation of such information. At the request of a Service, EPA will provide documentation of its evaluation of such information.

EPA and the Services agree that the provisions in this paragraph fulfill the requirements of 50 CFR section 402.45(b)(2)(iii).

(D) Procedures to ensure EPA incorporates advances in the science of ecological risk assessment in making ESA determinations regarding pesticides.

The Services and EPA agree that it is important to collaborate in the development of any possible changes to the approach that EPA uses to make determinations regarding the impacts of pesticides on listed species or designated critical habitat. The objectives of this section of the agreement are to provide for the continued improvement of the approach by which EPA assesses pesticides in making ESA determinations regarding pesticides, and to ensure that any future changes to EPA's approach continue to produce effects determinations that: reliably assess the effects of pesticides on listed species and critical habitat pursuant to section 7 of the ESA and implementing regulations; appropriately identify actions that are not likely to adversely affect listed species or critical habitat; and are consistent with those determinations that otherwise would be made by the Services. Accordingly, EPA and the Services have agreed on the following procedures:

(1) EPA and the Services will meet on an annual basis, or more frequently as may be deemed appropriate, with the intention of identifying new research and other activities that might improve EPA's current approach to assessing the potential ecological risks posed by use of a pesticide to listed species or designated critical habitat.

(2) EPA will notify the Services in writing if EPA proposes to make changes to its approach to assessing the potential ecological risks posed by use of a pesticide to listed species or designated critical habitat or to determining whether such risks are not likely to adversely affect a listed species or designated critical habitat, as described in EPA's Overview or amendments to that document. EPA's notice will describe and explain the reasons for the proposed change. The Services will promptly review any proposed changes and will provide written responses indicating whether the Services support implementation of the change, together with the reasons for their positions. EPA will not make any changes to its approach to assessing the potential ecological risks posed by use of a pesticide to listed species or designated critical habitat, as described in the Overview document, until the Services concur on the change or, if the Services do not respond, until 90 days after providing notice to the Services, whichever is sooner. If a Service objects to the change, EPA will not make the change pending resolution of the disagreement, and any disagreement may be referred to the Coordination Communication, and Implementation Panel (CCIP) described in section V(G) of this agreement. The Services and EPA may agree to extend the time lines in this paragraph.

(3) The Services may recommend that EPA change its current approach to assessing the potential ecological risks posed by use of a pesticide to listed species or designated critical habitat or to determining whether such risks are not likely to adversely affect listed species or designated critical habitat. EPA will promptly review any recommended changes and will provide a written response indicating whether it supports implementation of the change, together with the reasons for its position. In the event that EPA does not respond within 90 days or does not support the implementation of the change, the disagreement may be referred to the CCIP described in section V(G). The Services and EPA may agree to extend the time lines in this paragraph.

(4) Recommendations to change EPA's current approach to assessing the potential ecological risks posed by use of a pesticide to listed species or designated critical habitat may be reviewed by EPA's Scientific Advisory Panel (SAP) before implementation by EPA. If a recommendation jointly developed by EPA and Services is deemed appropriate for review by the SAP, the Services will assist in any presentation to the SAP upon request by EPA.

EPA and the Services agree that the provisions in this paragraph satisfy the requirement in 50 CFR section 402.45(b)(2)(iv).

(E) Procedures EPA will use to inform the Services of its NLAA determinations.

EPA will make available to the Services and to the public all NLAA determinations it has made with respect to pesticides under the provisions of 50 CFR section 402.45(a), by maintaining a list of such determinations on its website. EPA will maintain the necessary records to allow the Service to complete all necessary program evaluations. At all times, EPA and the Services will comply with the requirements of FIFRA and applicable EPA regulations regarding the handling of any confidential business information (CBI) proposed to be exchanged in connection with the Services' program evaluations.

EPA and the Services agree that the provisions in this paragraph satisfy the requirement in 50 CFR section 402.45(b)(2)(vi).

(F) Oversight of EPA's Implementation of section 402.45 of the Counterpart Regulations and the Alternative Consultation Agreement

This oversight process will provide a programmatic review of EPA's exercise of its authority pursuant to 50 CFR section 402.45. The Services and EPA agree that periodic evaluation of EPA's implementation of the procedures described in this agreement will serve to ensure NLAA determinations made by EPA appropriately identify actions that are not likely to adversely affect listed species or critical habitat, and are consistent with those that otherwise would be made by the Services. The program review will be conducted at mutually agreed time intervals consistent with the provisions of 50 CFR section 402.45(b)(2)(v) and will involve examination of previous NLAA determinations made by EPA. The Services and EPA agree that the following procedures will be followed when any such review is conducted:

