



Episode Title: Wildlife Protection and Responsible Pesticide Use -- A Conversation with EPA's Jake Li

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Lynn L. Bergeson (LLB): Hello, and welcome to All Things Chemical, a podcast produced by Bergeson & Campbell, P.C. (B&C[®]), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I sat down with Jake Li, Deputy Assistant Administrator (DAA) for [the Office of] Pesticide Programs (OPP) in the U.S. Environmental Protection Agency's (EPA) Office of Chemical Safety and Pollution Prevention (OCSP), and my colleague Jim Aidala, Senior Government Affairs Consultant here at B&C. My guests have a lot in common. They both have served (or in Jake's case is serving) in senior policy positions at EPA in the chemical space. And they both have a really keen, sophisticated understanding of the legal, policy, and commercial implications of the Endangered Species Act [ESA].

ESA was enacted about 50 years ago. It is intended to preserve and protect imperiled species. As anyone in this space knows, however, implementing the ESA and balancing the need for pesticide use has proven to be a challenging issue for literally decades. Our conversation today covers what the Administration is doing to balance wildlife protection and responsible pesticide use. We will discuss what the Federal Interagency Working Group is doing in this regard and consider how the newly issued ESA Workplan is helping EPA OPP meet its ESA obligations. Now, here is my conversation with Jake and Jim.

Good morning, gentlemen. Jake, it is just wonderful to have you on as a guest today. You are in an amazing position at EPA as DAA, and we're going to hear a lot about what you've been up to. Jim, always a pleasure to listen to what you have to say about topics near and dear to you relating to FIFRA [Federal Insecticide, Fungicide, and Rodenticide Act] and ESA. So welcome, gentlemen.

Jake Li (JL): Thank you so much, Lynn. And it's always wonderful to speak with you and Jim. And this is actually a great crew of experts here, and I'm really excited to dive into some of the issues in our OPP.

James V. Aidala (JVA): Right, now, no small task, just even with that small introduction there, Jake. But we'll find out here in a minute.

LLB: Exactly. Well, Jake, you've been in the position of DAA for about a year now. And I saw you on the ABA [American Bar Association] program a week or so ago. I've been listening to the comments, reading the trade press, and by all accounts, you are doing a super job. Maybe you can give our listeners just a little background about the ESA and why it is such a dominant part of your job.

JL: Lynn, thank you for the compliment. You're correct: I've been here -- actually, in a week and a half, it's going to be exactly a year -- and having a lot of fun here, and I think doing a lot of important work. Michal Freedhoff, who is my boss, and I are, I think, really excited every day we come to work here.

In terms of -- a little bit of background about the Endangered Species Act and myself. On the ESA, first, the reason this is such a pertinent and really controversial issue is because when EPA registers pesticides, we have to comply with the ESA. And in our Workplan we put out recently, we were very candid that, historically, we have met our ESA obligations for far less than 5 percent of all of the FIFRA actions we've taken. And that's resulted in a lot of lawsuits against us, an increasing number of lawsuits. I think as a practical matter for growers and other pesticide users out there, it's not hard to imagine that some court in the future, impatient or upset with the lack of progress that EPA has made, decides to vacate one of our FIFRA decisions, and that basically results in us having to freeze or suspend parts of the FIFRA program until we can bring it into compliance with the ESA, which will, in all likelihood, take years, given how long it takes to complete the evaluation for just one pesticide active ingredient today. So this is absolutely a very urgent issue. The Administrator of EPA is well aware of the need to make progress on this for all of the reasons that we all know. And part of the reason I'm here is to roll up my sleeves with our entire team and make as much progress as we can in my limited time here.

LLB: Great. Thank you, Jake. And, Jim, in thinking back on your extraordinary career, I'm reminded that you were a political deputy under the Clinton Administration. And if I recall correctly, you were brought in to address another urgent exigent situation called, "Hey, Jim. Fix the Delaney Clause." You and Jake share a lot of similarities in terms of the challenge that your mandate presents, the urgent consequences derivative of not meeting that goal. Maybe you can give a few words to our listeners on how your position and Jake's position are similar and perhaps different.

JVA: Well, yes, exactly. I had a little PTSD there with the thing about shutting down the program because that was kind of the fear: if the Delaney Clause -- and it had been through a court determination. No, you really have to do it. Whatever else somebody else says, that's smart, dumb, good, bad, or in between, you got to fix it. Congress can fix it. You can't by bureaucratic declarations. And so, now, it's a little bit different, which only makes it tougher -- right, Jake? -- the idea of having ESA legislation is sort of off the table for a lot of reasons, and that could be a separate day-long event to talk about that.

But the point is that you come in with what seems like a narrow mandate, which -- people are not stupid about it. I mean, it's a big mandate. And again, as you said in your introduction, Jake has done a great job so far. But the whole point is what else is behind the curtain with that? So, for example, all the staff that you have at EPA, and there's really dedicated, really sharp people that have been working on this for a long time. You've got

other agencies you've got to deal with, the Hill. You've got to deal with all these other moving pieces, which just make it difficult.

