WILEY REIN LLP
1776 K Street NW
Washington, DC 20006

PILLSBURY WINTHROP LLP
2300 N Street, NW
Washington, DC 20037

VIA FACSIMILE AND FIRST CLASS MAIL

April 16, 2010

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Violation of Provisions of Endangered Species Act that Have Been Held Applicable to FIFRA Pesticide Registration Activities

Dear Administrator Jackson:

This letter provides notice that Crop Life America ("CLA"), Cheminova, Inc. ("Cheminova"), Dow AgroSciences LLC ("DAS") and Makhteshim Agan of North America, Inc. ("MANA") (jointly, "Potential Plaintiffs") are prepared to bring a lawsuit against the Environmental Protection Agency ("EPA") for failure to comply with its obligations under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, in a manner consistent with its obligations under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y.

The lawsuit would be grounded in the citizen suit provision of § 11(g)(1)(A) of the ESA, 16 U.S.C. § 1540(g)(1)(A). It would also state claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

Potential Plaintiffs regret the need to consider this suit. We are obliged to do so, however, because of the immediate threat to the continued effective operation of EPA's pesticide registration system. American consumers, public health agencies and farmers rely on the Agency to assure the availability of pest control products that can be used safely and without undue risk to the environment, including endangered species. FIFRA provides the framework for the Agency's activities and, we believe, properly delineates EPA's responsibilities. Our industry's compliance with FIFRA's mandates has assured that the proper use of any regulated products will not jeopardize endangered or threatened species or adversely affect critical habitat.

Nonetheless, the claims more fully set forth below recognize that all actions taken, procedures followed and standards applied by the EPA Administrator may not have been

consistent with Section 7 of the ESA, 16 U.S.C. § 1536, in connection with pesticide regulatory activities under FIFRA. The Agency failures described below also violate FIFRA and the APA and frustrate the FIFRA scheme by threatening the continued efficient operation of EPA's pesticide regulatory program, violate Section 1010 of Pub. L. 100-478, 102 Stat. 2306 (1988), by inadequately informing persons engaged in food and fiber production about the Agency's pesticide registration and ESA programs and failing to undertake appropriate actions to allow continued such production, and threaten the continued availability of pest control products necessary to protect public health from vectors and disease and to allow American agriculture to flourish.

Our lawsuit would seek an order declaring EPA to be in violation of the ESA and other cited authorities, and injunctive relief compelling EPA to take specific actions, in accordance with a schedule set by the court. Those actions would be designed to assure EPA's compliance with the ESA, while also correcting and remedying EPA's failures to meet its obligations under FIFRA and Section 1010, and thus assuring the continued viability of the pesticide regulatory program.

Background

In late 2000, activist groups began filing lawsuits alleging that EPA had violated the ESA by taking actions under FIFRA without consulting with either the U.S. Fish & Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (jointly, "the Services"), concerning the alleged effects of pesticides on one or more species listed as endangered or threatened under the ESA ("listed species"), as allegedly required by Section 7(a)(2) of the ESA. The cases concluded to date have resulted (either through court order or settlement agreement) in schedules under which EPA must make Section 7(a)(2) effects determinations and consult, as appropriate, for the pesticides and species at issue.[1] In addition, in one case the court imposed interim constraints on pesticide use and required the posting of point-of-sale warnings pending the completion of EPA's effects determinations and any necessary consultations. In others, the plaintiffs insisted on

[1] *See Washington Toxics Coal. v. EPA*, No. CV-01-0132-JCC (W.D. Wash. July 2, 2002 and Jan. 22, 2004), *aff'd*, 413 F.3d 1024 (9th Cir. 2005) (finding of liability, followed by court-ordered injunction and interim measures); *Californians for Alternatives to Toxics v. EPA*, No. C-00-3150-CW (N.D. Cal. filed Sept. 18, 2002) (consent decree setting schedule for effects determinations; no interim measures); *Ctr. for Biological Diversity v. Leavitt,* No. C-02-1580-JSW (N.D. Cal. Sept. 19, 2005 and Oct. 20, 2006) (finding of liability, followed by stipulated injunction and interim measures); *Ctr. for Biological Diversity v. Johnson*, No. 1:04-cv-00126-CKK (D.D.C. Aug. 29, 2005) (settlement agreement stipulating to schedule for effects determinations without prejudice to plaintiffs' right to seek interim measures depending on outcome of effects determinations); *Natural Resources Defense Council v. EPA*, No. 1:03-cv-02444-RDB (D. Md. Mar. 29, 2006) (same).

