

Center for Regulatory Effectiveness

March 25, 2003

Public Information and Records
Integrity Branch (PIRIB)
Office of Pesticide Programs (OPP)
Environmental Protection Agency (7502C)
1200 Pennsylvania Ave., NW.
Washington, D.C. 20460-0001

RE: Supplemental CRE Comments on Docket ID No. OPP-2003-0010

Ladies and Gentlemen:

The Center for Regulatory Effectiveness (CRE) submits the following supplement to its initial comments in the above-referenced docket.

First, CRE believes that, under 50 C.F.R. § 402.07, EPA should be the “lead agency” in inter-agency Endangered Species Act (“ESA”) consultations regarding pesticides. In this context, the lead agency is the one that prepares “not likely to adversely affect determinations.” The factors for determining a lead agency are “the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action.” *Id.* EPA’s registration or reregistration of pesticides is a very time-consuming and data-intensive process. The data base developed by EPA’s Pesticides Office during its pesticide review includes extensive data on environmental effects, including effects on endangered species and critical habitat. The EPA Pesticides Office has developed considerable expertise regarding pesticides’ environmental effects, including their effects on endangered species and critical habitat. By contrast, the Fish and Wildlife Service and National Marine Fisheries Service (the “Services”) are over-worked, under-staffed, and must devote their resources to many issues in addition to pesticides. Under these circumstances, the only effective way to administer a pesticides ESA consultation process is for EPA to be designated the lead agency.

Second, EPA, subject to the conditions set forth in the following paragraph, should be authorized to make “not likely to adversely affect” determinations without prior consultation with, or prior concurrence from, the Services. EPA has the expertise to make these determinations, and they could be made with relative ease during EPA registration or re-registration. Allowing EPA to make

these determinations without prior consultation with or concurrence from the Services would greatly streamline the consultation process.

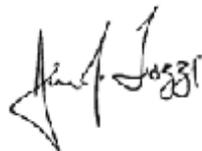
Third, the Services should have the right to object to an EPA “not likely to adversely affect” determination, thereby triggering formal consultation and a biological opinion by the Services, if they can demonstrate that the EPA determination is procedurally flawed , arbitrary and capricious, or not based on “the best scientific and commercial data available.”

Fourth, the Services should provide EPA with a draft biological opinion if formal consultation and a biological opinion are required. In all instances, EPA should have the right to comment on a draft opinion. EPA should also have the right to object to a draft biological opinion if EPA can demonstrate that the opinion is procedurally flawed, arbitrary and capricious, or not based on “the best scientific and commercial data available.” Such an EPA objection and demonstration could require a revised biological opinion by the Services that corrects the errors.

Fifth, the Data Quality Act’s provisions requiring pre-dissemination review, and establishing an administrative request for correction process, apply to all disseminations of information resulting from the ESA consultation process. As part of their pre-dissemination review, EPA and the Services should consult with others that have a substantial interest in the ESA consultation before issuing “not likely to adversely affect” determinations and biological opinions. CRE’s initial comments emphasized the need for reliable, accurate and validated tests in order for the ESA consultation process to meet Data Quality Act requirements. In addition, CRE understands that various models are often used during ESA review. Any models should also be demonstrated to be reliable, accurate and validated.

Thank you for the opportunity to submit the these supplemental comments on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim J. Tozzi". The signature is stylized and cursive.

Jim J. Tozzi
Member, CRE Board of Advisors