We were lucky when we ended up getting [the Food Quality Protection Act] (FQPA) as legislation that was actually and ironically, in a good sense, passed unanimously in a roll call vote in the House when Newt Gingrich had already taken over. But this is not an FQPA webinar podcast; this is ESA. And if ESA can be fixed, even with a little bit of that energy - - and there *is* a lot of new energy. I think we're going to talk about a little bit later -- new and re-newed energy to try and get it fixed, which is part of the mandate, as I see it, from the outside looking in for Jake. And he can tell us about it. But there really is a renewed spirit and energy to try and get it done. And that's great. That's a great start. And I was lucky because I had a lot of contacts. I had come from the Hill, I knew a lot of the stakeholders and committee world and the ag grower groups, and along with NGO [non-governmental organization] stakeholders and all that. And again, that's just a great recipe. And Jake has that and more in terms of trying to find a solution set. So by the way, that also means that if you fail, then that's a bad thing.

JL: That's right. It's all on me.

JVA: But make sure you fix this before you leave. You just talked about you have your one-year anniversary. I assume you could ask about your step increase; for anyone who is a career fed, they know what that means anyway, but I won't go into that either.

LLB: Let's focus on the ESA Workplan, and before we get to some of its provisions and the bottom line set out in the plan, maybe I can ask each of you gentlemen to tell me why is the ESA broken? I mean, what in a nutshell is the problem (starting first with you, Jake, and then on to you, Jim)?

JL: I guess I'll maybe recharacterize it slightly in a sense that I think the current -- so the ESA itself is, in my mind, it is what it is, right? I don't personally view it as broken, but more that how the ESA applies to this very, very, very challenging set of consultations that the drafters of the ESA absolutely never imagined is what creates this really challenging intersection. And the reason it is so challenging -- there are several reasons, but in the interest of concision, let me just offer two.

One is -- I see this day-to-day now -- if you think about the number of species in the United States, which is roughly 1,700 endangered species, multiplied by the number of pesticide active ingredients and the number of other FIFRA actions, like registration of new uses, label amendments, experimental use permits, and so forth. If you multiply that intersection, your result is enormous. I think that's what makes this issue so difficult. Just the sheer numbers make it so different from, for example, a highway repair project or a cell phone tower construction, right? Or even many of the other fairly complex ESA projects I've worked on in the past.

And for listeners who don't know me, a lot of my background is on ESA. I worked for over a dozen years in the environmental community on ESA issues, and by and large, nothing even comes close to how difficult the pesticide-ESA issue is. And I think a big part of that is because of the numbers. And then the flip side of that is sitting here at EPA, if we really are to be fully complying with the ESA, we have nowhere near the level of staff that are needed to do that. We actually, as part of the Workplan you mentioned earlier, Lynn, completed for the first time or maybe the first time in many, many years an assessment of how much time as an FTE [full-time employee] it takes us to complete each FIFRA action that needs to

comply with the ESA. And if you multiply that by the number of actions, on average, every year, you get an office that needs to be many times bigger than our current office size. You can just see, there are currently some hard walls that we're running against in terms of our ability to come into full compliance.

LLB: Jim, maybe you can either say, "Yes, I know. Those are the same challenges that existed back in 1993 and going forward." But what's your take? It's maybe not the statute as constructed, but it's implementation and the complexity of managing so many different cooks in the kitchen, as it were, with the Services [the U.S. Department of the Interior's (Interior) U.S. Fish and Wildlife Service and the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA)] and EPA all trying to discharge their duties. What say you, Jim?

JVA: Well, two things. One is I push back a little bit that it's an enormous task, Jake, because it's ginormous.

JL: Right.

JVA: Number one. And then it appears broken. And the reason it appears broken is in part because you've got -- EPA has been doing ecological assessments. And I don't think anybody at EPA, when they approved a pesticide over the past many decades, literally going back -- I've always thought about this in terms of, "When would you say the break point is when chemicals that really cause problems have been, for whatever reason and however they got there, and changing regulations and politics and all the things that go into it, when does this get better?" About the kind of pesticide products that have been, for whatever reason again, as I said, allowed on the market. And it goes back pretty far. EPA has been doing ecological assessments at great cost to the industry, at great cost to the Agency, of review time, and lawyering, and all the things to be compliant with FIFRA.

That's -- again, I'm sure it's part of the fundamental disconnect from a certain perspective that -- "Hold it! I thought FIFRA protected the environment. Now you're telling me there's all this extra work to do." And I'm not saying you don't have to do it. I'm just saying that's part -- to the, quote, "average citizen," if there is such a construct out there in reality, that it doesn't make sense. I thought we were already protecting the environment when we filed the label and EPA did all the work they have to do. And there are chemicals that have been prohibited and uses that have been prohibited over the years to protect environmental impact, including species, even though we didn't call it ESA compliant. So it's not -- that doesn't mean it's broken. That just means, okay, how do we -- and I think that's what Jake just talked about -- How do we adapt all that to be clearly compliant? And whatever you think of it, within the world of the jot and tittle of the regulations and requirements of the other laws, how is that going to work?

Absolutely the net result -- and this is one of the things (and Jake, you already hit on it). EPA's OPP does not just the sexy chemicals that you read about, maybe in the newspaper. Very little of what you read about is really what the program does, because they do so many other things, as you said, 5,000 actions; do the math. You didn't officially complete that mathematical equation of 5,000 actions, times 1,700 species, times the amount of work that currently goes into it. And I think partly maybe you don't want to have a fixed number of the FTE numbers is because you may need something the size of EPA as a whole right now. And you're never going to get that. You know that, and that means you have to figure out a way to still comply with both laws.

