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The Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: "Final" EPA Chlorpyrifos, Diazinon, and Malathion Biological Evaluations Released on January 18, 2017

Dear Mr. Administrator:

We are writing on behalf of our clients Dow AgroSciences, LLC ("DAS"), Makhteshim Agan of North America, Inc., d/b/a ADAMA ("ADAMA"), and FMC Corporation ("FMC") (together, the "OP Registrants"), to request that you withdraw from the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (jointly, "the Services") three Biological Evaluations ("BEs") that the Environmental Protection Agency ("EPA") transmitted to them on January 18, 2017.

Our clients and their affiliates hold EPA registrations for products containing one or more of the organophosphate ("OP") pesticide active ingredients that are the subject of the BEs: chlorpyrifos, diazinon, and malathion.

Our clients are unclear about the Administration's intentions related to the ongoing controversy regarding the intersection between pesticide registration activities under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and activities of EPA and the Services under the Endangered Species Act ("ESA"). We would welcome the opportunity to discuss that issue with you. However, our clients' immediate concern is with the fundamental scientific unsoundness of the OP BEs.

The BEs purportedly were prepared in accordance with the "Interim Approaches" to FIFRA-ESA issues adopted by the Obama Administration in November, 2013.[1] Our clients believe that the Interim Approaches are

[1] Interim Approaches for National-Level Pesticide Endangered Species Act Assessments Based on the Recommendations of the National Academy of Sciences April 2013 Report, *available at* https://www.epa.gov/sites/production/files/2015-07/documents/interagency.pdf.

fundamentally flawed and should be set aside. Each client filed substantial comments on drafts of the BEs that were released for public review in April, 2016. Those comments document our clients' views. Yet EPA conceded in its response to these comments that it did not address most of them in the final versions of the BEs.

Reviews of those "final" BEs, enclosed with this letter, confirm this fact. It also demonstrates that the Agency did not correctly apply processes described in the Interim Approaches. Below are what our clients consider some of the most egregious examples of these shortcomings of the BEs:

- A major lack of transparency necessary for evaluation and reproduction of results.
- Inclusion of proposed and candidate species that are not afforded protection under the ESA.
- Many studies selected by EPA as sources of information on effects and exposure were not evaluated for data quality and relevance. When evaluated, many evaluations did not follow EPA's own study quality criteria. In addition, many scientifically valid, registrant-submitted studies were not evaluated by the Agency, with no explanation. This is contrary to EPA's own guidance and the recommendations made by the National Academy of Sciences.
- Effects determinations were made assuming that product may be applied anywhere in the United States, without consideration of distinctions between use patterns, timing of applications, locations of use, and presence of listed species and critical habitats.
- Compounding of conservatism in the assessment of exposure, resulting in unrealistically high and sometimes physically impossible estimates.
- Failure to consider appropriate lines of evidence, as recommended by the National Academy of Sciences, to determine the likelihood of an effect occurring.

EPA's submission of the BEs in their current form is improper in light of both these facts and the many other critical comments EPA has received from the

OP Registrants, farmers, agriculture organizations, public health officials, professional pest control applicators, and others.

Furthermore, in failing to "explain or support several assumptions critical to its conclusions," EPA violated the Fourth Circuit Court of Appeals' direction that an agency acting to implement the ESA must explain its analysis "with sufficient clarity" to allow stakeholders to determine whether the analysis is "the product of reasoned decisionmaking." *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 464, 475 (4th Cir. 2013). For example, EPA relied on several data sets that it does not dispute are incomplete and/or inaccessible. But it never "cogently explain[ed] why." *Id.* at 473.

EPA sought to excuse its failure to properly revise the drafts or otherwise respond to comments by asserting that the revisions were precluded by a legal obligation to complete biological opinions based upon the BEs by December 31, 2017.[2] That position is incorrect. EPA is not bound by any such obligation.

