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April 13, 2017

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

Re: "Final" Chlorpyrifos, Diazinon, and Malathion Biological Evaluations Sent
by EPA to Fish and Wildlife Service on January 18, 2017

Dear Secretary Zinke:

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 (1) instruct the Acting Director of the Fish and Wildlife Service ("FWS") to return to the U.S. Environmental Protection Agency ("EPA") three Biological Evaluations ("BEs") that EPA transmitted to FWS on January 18, 2017; (2) direct that any effort to prepare biological opinions based on them be set aside; and (3) direct legal counsel representing FWS in *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.*, No. 11-cv-5108 (N.D. Cal.) ("*CBD v. FWS*"), to meet and confer on a timely basis with counsel for the other parties to that case, as required by Paragraph 4(c)(1) of the Stipulation Amending Original Stipulated Settlement and Order approved by the Court on July 28, 2014 (the "Stipulated Settlement"), to discuss further activity in that case. *See* Stipulated Settlement, *CBD v. FWS*, Dkt. No. 87.

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). The BEs are documents from EPA required by the "Interim Approaches" adopted during the Obama Administration in an effort to resolve controversies regarding the relationship between pesticide registration activities under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and activities of EPA and the

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Departments of the Interior and Commerce under the Endangered Species Act (“ESA”).¹

Our clients believe that the Interim Approaches are fundamentally flawed and should be set aside. Drafts of the BEs were released for public review in April, 2016, and substantial comments submitted on those drafts explained the reasons for our clients’ view and demonstrated the many flaws in the draft documents.

When EPA sent final versions of the BEs to FWS, the Agency conceded that it had not responded to most of the comments it had received. This is confirmed in the three reports from expert consultants to our clients that are enclosed with this letter. Those comments also demonstrate that EPA has not even correctly applied in the BEs the processes described as the Interim Approaches.

We will not belabor here the matters addressed in the enclosed reports. But some representative examples of the BEs’ flaws include the following:

- A major lack of transparency necessary for evaluation and reproduction of results.
- Inclusion of proposed and candidate species that are not afforded protection under 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 not justified and 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

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>.

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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 in order to determine the likelihood of an effect occurring.

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 FWS and the National Marine Fisheries Service (“NMFS”). The one of those stipulations to which FWS was a party did express an intent to complete a nationwide OP biological opinion by December 31, 2017. *See CBD v. FWS Stipulated Settlement* at 3.³ But it also expressly stated that FWS “is not obligated to” complete OP consultations by then, and provided that if there were to be a delay

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>. 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.

³ The National Marine Fisheries Service entered into an analogous stipulation in May 2014 in which it agreed to complete an OP biological opinion by December 31, 2017. *See 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. Nat’l Marine Fisheries Serv.*, No. 07-cv-01791 (W.D. Wash., May 21, 2014), Dkt. No. 50, at 6.

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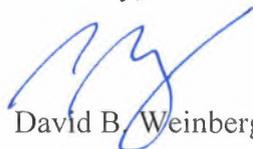
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parties would meet and confer to discuss appropriate actions and, if necessary, petition the Court to resolve any dispute. *Id.* at 4-5.

We recently have written to EPA Administrator Pruitt asking that he withdraw from FWS the three BEs at issue. However, we urge that you not await that action. Instead, our clients respectfully request that you promptly return the BEs to EPA and direct that any effort to prepare biological opinions based on them be set aside. Our clients similarly request that once you, NMFS, EPA, and presumably the U.S. Department of Agriculture (which was a party to development of the “Interim Approaches”) have determined how the new Administration is going to address the “Interim Approaches” and, more broadly, the issue of FIFRA-ESA integration, you direct the legal counsel representing FWS in *CBD v. FWS* to meet and confer on a timely basis with counsel for the other parties to that case to discuss appropriate further actions.

Thank you for your prompt attention to these requests.

Sincerely,



David B. Weinberg

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

Enclosures

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cc (without attachments except as noted):

The Honorable Scott Pruitt, Administrator of the United States Environmental Protection Agency
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