Such is the task. And all I can say at the end of that sentence is, “Better you than me.” Fixing Delaney was easy. No, I’m serious. Fixing Delaney was relatively easy, and it wasn’t easy, but relatively so because, again, it was -- the idea from the start that it had to be legislative. Again, the good news is the context of it is stakeholders are realizing we all have a reason to fix this problem, and then, the task begins. That, I think, is what you’re presented with. Again, even the Workplan is refreshingly candid and refreshingly, well, whatever you want to call it, admissions against interest, I guess. I’m not a lawyer. I work for a law firm; I’m not a lawyer. But I know both of the other two folks here on the podcast are lawyers. And that was not just forthcoming in a kind of legal sense, but forthcoming in a bureaucratic sense that, yes, we’ve all said -- we would nod our head -- we got to fix this problem. The Workplan goes a long way to at least articulate, and honestly, not saying, “And we’re going to fix it, and we’re going to fix it by Tuesday by doing these three things.” It’s got a lot of open-ended ideas in there, and “to be determined,” and we all have to try and come to find a way to make sure it works.

LLB: Let’s focus a little more on the ESA Workplan, and for our readers -- or listeners, rather -- who have not looked at this document, you may wish to do so because it’s an excellent read. And as Jim notes, it’s both candid, in that it really does lay out the reasons why it could take literally hundreds of years to complete ESA assessments, but also ambitious, in that it talks about new approaches and new considerations to try to address implementing the ESA. So Jake, perhaps you could summarize for our audience just some of what you see as the really important takeaways and conclusions and messages from the document.

JL: Yes, it’s a great question, Lynn. And actually, Jim stole a lot of my thunder, so that’s a really insightful region of the Workplan. But you are spot on in terms of some of the most important and salient parts of the Workplan. Let me just phrase it in my own words, if that’s helpful to our audience. So the first thing is, Jim, you’re spot on. We really strive to be candid and transparent. As you all know, agencies say they try to be transparent with our stakeholders. I think we really did that in a somewhat unusual way in the Workplan, in terms of we actually decided to make ourselves vulnerable, and we offered a *mea culpa* in confessing that we have not met our ESA obligations for well over 95 percent of our past FIFRA decisions.

That is not the type of language you typically hear federal agencies put out there. But we thought it was really important to say that because on this issue, there is no way in my mind to make progress unless we can maximize trust among all of the stakeholders, including the environmental groups who are challenging our FIFRA decisions. And we can’t be in a state of denial about the challenge or about our past compliance issues. So I think we really needed to put that out there to say, “That’s what the past was, and we have to move beyond it. But we’re also not in denial that we have dug a hole for ourselves and we’re trying to dig ourselves out of it.” Jim, that was very deliberate, being candid, and also really, you also mentioned trying to avoid what’s called oftentimes bureaucratese, right?

So we really tried to write this in a fairly layperson’s terms because the audience is actually quite broad. It’s not just people who are versed in this issue. We have a lot of Hill staff who are interested [but] don’t have a lot of background on this, want to help figure out a solution. So we wrote this for a really, really wide audience. So that’s the first thing.

The second thing is I think we really need to reinvent the process for how we do consultations for pesticides and address our resource deficits. And specifically, for those who are looking through the Workplan, I encourage you just to glance at Appendix A. Usually the appendices are not the most important parts of a document. Appendix A is one

of the most important parts of the Workplan, and we spent a lot of time putting Appendix A together. And what Appendix A lists is the roughly 57 chemicals for which we have current or upcoming court-enforceable deadlines to complete our ESA determinations.

We do not complete those determinations using our current resources and processes until we're well into the 2030s. In other words, if we got no more resources and we adopted no changes to our policies and processes, we're well into the 2030s before we can just get through the first 57 chemicals. And then the Services have to produce biological opinions (BiOp) for presumably most of these chemicals. And then we at EPA have to amend our labels to incorporate the mitigation measures. So that puts us very likely into the 2050s. And by then, what are we, in our third cycle of registration review for many chemicals? And yet we've only addressed 57 chemicals, mostly from the first cycle of registration review.

I think Appendix A, to me, really illustrates the need not just for EPA to work on the resource challenge, but [to] figure out how we make more efficient use of our resources. And that has to involve far better partnerships and coordination with the Services and USDA. I will say in this Administration, I feel we've been working really well with both the Services and USDA. We meet regularly, actually every two weeks. There is a meeting of all of the career managers in all four agencies and me, and we just roll up our sleeves. And there's no substitute to just doing the hard work, prioritizing this issue and just talking through it. I think that's been a really important change in terms of maybe compared to the past, the ability to work constructively with our sister agencies. So that's the second thing.

Third thing is actually something, Jim, you also said. I would put it as prioritization because -- actually, Lynn, you also said this, right? -- that it's going to be decades, very likely, until we could come into full compliance. In the here and now, what are we supposed to do? Well, we're not going to pretend like we can fix this problem overnight. Michal and I didn't come into our positions as wizards that can change around, reverse an ocean liner overnight. So what we've done is to prioritize: what are the highest risk situations that we're going to focus on the next few years, and to really get real-world protections in place for species. And I actually think that is a subtle shift in how we think about meeting success. I would say as a former stakeholder, what I saw from EPA oftentimes was success is measured in terms of how many biological evaluations (BE), how many BiOps did we complete?