- (1) The periodic program review will evaluate a sample of the past NLAA determinations made by EPA subsequent to execution of this agreement. In order to complete program reviews within the time frame described in paragraph (2) below, once the Services choose the NLAA determinations to review, EPA will promptly provide documentation of the basis for those determinations. To the extent possible, EPA will try to provide such information within two weeks. The review will examine how EPA developed its determinations, consistent with the ESA and the applicable section 7 regulations, with particular focus on the extent to which EPA followed the methodologies set forth in the Overview when developing its determinations. In conducting the review, the Services and EPA will take into consideration any changes to EPA's Overview adopted through the procedures described in section V(D) of this agreement.
- (2) The parties will start the initial program review at the end of the first year following signature of this agreement. The Services will begin the review by promptly identifying the sample of NLAA determinations to evaluate. Recognizing that EPA will provide documentation of the basis for those determinations as described in paragraph (1) above, the Services intend to conclude the review within 90 days of identifying the sample of NLAA determinations to evaluate, but may extend such period by mutual agreement with EPA.
- (3) A national evaluation team (Team) will be comprised of individuals from the Services and EPA. The Service Team members will be responsible for conducting the evaluation and writing any resulting report, with the EPA members available to provide any needed context and clarifications, and to answer questions on particular NLAA determinations. The Team shall include at least one individual from each party who is also a member of the CCIP described in section V(G) of this agreement.
- (4) Each Team member shall have received the training outlined in section V(B)(1) of this agreement, or its equivalent.
- (5) The review of the sampled NLAA determinations completed in fulfillment of this requirement will be summarized in a written report detailing the findings of the review, including any appropriate recommendations regarding either programmatic or specific NLAA determinations. EPA will respond in writing within 60 days to any findings or recommendations from the Team.
- (6) Oversight and monitoring reports prepared under this agreement shall be made available to the public to the extent permitted by law.
- (7) At all times, EPA and the Services will comply with the requirements of FIFRA and applicable EPA regulations regarding the handling of any CBI proposed to be exchanged as part of this oversight process.

The Services and EPA agree that the provisions in this paragraph satisfy the requirements in 50 CFR section 402.45(b)(2)(v).

(G) Coordination, Communication, and Implementation Panel

The Coordination, Communication, and Implementation Panel (CCIP) consists of appropriate personnel from the participating agencies. The CCIP provides coordination for and oversees the implementation of all aspects of this agreement. Its functions include, but are not limited to:

- (1) Maintaining and updating process guidance;
- (2) Addressing issues about process implementation;
- (3) Incorporating/identifying improvements and revisions into the process;
- (4) Identifying scientific or risk assessment issues to be addressed through the process described in section V(D) of this agreement;
- (5) Facilitating reaching consensus on particular issues at any level upon requests by personnel at that level; and
- (6) Reviewing and evaluating, at least on an annual basis, the agreement and its implementation by the three agencies.

At all times, EPA and the Services will comply with the requirements of FIFRA and applicable EPA regulations regarding the handling of any CBI proposed to be provided to the CCIP in connection with its activities under this agreement.

The Services and EPA agree that the provisions in this paragraph satisfy the requirements in 50 CFR section 402.45(b)(2)(vii).

VI. Revisions or Amendment to Agreement

This agreement is not a legally binding regulation and the Services and EPA may jointly decide to revise, amend, or act at variance from the agreement without conducting notice and comment rulemaking under section 553 of the Administrative Procedure Act. If, however, the Services and EPA do decide to revise, amend or vary from this agreement, the Services and EPA will provide an explanation for the actions taken.

VII. Reservation of Agency Positions

No party to this agreement waives administrative claims, positions, or interpretations it may have with respect to the applicability or the enforceability of the ESA or FIFRA.

VIII. Obligations of Funds, Commitment of Resources

Nothing in this agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise committing any of the agencies to actions for which it lacks statutory authority. It is understood that the level of resources to be expended under this agreement will be consistent with the level of resources available to the agencies to support such efforts.

IX. Nature of Agreement

This agreement is intended only to improve the internal management of EPA and the Services and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. This agreement does not modify existing Agency authorities by reducing, expanding, or transferring any of the statutory or regulatory authorities and responsibilities of any of the signatory agencies.

X. Effective Date; Termination

This agreement will become effective upon signature by each of the parties hereto. The Services and EPA agree that any party may terminate or suspend the agreement at any time, as applied to that party, subject to the following:

(A) Termination or suspension shall be based on a reasonable belief that the agreement, or implementation of the agreement, has not and likely will not achieve any one of the following criteria:

- (1) produce effects determinations that reliably assess the effects of pesticides on listed species and critical habitat pursuant to section 7 of the ESA and implementing regulations;
- (2) produce effects determinations that appropriately identify FIFRA actions that are not likely to adversely affect listed species or critical habitat;
- (3) satisfy relevant requirements of the ESA or implementing regulations; or
- (4) satisfy relevant requirements of FIFRA or implementing regulations.

(B) No party shall terminate or suspend the agreement as applied to that party unless the following actions have been undertaken:

(1) Any issue deemed a potential cause for termination or suspension shall initially be submitted to the CCIP described in section V(G) for possible resolution.

(2) No termination or suspension shall be effective unless and until 21-day advance written notice has been provided to the Secretary(s) and Administrator, respectively, of each party to the agreement, and such notice shall not be submitted until at least 21 days after the issue has been submitted to the Assistant Secretary(s) and Assistant Administrator for resolution.

(C) Notwithstanding the above, this agreement may be terminated or suspended by mutual written agreement of the parties at any time.

(D) A party that suspends this agreement as applied to that party may reinstate the agreement upon written notice to the other parties.

(E) Termination or suspension of this agreement by any party does not create a need to consult informally or to obtain concurrence on any NLAA determination made under section 50 CFR section 402.45 before the effective date of that party's withdrawal.

XI. Conclusion of the Services

It is the opinion of the Services that the NLAA determinations EPA makes consistent with this agreement and 50 CFR section 402.45 will comply with the substantive and procedural requirements of section 7 of the ESA.

XII. Signatories (page 1 of 3)

Dated: 8/25/04

Susan B. Hazen

Susan B. Hazen
Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances,
Environmental Protection Agency

XII. Signatories (continued, page 2 of 3)

Dated: 8/25/04

Steve Williams

Steven A. Williams
Director, U.S. Fish and Wildlife Service

XII. Signatories (continued, page 3 of 3)

Dated: 8/26/04

William T. Hogarth

William T. Hogarth
Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration