

April XX, 2021

The Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Gina Raimondo
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Martha Williams
Principal Deputy Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Benjamin Friedman
Acting Administrator
National Oceanic & Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

Re: Request to Expeditiously Complete Nationwide Pesticide Biological Opinions for Neurotoxic Organophosphate Insecticides

Dear Secretary Haaland and Secretary Raimondo,

On behalf of our organizations and our millions of members and supporters, we ask you to move forward and expeditiously complete the nationwide consultations for three highly toxic insecticides — chlorpyrifos, malathion and diazinon — under the Endangered Species Act. In December 2017, the National Marine Fisheries Service (“NMFS”) released a biological opinion that concluded the use of these three pesticides is jeopardizing the continued existence of the southern resident killer whale and 37 species of salmon, sturgeon and steelhead. Unfortunately, due to political interventions, NMFS wrongly agreed to delay and reinitiate consultation on this biological opinion — the most comprehensive, analytically rigorous biological opinion in the history of the Endangered Species Act — and issue a new biological opinion in 2022.¹ Meanwhile the EPA has taken no on-the-ground action to protect any of these imperiled species from these highly toxic pesticides at all.

Likewise, in October 2017 then-Deputy Secretary Bernhardt personally stopped all progress on the U.S. Fish and Wildlife Service’s (“USFWS”) efforts to complete its biological opinion on these three insecticides,² even though career scientists had concluded that chlorpyrifos is jeopardizing the existence of 1,399 endangered and threatened species, malathion is jeopardizing 1,284 species, and diazinon is jeopardizing 175 species.³ To date, the USFWS has demonstrated little progress in completing the biological opinions, nor has EPA taken on-the-ground actions to protect wildlife from these pesticides.

Specifically, we request that the USFWS and NMFS (the “Services”) release their revised draft

¹ U.S. EPA et al., 2020. *Progress Report to Congress on Improving the Consultation Process Required Under Section 7 of the Endangered Species Act for Pesticide Registration and Registration Review*, available at: <https://www.epa.gov/sites/production/files/2020-06/documents/second-esa-progress-reportfinal.pdf>.

² U.S. Dept. of Interior, 2019. *Investigative Report of Alleged Improper Influence by the Secretary of the Interior in the FWS' Scientific Process*, available at: https://www.doi.gov/sites/doi.gov/files/WebRedacted_AllegedInterferencebyDOISecretary_0.pdf.

³ New York Times, Eric Lipton, March 26, 2019. *Interior Nominee Intervened to Block Report on Endangered Species*, <https://www.nytimes.com/2019/03/26/us/politics/endangered-species-david-bernhardt.html> (accessed, Mar. 17, 2021).

biological opinions for all three chemicals public comment no later than June 1st, 2021. In order to help the public understand the validity of the Trump administration's actions over the last four years with respect to these pesticides, we also request that the Services provide the public with a concise and clear explanation and summary — as well as all available raw data to the fullest extent possible — related to the use and usage of chlorpyrifos, malathion, and diazinon. The Services should explain and demonstrate to the public how this “use and usage data” affected or altered the Services’ analyses in these biological opinions.

Releasing the draft biological opinions by June 1st is an eminently reasonable goal. With respect to malathion, USFWS promised both EPA and the pesticide manufacturers that a “draft biological opinion will be provided to EPA for its review and release for public comment on April 2020 and that a final biological opinion will be released on March 2021.”⁴ Recently, the USFWS has promised it will now release the draft opinion for malathion in April of this year. However, with respect to chlorpyrifos and diazinon, the USFWS has now been working on these two biological opinions for over four years and has made zero commitments regarding their completion.

While NMFS has stated that it will reissue a revised biological opinion on these three organophosphates by June 2022,⁵ we can only note that this does not preclude the agency from completing its work sooner than that — especially since the 2019 biological opinions were scientifically, factually and legally sufficient other than the political reality that the pesticide industry did not like the result. Given the highly imperiled status of the southern resident killer whales and the poor conservation status of numerous salmon and steelhead in the Pacific Northwest and elsewhere, it would seem only reasonable for NMFS to go faster and work harder to complete these biological opinions as soon as possible.