When you look at the numbers now, we don't have time to wait ten, 15 years for a BiOp on some of these chemicals. We have species being exposed weekly, and especially some really vulnerable species. And I absolutely do not want to be responsible for the extinction of any species on my watch. So that's why we are really prioritizing, trying to get some on-the-ground conservation in our upcoming registration review and registration decisions for the species that we identify or that Services believe are most vulnerable. And just as a quick preview, later this month, we are expecting to release a list of -- a tentative list; it's not going to be the complete one -- of species that we believe are highly vulnerable to pesticides and species that we're going to work with other federal agencies on to get some mitigation measures in place in the next few years.

This is one way that we're prioritizing this issue and trying to measure success in terms of how many mitigation measures do we actually adopt for the species that are most impacted by pesticides, as opposed to saying, how many BiOps are we completing? Because at the end of the day, the BiOps are going to be, as I said earlier, well into the 2050s, 2060s. And NGOs are not going to let us wait that long to get protections in place. So we almost have to flip the script a little bit and say, how can we get protections in place first? It may not be everything, right? It may not be everything that's needed to completely avoid jeopardy or

adverse modification. But if we can get -- I'm just going to make this number up -- 60 to 70 percent of the way there using our FIFRA authorities -- and we do believe we have FIFRA authorities that allow us to adopt protections for endangered species.

Then at least we have some defense on the merits. If we are challenged, we're not in the position of saying, "Well, we did nothing," right? We at least got some protections in place. And then the other part of the argument is, given our current resources, there's really no way we can get around to consulting on those chemicals until a number of years from now. But it doesn't mean that the purpose, the spirit of the ESA isn't at least being partially fulfilled right now. So that's a real change in how we're thinking about compliance. And we have spent a lot of time internally, as in -- just in my 11 months here, we've had five all-day workshops, just within OPP, on ESA issues. So that's how much I'm working with our staff and Office of General Counsel (OGC) to figure out how do we actually move forward on some of these issues. And we have a number of really exciting proposals that we're going to release in the next year or so. The Workplan just lays out the big umbrella picture, but there's a lot of details that we're going to be proposing to stakeholders and asking for public comments on. We might try to do a workshop or some type of listening session later this year to get input.

Let me pause there, since I've been talking for a while. But to me, those are some of the most important themes of the Workplan.

JVA: I mean, not just an ambitious agenda and an impressive list of things that are different. One sidebar for a second is just when you mention the ocean liner, again, I used to describe the job -- and I think a lot of jobs like it, I put it that way -- I used to describe the job as trying to turn the Titanic around in a sea -- in a stiff wind, in a sea of molasses. So it's not just trying to turn an ocean liner around. You didn't add the wind and the molasses part. So maybe you'll get there.

JL: That's right. The molasses. That's right. That's right. There is a good distinction between the inertia, right? Against moving a huge ocean liner and then the fact that it's stuck in molasses.

JVA: Yes, right. But at the same time -- not to be totally cynical about it -- you say ever moving forward. So the bureaucracy does try, notwithstanding all those things you talked about before. And the bean counting about, well, we did this many BiOps and that many of this and that. In the earlier days, that would be how many regs we did or whatever in terms of questions about registration review status, that eventually, just by way of history -- just tell one of my many grandpa, grandpa stories. But the original deadline to get what we now call re-registration done was 1975 from the 1972 amendments. So in a certain sense, we didn't really get that completed until 2006. And in a certain way still, even that wasn't quite a full completion. So yes, it was a 30-year process. You outlined a 30-year process to get the first 57 done.

At the end of the day, it's everything from it just makes you look stupid as a bureaucracy. People don't wake up -- this is something you just remind people in speeches; you can feel free to adapt this one for your own version -- but we don't wake up in the morning and say, "Hey, let's go be stupid today." So at the same time, sometimes it looks that way, right? Here you have this process that -- you just told me -- is going to take hundreds of years. "Excuse me, sir. I thought the government was trying to do the right thing," or whatever. You can imagine all the political rhetoric you can wrap around that.

One of the things that's most interesting is the way that interacting with the agencies to get some candor began not just from internal -- we talked about that in the Workplan -- but from the other agencies, if you can talk about that a little bit. These are the species most vulnerable, and we think we can at least get some of the first steps to protect species more. And I think that goes a long way. And this is -- I'm saying that as a sentence, but it's really a question. Will that go a long way toward having people have more faith that EPA's pesticide registration program is protective of species, even if it's, quote, 60 to 70 percent or whatever -- some measurable fraction by some metric? But it's more than what you've got so far, because -- given that the law's been on the books for 50 years almost, and sincere efforts have been started at least since 2003 for a lot of different reasons. You can use that as a milestone. And at the same time, we have a lot of paper produced and not a lot of species protection in the field. I think that's what you're really reacting to, right?

JL: Exactly.

JVA: Yes. So okay. How do we do better, and not just a little bit better, but a lot better? And if we show that we are able to at least take off just using the metric you mentioned, 60 to 70 percent, that's more than half and that's a whole lot better than zero. And then you can build on that credibility. And again, I'm going to use the word momentum to try and say, "And by the way, I don't know, whoever is going to be in charge at that point is going to be -- and it is in the current Workplan." But we technically are on the hook, right? The law says 100 percent. Okay. That's to be determined -- not to be dismissive -- just to say 60 and 70 percent is better than none. And again, that sounds overly simple, but that would be a huge change, at least to me. And I'd love to hear your reaction on that. If you got there, the 60 to 70 percent protection, within a reasonable period of time -- I use a general term -- that's a sea change to the way it's been done in the past. And I think that's what you're saying.