EPA presumably based its assertion on stipulations entered in court cases by NMFS and FWS. The one of those stipulations to which NMFS was a party did commit NMFS to complete a nationwide OP biological opinion by December 31, 2017. Stipulation and Order to Amend the Stipulated Settlement Agreement Affirmed by this Court on August 1, 2008, *NW Coalition for Alternatives to Pesticides, et al. v. National Marine Fisheries Service*, No. 07-cv-01791 (W.D. Wash., May 21, 2014) ("*NCAP v. NMFS*"), Dkt. No. 50, at 6. But a party to a settlement agreement may request, by motion, that the court modify the settlement agreement for any "reason that justifies relief." Fed. R. Civ. P. 60. Thus, rather than issue flawed BEs, EPA could have asked NMFS to file a motion to modify the *NCAP v. NMFS* settlement agreement deadline so EPA could adequately fulfill its own statutory obligations.[3] Our clients believe there is significant documentation to support a deadline change.

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[2] Office of Chemical Safety and Pollution Prevention's Response to Comments on the Draft Biological Evaluations for Chlorpyrifos, Diazinon, and Malathion, at 2 (Jan. 17, 2017), *available at* https://www3.epa.gov/pesticides/nas/final/response-to-comments.pdf.

[3] FWS entered into an analogous stipulation in *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.* *See* Stipulation Amending Original Stipulated Settlement and Order, No. 11-cv-5108 (N.D. Cal., July 28, 2014), Dkt. No. 87 ("Amended Stipulated Settlement"). But that stipulation expressly states that FWS "is not obligated to" complete OP consultations by December

Finally, EPA compounded its error by taking the position that it would not revisit these BEs even while acknowledging their shortcomings. EPA cannot dodge its ESA statutory obligation to rely on the "best scientific and commercial data available."[4] At this point, EPA should withdraw the BEs from the Services and leave it to NMFS to address the existing settlement agreement deadline.

We recently have written to Secretaries Ross and Zinke asking that they similarly direct NMFS and FWS, respectively, to return the BEs to EPA and halt any work on preparation of biological opinions based on them, but urge that you not await their actions before withdrawing the BEs.

Thank you for your prompt attention to this request.

Sincerely,

David B. Weinberg

Counsel to Dow AgroSciences, LLC; Makhteshim Agan of North America, Inc., d/b/a "ADAMA"; and FMC Corporation

Enclosures

31, 2017, and it provides that if there were to be a delay the parties would meet and confer to discuss appropriate actions and, if necessary, petition the Court to resolve any dispute. Amended Stipulated Settlement at 4-5.

[4] ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2).

Wiley Rein LLP

cc (without attachments except as indicated):

The Honorable Ryan Zinke, Secretary of the United States Department of the Interior
The Honorable Wilbur Ross, Secretary of the United States Department of Commerce
The Honorable Michael Young, Acting Deputy Secretary of the United States Department of Agriculture
The Honorable Jim Kurth, Acting Director of the Fish and Wildlife Service (with attachments)
The Honorable Samuel D. Rauch, III, Acting Assistant Administrator for the National Marine Fisheries Service
The Honorable John Barrasso, Chairman, Senate EPW Committee
The Honorable Tom Carper, Ranking Member, Senate EPW Committee
The Honorable Rob Bishop, Chairman, House Committee on Natural Resources
The Honorable Raul Grijalva, Ranking Member, House Committee on Natural Resources
The Honorable Pat Roberts, Chairman, Senate Committee on Agriculture, Nutrition and Forestry
The Honorable Debbie Stabenow, Ranking Member, Senate Committee on Agriculture, Nutrition and Forestry
The Honorable Michael Conaway, Chairman, House Committee on Agriculture
The Honorable Collin Peterson, Ranking Member, House Committee on Agriculture
Dr. Sheryl H. Kunickis, Director, Office of Pest Management Policy, United States Department of Agriculture
Mr. Ray Starling, Special Assistant to the President for Agriculture, Trade and Food Assistance (with attachments)
Mr. Richard Keigwin, EPA OPP (with attachments)
Mr. George Oliver, DAS
Ms. Laura Phelps, ADAMA
Mr. Paul Whatling, FMC