

April XX, 2021

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

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

Re: Restrict the Use of Pesticides in Designated Critical Habitat for Threatened and Endangered Species

Dear Secretary Haaland and Principal Deputy Director Williams,

Pesticides are, right at this moment, jeopardizing the continued existence of many of the plants and animals protected under the Endangered Species Act (ESA). Despite over a decade of sustained advocacy and litigation by many environmental organizations, the U.S. Environmental Protection Agency (EPA) has skirted its Section 7 consultation obligations under the ESA and failed to implement on-the-ground conservation measures to protect threatened and endangered species from deadly pesticides. Because many endangered species continue to decline as the EPA struggles to meet its obligations, on behalf of our organizations and our millions of supporters and members, we request that the U.S. Fish and Wildlife Service (“FWS”) exercise its own independent authority under the ESA to precautionarily protect listed species by restricting pesticide use in designated critical habitat. Under this approach, pesticide use would be restricted inside critical habitat unless and until the EPA finally meets its obligations under the ESA for a specific pesticide and the USFWS has concluded that use of the particular pesticide will not adversely modify critical habitat.

I. Pesticides Are Known to Pose Extinction-Level Threats to Listed Species

The National Marine Fisheries Service (NMFS) and FWS (collectively “the Services”) have, in recent years, completed or nearly completed nationwide biological opinions for just three pesticides: chlorpyrifos, malathion, and diazinon. In its final biological opinion for these pesticides, NMFS found jeopardy for the southern resident killer whale and 37 species of salmon, sturgeon, and steelhead.¹ The FWS had nearly completed a draft biological opinion for these same three chemicals, finding that chlorpyrifos jeopardized the continued existence of 1,399 species, malathion jeopardized 1,284 species, and diazinon jeopardized 175 species, but the release of those biological opinions was stalled by then-Deputy Secretary of the Interior David Bernhardt.²

The fact that just one pesticide, chlorpyrifos, jeopardizes over 1,437 listed species is chilling. Even worse, the EPA has failed to take action for four years, refusing to implement even one single measure to protect even one of the most critically imperiled species from even one

¹ See NMFS Pesticide Consultations <https://www.fisheries.noaa.gov/national/consultations/pesticide-consultations> (last accessed March 25, 2021).

² Lipton, Eric, March 26, 2019, *Interior Nominee Intervened to Block Report on Endangered Species*, New York Times, available at <https://www.nytimes.com/2019/03/26/us/politics/endangered-species-david-bernhardt.html>.

pesticide.

This is just the tip of the iceberg. The EPA has registered or re-registered over 1,100 pesticide active ingredients and 18,000 pesticide products — *all* of which were done without complying with the Endangered Species Act. It is not surprising then that recovery plans for over 250 threatened and endangered species list pesticides as known threats and obstacles to their recovery. Nor is it surprising that with over a billion pounds of pesticides being used in the United States each year, additional species continue to be added to the list of threatened and endangered species, including four butterfly species that are harmed by pesticides in 2014,³ the rusty patched bumble bee in 2017⁴ and the trispot darter, listed in 2018 due in part to threats from pesticides.⁵

II. FWS Has the Independent Authority to Act to Prevent Pesticides from Destroying Critical Habitat and Avert Extinction

The Endangered Species Act is the world's most powerful and effective conservation law. It has prevented the extinction of 99 percent of the species under its care and put hundreds of species on a path to recovery. The law's clear and absolute command to prevent extinction at "whatever the cost," its unambiguous mandate to base decisions on the best available science, and its precautionary approach to give threatened and endangered species the benefit of the doubt in federal agency decision-making have all contributed to the Act's effectiveness and success.⁶ The Endangered Species Act mandates that all federal agencies, including the Services, have a duty to conserve species under 7(a)(1) of the Act.

The Act also provides the Services the inherent authority to protect endangered species from being killed, injured, or harmed under both Section 4(d) and Section 11(f) of the Act. Section 4(d) of the Act states that the Services "shall issue such regulations as [the Service] deems necessary and advisable to provide for the conservation of such species" and that they "may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species."⁷ Section 11(f) of the ESA authorizes NMFS and FWS to "promulgate such regulations as may be appropriate to enforce [the Act]."⁸ This mandate and authority must be used here in the face of the EPA's continued failure to comply with the mandates of the Endangered Species Act. What we are asking for is not unprecedented, the Services have used their authority in the past to protect species like the North Atlantic right whale, sea turtles and the manatee in situations where other federal agencies and state agencies have failed to take sufficient action to address the harm caused by their activities.