JL: Yes, it is. And the way I think about it, Jim and Lynn, is progress, not perfection, at least in the near to medium term, right? Because perfection is 100 percent compliance, and on average, we're looking at roughly 500 of these new uses, label amendments, Section 18s, experimental use permits. There's just no way we're going to get around to full ESA compliance for all of those actions in the next few years. There's almost a psychological part to this whole issue, which is, if our goal is -- if we're measuring ourselves by perfection on a day-to-day basis, I think we get into this paralysis situation on ESA and FIFRA. And as a former stakeholder, sometimes I've noticed that the agencies seem stuck, that the problem is so overwhelming. And then stakeholders and others believe, well, this was just never meant to be. No need to worry about pesticides and endangered species. Let's create some sort of exemptions. And for us now here at EPA, we're really thinking about this in terms of how do you take this, using your words, ginormous problem and really break it down into a whole bunch of manageable chunks?

And we're really just solving each chunk at a time, knowing what the big picture is. And if you think about the issue that way, well, here's chunk one and two. We're going to try to solve this in the next two to three years. And then we're going to move on to chunk three and four and then four and five. I actually think that's really important internally for morale because it creates little victories and successes. And I think that's so important on the issue where it's so easy to get demoralized and bogged down.

So let me then go backwards and answer two questions you posed earlier, which is, do the Services and USDA, what do they think about this approach that we've been talking about here of breaking things down into smaller chunks, prioritizing them, getting real-world conservation? I generally think they're on board with this. I don't think anyone, at least I've

been working with in the federal family, thinks we can solve all of this, for all species, for all pesticides.

And I think a key breakthrough was the ability to roll up our sleeves a little bit, go through all of these ESA documents, and figure out what are the species that truly are at the highest risk from pesticides, and focus on those first. And when we say focus, we mean actually getting mitigations in place. The metric assessed is not just the BiOp. In fact, I would say the more important measure of success is: are we getting effective mitigations in place that are also practical for growers and other pesticide users to implement? Because, as I'm sure both of you know, the federal government does not have eyes and boots on the ground in all places and all times.

And the only way in my experience that ESA protections are actually implemented is if the people who are responsible for implementing them can actually do so. And especially when we're talking about private lands, it's really hard to monitor and enforce outcomes. So we really want to make sure these mitigations are ones that there's generally support for. And so that's why, actually later this year, we're going to be releasing our plans for this interagency mitigation pilot project. And the whole idea of that pilot project is to demonstrate through roughly 15, 20 species -- so it's a small number of species -- but this is to demonstrate a process. It's not so much about the species or not *just* about the species, I should say. A process for how do you even identify the most appropriate mitigation measures for endangered species? How do you go through a process of engaging pesticide users and registrants to figure out which of those mitigation measures are actually practical? Because you can imagine, if I were a species expert, I would give you a list of maybe 30 mitigation measures. And maybe half of those you can actually do, right? You could find a farmer who would raise their hand and say, "Yes, I'm willing to do that."

So there has to be the second level of filtering to say, "Okay, we have to do something. Here's a menu of things that are out there. What can we actually get in place?" And then getting those mitigation measures adopted through registration review. So you can imagine in the future that our [Proposed Interim Decisions] (PID) and [Interim Decisions] (ID) contain endangered species protection measures ten years before we're even on the hook for implementing a BiOp because we already know what are the expected mitigation measures for that species for certain classes of chemistry, right? That's where we're spending a lot of time right now. It's not just in developing BEs and working with the Services on BiOps. It's really taking almost five steps back and saying, "In the FIFRA process alone, given what we know about ESA species, what can we adopt right now for the highest risk species?" And I think that's a really fundamental shift in thinking.

LLB: Both of you gentlemen have done an excellent job of providing some clarity as to what the Workplan says. It's candid. It didn't pull any punches regarding what are the consequences of not getting this right. But what I am -- is a big believer in process. To me, the process is almost as important as the outcome that it hopes to achieve. And, Jake, you did a super job of letting us know that you're working closely with the agencies, you're working with OGC, you're working with your program staff.

What I'm less clear about, Jim, is what the regulated community is. How is it plugging into this process? Registrants appreciate that not getting this right will have some very draconian consequences with regard to understanding how long it will take to get a pesticide reviewed and registered. The lack of a predictable process is just super damaging commercially. For the user community, if some court ultimately decides that we're not meeting our legal obligations, users could lose access to a much-valued product out in the field.

The NGO community -- and Jake, I know that you've worked as a lawyer. You're a brilliant lawyer, and you understand the consequences of the law. You also worked in the NGO space for a while and appreciate that litigation is an option, but it may not be the best or only way to go. And truth be told, there might be not as many outcomes that are bringing success or improvement to the process as a consequence of litigation. So my question with that big windup is how is the regulated community, both from the registrant and the user community, plugging into the Workplan as a practical matter? Are there opportunities for discussion, collaboration, shared views on what might work with respect to new approaches to implementing ESA? Maybe, Jim, you might be the better person to start that conversation out.

JVA: Sure. And it is different. It's two very large different communities, obviously, the registrants and then the customers of the registrants, the growers. But for the registrants, I think what's interesting -- and Jake, you just mentioned a little bit about small steps and incremental successes then help build confidence and at least raise the morale of the team. And I couldn't agree more. Just because otherwise everyone yells at us about fill-in-the-blank: missing deadlines about acts, in this case, ESA. And we're understaffed and don't have enough resources, and we're doing our best, whether that's at the Services, and the folks that work there or at EPA and OPP or even within separate divisions of OPP. It goes all the way down the line.