Finally, as noted above, we hope the Services act in good faith and with full transparency regarding these draft biological opinions. In 2019, Secretary Bernhardt forced the Services to engage in a long, costly — and likely futile effort — to obtain refined “use and usage data” to incorporate into its biological opinions. After over two years without a single public showing or explanation as to whether this effort was fruitful, we can only ask that the Services provide the public some explanation as to whether the “use and usage data” exist and whether the data were efficacious in improving the biological opinions.

Secretary Bernhardt believed it was acceptable to myopically limit the analysis in the biological opinions and only consider the unverifiable, anecdotal claims of the pesticide industry that “actual use” levels for chlorpyrifos are lower than what is being authorized by the label and vague promises that use would remain lower in the future. Under FIFRA, however, the user of a pesticide may legally use a pesticide in any manner that is authorized on the label. Or, as the EPA endlessly proclaims, “the label is the law.”⁶ If a pesticide like chlorpyrifos can be legally applied in a particular location a certain number of times and at a certain concentration, then the Endangered Species Act requires the Services must consider the real possibility that this will happen in the future, as this is the action authorized by the action agency.

⁴ Letter from Gary Frazer to Drexel Chemical Company, Oct. 12, 2018.

⁵ <https://www.epa.gov/sites/production/files/2020-10/documents/consultations-next-steps-ppdc-october.pdf>

⁶ U.S. EPA, 2017. Introduction to Pesticide Labels. <https://www.epa.gov/pesticide-labels/introduction-pesticide-labels> (last accessed Mar 15th, 2021).

As a clear legal matter, limiting the analysis in the biological opinion to the lower “use and usage data” obviously contradicts Section 7’s mandate — and Congress’ clear command — that the Service “give the benefit of the doubt to the species” in all consultations.⁷ Nonetheless, if the Services believe that their multi-year quest to obtain this valuable “use and usage data” instead turned out to be revelatory and enlightening, then surely they should share this newfound wisdom with the public so we can all celebrate this achievement.

Pesticides are designed to kill living things. Pesticides are in fact driving hundreds of endangered species closer and closer to extinction every day. Even in the worst days of the previous administration, the Services *still* needed to protect species as threatened and endangered because of the danger of pesticide use without meaningful safeguards for listed species.⁸ Completing these consultations — and then expeditiously turning to biological opinions on additional pesticides — should be the most urgent of imperatives for the Services. The EPA has just completed its next biological evaluations on carbaryl and methomyl, finding that over 90 percent of listed species are adversely affected by those two chemicals. It would be a conservation tragedy for the Services to squander precious time and get further delayed or backlogged by other pesticide consultations, simply to meet an arbitrary deadline forced upon it by political appointees from the previous administration. The Services must allocate sufficient resources to efficiently and expeditiously complete their obligations under the ESA and do so in a scientifically defensible manner.

Nationwide consultations should not be feared by the Services, instead they should be embraced and completed without delays. Nationwide biological opinions provide some of the greatest conservation benefits of any reviews that the Services — and their dedicated scientists and conservationists — will ever have the chance to work on during their careers. Imagine having the opportunity to protect over a thousand endangered species across this nation from neurotoxic pesticides, carcinogenic pesticides, and endocrine-disrupting pesticides. Not only do you have the opportunity to save hundreds of species from extinction, but by protecting the very real canary-in-the-coal-mine that these species represent, you would also be protecting the health and well-being of millions of people around this country.

Sincerely,

⁷ *Conner v. Burford*, 848 F. 2d 1441, 1454 (9th Circuit 1988); *see also*, H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S. Code Cong. & Admin. News 2572, 2576.

⁸ *See, e.g., Endangered Species Status for Black Warrior Waterdog and Designation of Critical Habitat*, 83 Fed. Reg. 257 (Jan. 3, 2018).