Safeguarding species in their critical habitat is a central component of species conservation under

³ *Endangered Status for the Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies*, 79 Fed. Reg. 47,221 (Aug. 12, 2014); *Threatened Species Status for Dakota Skipper and Endangered Species Status for Poweshiek Skipperling*, 79 Fed. Reg. 63,672 (Oct. 24, 2018).

⁴ *Endangered Species Status for Rusty Patched Bumble Bee*, 82 Fed. Reg. 3186 (Feb. 10, 2017).

⁵ *Threatened Species Status for Trispot Darter*, 83 Fed. Reg. 67131 (Dec. 28, 2018).

⁶ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

⁷ 16 U.S.C. § 1533(d).

⁸ 16 U.S.C. § 1382(a).

the ESA. When Congress enacted the ESA, it understood that habitat protection was key to saving species from extinction and allowing for their eventual recovery.⁹ Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."¹⁰ The ESA commands that the Services generally designate critical habitat — including unoccupied areas that are "essential to the conservation of the species" — concurrently with a species' listing as endangered or threatened.¹¹ The Service must make that determination based on the "best scientific and commercial data available."¹²

Congress characterized the ESA Section 4's listing and critical habitat designation provisions as the "cornerstone of effective implementation" of the Act.¹³ Critical habitat designation provides additional benefits to listed species, beyond the prohibition against agency actions that jeopardize their continued survival, because critical habitat further provides for the "conservation" needs of the species.¹⁴ In other words, critical habitat is the key tool that furthers not only the survival of listed species, also the recovery of listed species.

Protecting critical habitat therefore is critical for ensuring that mandatory, substantive protections for the species are in place. In occupied critical habitat, protection against destruction or adverse modification of habitat is separate from, and additional to, protection against jeopardy to a species.¹⁵ In unoccupied critical habitat, the ESA still requires protection against adverse modification, again recognizing that the ultimate goal of the ESA is not just to prevent extinction, but to provide mechanisms that allow species to recover to healthy populations.

A prohibition on the use of pesticides in critical habitat is needed now to effectuate Congress's intent, because the EPA's continued refusal to comply with the ESA directly undermines the FWS's vital work of protecting listed species from extinction.¹⁶

III. Conclusion

The FWS should restrict pesticide use in designated critical habitat because this is the single most effective action it can take *right now* to stem the extinction threat from pesticides. While

⁹ See H.R. Rep. No. 93-412, at 5 (1973).

¹⁰ 16 U.S.C. § 1531(b).

¹¹ *Id.* § 1532(5)(A)(ii); see also *id.* § 1533(a)(3)(A).

¹² *Id.* § 1533(b)(2).

¹³ S. Rep. No. 97-418, at 10 (1982).

¹⁴ 16 U.S.C. § 1532(5)(A)(i), (ii); see also *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

¹⁵ See 16 U.S.C. § 1536(a)(2) (separately prohibiting actions that "jeopardize the continued existence" of species and those that "result in the destruction or adverse modification" of critical habitat); see also *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1166 (9th Cir. 2010) (recognizing "the independent significance of critical habitat as a measure to protect endangered species").

¹⁶ This ask mirrors the Center for Biological Diversity's January 7, 2019 petition to the Services, "Petition for Rulemaking to Protect Endangered Species from Pesticides by Restricting Pesticide Use in Critical Habitat" (Critical Habitat Petition). The Critical Habitat Petition contains more detailed information on the subject matter of this letter, proposes language for rulemaking, and contains critical habitat maps for all listed species. The Center has not received a response to the Critical Habitat Petition or notification that the Services have initiated rulemaking in response to the Petition.

we commend any effort to complete and implement ESA consultations, unless these pesticide consultations receive a substantial increase in staff resources and prioritization, it will take decades for EPA to complete consultations for all the pesticides currently registered for use in the United States.

Thus, FWS must intervene to stop preventable extinctions by prohibiting the use of pesticides in designated critical habitat, until and unless the EPA has completed a Section 7 consultation assessing a pesticide's impacts on listed species, a private party has entered in to a Habitat Conservation Plan under Section 10 of the ESA, a pesticide is essential to implement conservation activities essential to recover endangered species, or the use of the pesticide was needed to protect human health or safety. In all other cases, FWS should prohibit the use of pesticides in all designated critical habitats — the areas of land and water that are essential to the recovery of endangered species — before it is too late.

Sincerely,

GROUPS