The small success is helping with feeling successful, and building morale is non-trivial -- in any organization, I'm not trying -- this is not a management seminar. But at the same time, it goes for the companies and farmers and not necessarily in that order, but just separately again. For the registrants, the idea that this is a pathway forward, and it may take more money, so that may mean more [Pesticide Registration Improvement Act] PRIA fees. And I think when you talk about -- maybe not talk about PRIA per se, but certainly budget needs and things -- and you hinted at that already -- but okay, this is doable. It doesn't have to take 18 years to get to a decision.

And I think there have been some notable successes in that category. In my observation, my opinion would be the malathion situation where, okay, this wasn't just a big, messy bunch of paper and it went out and it really didn't do anything. I think people feel that -- depending on the registrant community -- that the malathion situation is one, well, some successes were embedded in there, that we sat down with the registrant -- in that case, sat down with the Services and EPA and came to some improvements and things like that. And I'd love to hear your opinion on that, Jake, in a second.

And then also even Enlist, where Enlist is an important product. I'm not trying to endorse any product or any company and all that, although our number is 202-557-3800. The point is that the successes -- some small successes breed bigger ones, right? Those are improvements, and it shows it isn't just this is an intractable problem. It'll never get solved. Now for the growers, it's a little bit less cooked. And what I mean by that is it's not like grower groups haven't known that ESA is a problem for this issue set, but at the same time, that -- what's that really going to mean? And, Jake, you were hinting at some of this. What are -- not just the appropriate measures? And so somebody can come up with the most important species; someone can come up with some appropriate measures, and we'll even defer on whose definition of appropriate.

But if you're a farmer, you want to know, am I going to be able to use these tools? What are the kind of things I'm going to need to do to do, whatever it takes, in terms of complying with the law? That might mean, for example, prohibitions. I'm just talking FIFRA before

ESA, right? I can't use ten pounds an acre; I can only use one ounce an acre. I can't use it at certain times; I can't use it in certain ways. That's what we're used to as growers about FIFRA restrictions. And is this just going to be a whole bunch of weird new stuff that I think won't work and isn't going to do any good? Or, as you just said, they're appropriate measures in what can work in the field, what is reasonable, and at the end of the day, one of the -- and we came up with this when we started the first implementation phases of the FQPA, quote, new requirements for tolerance assessments. And guess what, A, there's going to be disagreements. And B, it may mean at the end of the day, you're not going to be able to do some things that you were able to do before.

But that is the requirements for we, EPA, speaking in that voice as a regulatory agency, you have to do to comply with the law. But we're not just going to try and say, "You must." And you mentioned that the government doesn't have an ability to see everybody everywhere -- thankfully, at some level (not to sound like Rand Paul). But then the other thing is there are satellites, black helicopters, and microwaves everywhere, but we won't even talk about that. The government's not trying to dictate everything, but we have to comply with the law, right?

And that's kind of what the court cases, by the way, say that you talked about at the beginning of the session here. We are out of compliance at EPA, and we've been found to be so by the courts. And now it's a sort of "Now what? So what?" And that's what all this discussion is about. I did have one question, by the way, Jake. On the pilot project, when do you think that's going to come out? If I either missed it or just to emphasize that for the audience?

JL: Yes. So let me take that question and then go in reverse. For the pilot project, our plan is to actually announce the species for the pilot project and our overarching plans for the pilot project later this month, so probably around the last week of this month. It's still a moving target, but it's -- I would definitely say just a few weeks away. We've been working actively on it. I've been working with our team to write everything up for the website. So right around the corner.

And then obviously there's all of the follow-up and implementation through the pilot project. And there will be opportunities for stakeholder engagement, especially end user engagement throughout. So hopefully that sort of answers that particular question.

Let me go back, Lynn, and talk about your broader question of where are the doors that are open under the Workplan for stakeholders to engage.

LLB: Exactly.

JL: And let me answer this very briefly from the perspective of the regulated community, starting with the registrants. So I'm going to provide in my mind just a really quick list of a few things. So first is, on individual FIFRA decisions, engaging earlier on ESA is absolutely something that we're already starting to do with some of the pilot chemicals. On the rodenticides, the carbamates, the [organophosphates] OPs, Jim, as you said -- you mentioned in lists, so I won't talk about that again. But those are just, in recent months, a few examples of instances where we're engaging with the registrant earlier to figure out what is feasible. Here's the risk we're seeing for endangered species. What can be done? And that's not something that really has happened in any consistent way in the past. We are hoping to normalize it in the future so that we don't get all the way down the road in a FIFRA or ESA decision and only then start talking about mitigation. That's one opportunity.

Second one under the Workplan is -- and this is toward, I think, the last quarter of the Workplan. We talked about this a little bit: a greater ability to provide data and analyses to support our determinations related to ESA. That can absolutely include usage data and can include helping us figure out effects on species that there's -- I recognize here at EPA, we need to provide more guidance on how to do that. I want all the listeners to know that is absolutely a theme in not just the Workplan but [also] how we talk about the future of ESA and FIFRA. Because, as I think, Jim, you predicted earlier, or maybe you did, Lynn; I forget who, but at least in the near term we're not going to get all the resources that we're going to need to solve this problem just through federal agency staffing. We're going to need the equivalent of essentially in-kind support from stakeholders to help with this. And we realize that we need to put out guidance on how stakeholders can help us. So that's actually a huge opportunity to engage under the Workplan.

