



Legislative History of Section 1010 of the 1988 Amendments to the Endangered Species Act

Prior to 1981, EPA requested consultation with the Fish and Wildlife Service (FWS) on a case-by-case basis for newly registered pesticides. The process was very slow and only new pesticides underwent consultation. In response to these procedural faults, EPA and the FWS moved to a cluster approach to consultation in which all pesticides registered for the same use pattern were addressed at the same time.

Between 1982 and 1985, EPA received FWS Biological Opinions (BiOps) on a number of discrete clusters, including range land or pasture land, forestry, and mosquito larvicides. The Endangered Species Protection Program (ESPP) that EPA proposed in response to these BiOps featured the requirement that pesticide registrants amend their labels to refer users in specified counties of concern to county bulletins detailing use limitations designed to protect listed species. Based on FWS information on the location of listed species, EPA drafted maps of species' locations to be placed in county bulletins.

The proposed ESPP generated enormous public concern over the potential impact on agricultural land use, inaccuracies in the maps, inadequate public review and comment, and the need for additional education and training programs. This concern was sufficient enough for the Congress to enact Section 1010 of the Endangered Species Act Amendments (ESA) of 1988.¹ In § 1010, the Congress mandated that the ESA compliance for EPA's pesticide regulatory program be designed "to minimize the impacts to persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators." This provision directed EPA, in cooperation with the Secretaries of Agriculture and the Interior, to do the following three things:

- Inform and educate producer groups about any proposed pesticide labeling program or requirements that may be imposed for the ESA compliance purposes and provide notice and opportunity to comment on the proposal,²
- Conduct a study, with USDA and Department of the Interior, to identify a means to implement a labeling program that would comply with the ESA and allow the continued production of food and fiber commodities, and
- Report to the Congress on the results of the study including the best available methods to develop maps of areas in which listed species are present and use restrictions apply, and best available alternatives to mapping.

The overriding themes of Section 1010 are the need to educate agricultural producers on, and include them in the development of ESA use restrictions on pesticides, and to minimize the restrictions' impacts on producers.

¹ Public Law 100-478, 102 Stat. 2313 (1988); 7 U.S.C. 136a note. Section 1010 is a "stand-alone" provision and is not, in fact, an amendment to the ESA.

² Section 1010 specifies that this notice and opportunity to comment applies to each of the following:

- An identification of any pesticide affected by the labeling program;
- An explanation of the proposed restriction or prohibition on the use of the pesticide;
- An identification of the geographic areas affected by the restriction or prohibition;
- An identification of the effects of the pesticide on the listed species; and
- An identification of the listed species with a general description of the geographic areas where the species are located and pesticide application would be restricted, prohibited, or otherwise limited in its use.

The text of §1010 and its legislative history are replete with strong expressions of Congressional intent to limit the adverse impacts on agriculture of ESA compliance in pesticide registrations. The Conference Report elaborates:

Agriculture is a major part of the U.S. economy and provides nutritional sustenance for our population and exports abroad.... The Conferees, therefore, anticipate that...[the federal agencies shall] implement the Endangered Species Act in a way that protects endangered and threatened species while minimizing, where possible, impacts on production of agricultural foods and fiber commodities.³

In the 20 years since passage of this provision, concerns related to the potential adverse impacts on agriculture appear to have been set aside by EPA and the Services.

³ H.R. Conf. Rep. No. 100-928, at 24-25, *reprinted in* 1988 U.S.C.C.A.N. 2738, 2741-42. *See also* 134 Cong. Rec. S12559 (Sept. 15, 1988) (Sen. Burdick's summary that the conference report "recognizes that protection of endangered species is important, but also that agriculture is a major part of our economy and provides sustenance for our population"); 134 Cong. Rec. S9761 (July 25, 1988) (remarks of Sen. Mitchell that "[a]lternatives are to be identified which would protect endangered or threatened species from pesticides and which would minimize any adverse effect on the production of food and fiber," thereby "minimizing impacts to the farmers, ranchers, and foresters who earn their living from food and fiber production"); 134 Cong. Rec. S9756 (July 25, 1988) (similar remarks of Sen. Byrd).