

April 30, 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
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 and 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 103 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

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).

little progress in completing these biological opinions,⁴ nor has EPA taken on-the-ground actions to protect wildlife from these pesticides.

Specifically, we request that the USFWS releases the incidental take statements, reasonable and prudent measures, and reasonable and prudent alternatives for malathion immediately, during this current comment period. We request that USFWS release revised draft biological opinions for chlorpyrifos and diazinon for public comment no later than June 1st, 2021 and that these biological opinions contain incidental take statements, reasonable and prudent measures, and reasonable and prudent alternatives. Further, we request that NMFS release draft biological opinions for all three chemicals by no later than June 1st, 2021, and that these draft biological opinions contain incidental take statements, reasonable and prudent measures, and reasonable and prudent alternatives.

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 fully explain and demonstrate to the public how this “use and usage data” affected or altered the Services' analyses in these biological opinions both in regard to direct and indirect effects.

Releasing the draft biological opinions by June 1st is an eminently reasonable goal. While an incomplete draft of the malathion biological opinion has just been released by USFWS, with respect to chlorpyrifos and diazinon, the USFWS has now been working on these two biological opinions for over four years since they were allegedly completed and has made zero commitments regarding their release.

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 2017 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 2017, 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

⁴ On April 20, 2021, the EPA did release a draft biological opinion for malathion. While document contained a conclusion that 78 listed species are jeopardized by malathion, it did not contain incidental take statements for any species, any reasonable and prudent measures, or any reasonable and prudent alternatives. In short, it lacked all the aspects of a biological opinion that describe the measures that must be taken to protect impacted species. Thus, this draft document does not demonstrate significant progress towards issuing a final biological opinion.

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

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.

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

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

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).

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,



Lori Ann Burd
Environmental Health Director
Center for Biological Diversity



Brett Hartl
Government Affairs Director
Center for Biological Diversity

All-Creatures.org
Alliance for the Wild Rockies
American Bird Conservancy
Animal Legal Defense Fund
Animal Welfare Institute
Animals Are Sentient Beings, Inc.
Animas Valley Institute
Assateague Coastal Trust
Audubon Society of Central Arkansas
Audubon Society of Corvallis
Berkshire Environmental Action Team
(BEAT)
Bird Conservation Network
Black Warrior Riverkeeper
Boulder Rights of Nature, Inc.
Cahaba River Society
Californians for Pesticide Reform
Cascadia Wildlands
Center for Food Safety
Central Maryland Beekeepers Association
Christian Council of Delmarva
Ciudadanos Del Karso
Coast Range Association
Conservation Congress
Defenders of Wildlife
Earth Day Initiative
Eastern Coyote/Coywolf Research

Eco-Eating
Elena Saporta Landscape Architecture
Endangered Habitats League
Endangered Species Coalition
Environmental Protection Information Center
Florida Wildlife Federation
Footloose Montana
Friends of the Bitterroot
Friends of the Earth
Friends of the Sonoran Desert
Fund for Wild Nature
GARDEN, Inc.
GreenLatinos
Greenpeace US
Heartwood
Howling For Wolves
In Defense of Animals
In the Shadow of the Wolf
International Society for the preservation of
the Tropical Rainforest
Jemez Peacemakers
Jemez Valley Life Force
Kentucky Waterways Alliance
Kickapoo Peace Circle
Klamath Forest Alliance
Klamath Siskiyou Wildlands Center
LEAD for Pollinators, Inc.

Living Rivers & Colorado Riverkeeper
Madison Audubon
Maine Organic Farmers and Gardeners
Association
Malama Makua
Maryland Pesticide Education Network
Minnesota River Valley Audubon Chapter
(MRVAC)
Missouri Coalition for the Environment
National Freedom of Information Coalition
National Latino Farmers & Ranchers Trade
Association
Native Plant Society of the U.S. (formerly
Native Plant Conservation Campaign
NH Audubon
Northeast Oregon Ecosystems
Northeast Organic Farming
Association/Massachusetts Chapter
(NOFA/Mass)
Northwest Center for Alternatives to
Pesticides
Northwest Environmental Advocates
Oasis Earth
Occidental Arts and Ecology Center
Oceanic Preservation Society
Organic Consumers Association
Pesticide Action Network North America
Predator Defense
Preserve Lamorinda Open Space
Public Lands Project
Raptor Education Group Inc.
Raptors Are The Solution
Russian Riverkeeper
Santa Barbara Channelkeeper
Save Our Sky Blue Waters
SAVE THE FROGS!
Sequoia ForestKeeper®
SoCal 350 Climate Action
Social Compassion in Legislation
St. Johns Riverkeeper
St. Marys EarthKeepers
Sustainable Arizona
The Safina Center
The Shalom Center
Toxic Free NC
Toxic Free North Carolina
Turtle Island Restoration Network
Upper Peninsula Environmental Coalition

Ventura Coastkeeper
Western Nebraska Resources Council
Western Watersheds Project
Wild and Scenic Rivers
Wild Horse Education
Willamette Riverkeeper
Wings of Wonder, raptor rehabilitation,
education & research
Wishtoyo Chumash Foundation
Zero Waste Washington