Third thing is proposing mitigation. When we put out these lists of pilot species, of vulnerable species, to some degree, I'll say that the regulated community is somewhat put on notice that we're going to be drilling down on these species if we have FIFRA decisions that impact them, and it would be advisable to think about how best to address exposure to those species. That's another opportunity for us to basically make mitigation real, so to speak, by identifying, again, not all 1,700 species, but a smaller handful of a few dozen species to really get the ball rolling. That's number three.

Fourth is just providing feedback on the whole on broader policy changes. Earlier I mentioned that in registration review, we are trying to figure out how to get mitigation in place as part of a PID, even in a draft risk assessment phase, identifying some endangered species risk and starting to get public comment and engagement on those mitigations. The whole process for doing that is new, right? We've never really done ESA-specific mitigation at the PID phase, so we are going to lay out a process for how to do that and seek public input on it. That's an example of just a broader process and policy direction that we want to get input on under the Workplan.

Finally, the last thing I'll say from a registrant perspective is it's just not us at EPA, right? There's the three other agencies that have a really important role in all of this. I actually encourage all the listeners out there to think about what more can be done to engage with USDA and the Services. I see a lot of opportunities just from where I sit, so there's a lot there. Even though this was our Workplan -- EPA's Workplan -- there is a lot that can be done working with the three other agencies in collaboration with us.

And then just really quickly, in terms of the end users, Jim, as you said, one thing is a process for figuring out what's practical in terms of mitigation. I think that's a really important theme throughout the Workplan. We, I think, even put it in the Executive Summary. That's a challenging issue. I'll be candid because there's a lot of end users, and we at EPA cannot engage with every single one of them. So we're going to have to work through trade associations and others to figure out what is a process to do that efficiently. I don't think we've figured it out yet. I don't think anyone has figured it out yet, but I think we're going to have to work through that on a case-by-case basis, depending what the issue is. In my mind, that's a really important objective that we still need to figure out under the Workplan.

Second thing for end users is helping with usage data. As I think you've seen through the malathion BiOp from the Fish and Wildlife Service, usage data can be a really important determinant of the jeopardy adverse modification conclusions. If there are ways to get better usage data from end users, that can really help support the confidence of these

determinations. And the final thing I'll just say -- and this is not a comprehensive list -- is monitoring.

We have not talked about monitoring thus far, but it is a really important issue because there's a legal component to it, there's a practical component to it, there's a science component to it. And we have to figure out from a legal standpoint how to get some level of monitoring in place so that we know if there are, for example, spikes in pesticide usage in the future because of a pest outbreak that spike in usage doesn't create a jeopardy risk, right? If you're not monitoring that, then you don't know when that risk is created. And if a BiOp is challenged, there is a risk that a court will drill in on this issue. So those are just a small handful of the opportunities for stakeholders.

LLB: Gentlemen, we're running out of time. And I want to get to two additional topics. First, I'd like to ask Jake to explain the concept of compensatory mitigation, because I know that's a topic near and dear to you, Jake. And then to both of you gentlemen, what is the role of the Pesticide Registration Improvement Act (PRIA)? We're at PRIA 4 now, but PRIA 5 will be upon us in no time. And is there consideration of PRIA 5 as being a means to address the budget shortfalls that both of you gentlemen have addressed?

JL: Yes, absolutely. I'll be brief here. So compensatory mitigation. The role I see this is in many situations, it's impossible to completely avoid pesticide exposure to endangered species or their habitat, right? That's just not the nature of how pesticides are applied. There's drift, there's runoff. And in some of those situations, even if it's theoretically possible to completely avoid exposure, it can come at such a high opportunity cost for pesticide users that people just aren't going to do it, right? It's just -- so I think we have to figure out a way to say, "We've tried the best we could to avoid impacts, we've tried the best we could to minimize impacts, but there are some residual impacts. In order to comply with the law, we need to compensate for those impacts by doing good things for the species elsewhere."

That can include habitat restoration, it can include invasive species control, it can include maybe funding a captive reintroduction project. There are lots of things that can be done to help species that doesn't fit on a pesticide label. I think that's the way to think about it. As far as I'm aware, our program has only used compensatory mitigation once in 1983 for the peregrine falcon, and it's never used it again, even though compensatory mitigation is a staple of many, many, many other ESA consultations outside of the pesticide context. We are completely missing literally a third of the entire mitigation bucket because we've got avoidance, we've got minimization. Those are two of the three, and we're completely missing the third one.

LLB: Wow! That's pretty amazing.

JL: It is. Yes, it really is. You can think about the no net loss of wetlands goal under the United States. How is it that we can have no net loss of wetlands? It's not because we've just completely avoided all impacts to wetlands, right? It's -- I mean, development still happens. Wetlands are still drained, and so forth. That's just the nature of building highways and residential development, and so forth. It's because we can compensate for some of those losses by restoring wetlands elsewhere, protecting and building new wetlands. The same metaphor applies here. We're simply not taking advantage of this. It is really important for me in my time here, and it's because I have so much background in compensatory mitigation on other ESA projects, to figure out how to make it happen. We're in active discussions with some registrants. We're thinking about some interagency guidance or policy that we can issue to provide clarity on how someone would get credit for doing

compensatory mitigation. I'm really excited about this. I just think it's such a low-hanging fruit that we've never used before.

LLB: Got it. And PRIA?

JVA: Well, for PRIA, you can talk about it. The biggest thing about PRIA 4 is we soon need to start thinking about PRIA 5. I'll let you go, Jake. What do you hope to see in PRIA 5?

JL: Yes, I'll be brief, and I'd love to hear your response, Jim. PRIA 5, that is absolutely an opportunity for stakeholders, right? As you know, we can't lobby, we can't ask others to lobby, but we can provide technical assistance. We have been doing that actively on ESA needs to fully meet our obligations, so we've actually provided a whole technical assistance document. Unfortunately, I can't share it because it's really up to the individual Hill offices to decide whether to share it. But we have provided essentially a breakdown of what we think is needed for each type of FIFRA action to be fully ESA compliant, given our current processes. It's really up to the stakeholders to decide how much they want to incorporate the funding into PRIA for this type of work, and we've laid out different tiers of options. It's not an all or nothing 100 percent compliance or no compliance. There are different gradations, and it's like a menu, like the bronze, silver, and gold standard. There's that.

And the other thing I'll just say is the Workplan, I think, is really going to allow us to talk about a [fiscal year] (FY) 24 budget for ESA FIFRA that's a lot more detailed and just a lot more real than without the Workplan.

LLB: Yes.

JVA: I know we're getting ready to close here, but the simple thing is, I think -- and I'm certainly not speaking for the registrant community, but I have friends. Anyway, the point is that they realize that it's going to take more resources. They're willing to -- with a whole lot of ifs and caveats -- but, yes, we're all going to have to pay more. I think the ballpark -- at a minimum for some of the start in the current discussions -- as I've observed, again, and certainly a lot of other things could actually happen before it becomes a law -- but in the neighborhood of even a 30 percent increase in fees. Again, just from the fundamental PRIA starting point of, "Look, we want accountability. We want to make sure deadlines are real, predictable," whatever phrase, and that becomes a tougher issue than just saying it, because at the end of the day, until EPA is satisfied that the standards have been met, EPA is going to say, "Standards haven't been met."

And that's their job, and that's your job as a regulator. You have to do it, and if you don't do it, a whole bunch -- you're going to get in a lot of trouble -- just leave it that way. So obviously, it's all these moving pieces about more budget. You really could use probably *X* times more budget, let alone a third more. And even a third more is a non-trivial increase in terms of fees. People want to say, "What's your accountability for them?" All the arguments I know you've been hearing, but I'm saying that's the kind of operating set of some of the -- at least the initial bid, I guess, if you will -- of some of the ideas that we could maybe see those kind of changes. And if so, and said very politely, diplomatically, what do we get for it? And I don't mean guesses, because again, you can't guarantee an outcome, but again, more predictability. And how do we know it's really going to help this problem? And frustrations about no one wants to pay more taxes or more fees, but someone's got to pay the bill. I mean that, again, I'm certainly not speaking for any company, any industry, any anything, but that's kind of the -- my observation about the discussions that are heard around town.

LLB: And thank you for sharing that, Jim. And thank you both, gentlemen, for a truly in-depth, fabulous discussion on why the ESA is as challenging as it is and some of the wonderful opportunities that, Jake, you've identified through the Workplan, through optimizing better compensatory mitigation and the need for more resources to help us all get to a better place. Jake, the regulated community is lucky to have you, and we're appreciative of all that you're doing to rationalize this problem and fix it. Thank you. And Jim, your observations, as always, are spot on and very much appreciated. Thank you, gentlemen.

JL: Thank you so much, Lynn, for inviting me to this podcast interview. Jim, thank you so much for your insights and questions. The last thing I'll just say really briefly for listeners is we always welcome feedback, positive or negative, about our work, especially ESA work. And I personally invite feedback, good or bad, on this. I don't pretend like we have the perfect answer. I think this is frankly all a work in progress; we're building the plane as we're flying it, so to speak. And I think one of the most important things is to be constructive but candid with each other about what's working and what's not. I always welcome that feedback from you all and our listeners.

LLB: Appreciate that, Jake, and I'll use this occasion to ask you, where can our listeners get a copy of the ESA Workplan? I'm sure it's on the website, but if you could provide greater specificity, that'd be great.

JL: The easiest thing I have found is just to -- I do this myself -- just Google EPA ESA Workplan, and it's, I think, the first hit that comes up. That's a little easier than trying to memorize the entire hyperlink. And there's a four-page Executive Summary that's much faster to read than an entire 74-page Workplan. If folks have only five minutes, that's all you need to get through the Executive Summary.

LLB: Great.

JVA: And remember Appendix 1 because sometimes [the Office of Management and Budget] OMB doesn't review all the appendices, so you can get away with -- No! I'm just kidding.

But again, Jake, thanks for participating with us on the podcast. And it really -- at least I learned a bunch, which is harder to say at this age, doing this for so many years. So I appreciate that very much.

JL: Yes. Thank you both, and I hope to be able to see you in person in the not-too-distant future.

JVA: Right.

LLB: Agree. Thank you, gentlemen. My thanks again to Jake Li and Jim Aidala for speaking with me today about the ESA and the daunting challenges EPA faces in protecting and preserving endangered species while ensuring the responsible use of pesticides.

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