imposing or reserving the right to seek interim measures as a condition of settlement. Additional cases are pending or threatened.[2]

Working at the direction of the White House Council on Environmental Quality, EPA and the Services, in 2003 and 2004 negotiated a series of procedures intended to overcome perceived conflicts between EPA's FIFRA regulatory program and its alleged ESA obligations while avoiding disruption of FIFRA reregistration and registration programs. The outcome of these negotiations was embodied in the Services' promulgation, later in 2004, of a new section of their existing ESA implementing rules. 69 Fed. Reg. 47732-62 (Aug. 5, 2004). The new section is referred to hereafter as the "Counterpart Regulations." However, in 2006 a U.S. District Court found key portions of the Counterpart Regulations unlawful. *Washington Toxics Coal. v. DOI,* 457 F. Supp. 2d 1158 (W.D. Wash. 2006)

The United States did not appeal that decision, notwithstanding a seemingly opposite holding a few weeks later regarding comparable rules applicable to forest fire prevention. *Defenders of Wildlife v. Kempthorne*, No. 04-1230, 2006 U.S. Dist. LEXIS 71137 (D.D.C. Sept. 29, 2006). Nor has an adequate effort been made since to address the issues raised by the court or otherwise adopt procedures to facilitate integration of EPA's FIFRA/ESA obligations. For its part, EPA has taken no other actions to insure that its ESA responsibilities are properly integrated with those arising under its other statutory authorities, including FIFRA.

In the absence of the Counterpart Regulations, EPA has complied with obligations imposed upon it by court decisions and settlement orders, and initiated a number of consultations with NMFS.[3] However, a number of consultation requests have been rejected by the Services as incomplete or inadequate, and even more requests for consultation remain unanswered. The only consultation that has been completed and to which EPA has responded involves the evaluation of the potential impact on salmonids in California and the Pacific Northwest of pesticide products containing the active ingredients chlorpyrifos, diazinon and malathion.

---

[2] *See, e.g., Ctr. for Biological Diversity v. EPA*, No. 3:07-cv-2794-JCS (N.D. Cal. filed May 30, 2007); *Ctr. for Biological Diversity v. Pirzadeh*, No. 2:09-cv-01719-JCC (W.D. Wash. filed Dec. 3, 2009); *Pesticide Action Network N. Am. v. EPA*, No. CV08-3542-MHP (N.D. Cal filed July 24, 2008); *United Farm Workers v. EPA,* C-07-3950-JF (N.D. Cal. filed Oct. 19, 2007; *Ctr. for Biological Diversity,* Notice of Violations of the Endangered Species Act Related to the Registration of Pesticides (Jan. 27, 2010).

[3] EPA's listing of endangered species effects determinations and consultations is documented at http://www.epa.gov/espp/litstatus/effects/index.htm (last visited Feb. 25, 2010).

That consultation resulted in a finding of jeopardy by NMFS and the publication of a biological opinion (the "CDM BiOp").[4] The draft of that document, which was sent to EPA on July 31, 2008, was the first communication by NMFS to EPA or the registrants about NMFS' thinking about potential impacts of the subject pesticides on salmonids. But that draft was deeply flawed. As a result, it was severely criticized by EPA, the California Department of Pesticide Registration, other state pesticide regulatory agencies and the registrants.[5]

Shortly after receiving comments on its draft, NMFS published the final version of the CDM BiOp. Unfortunately, it failed to remedy the deficiencies of the draft. As a result, its lawfulness has been challenged in court by three of the Potential Plaintiffs.[6]

---

[4] Biological Opinion on Environmental Protection Agency Registration of Pesticides Containing Chlorpyrifos, Diazinon and Malathion, 341-402 (Nov. 18, 2008).

[5] *See, e.g.,* Letter from Debra Edwards, EPA, to James H. Lecky, NMFS (Sept. 15, 2008). The following quotations are representative of EPA's comments:

> First, we have serious questions and doubts about the support for NMFS' conclusion that these three pesticides jeopardize all of these species and adversely modify their critical habitat. Second, the Draft provides no basis from which to have a meaningful discussion of RPAs since it fails to identify a level of exposure to these pesticides that would *not* result, in NMFS' opinion, in jeopardy to the species. Without a target level of exposure, there could be no basis for agreement between our agencies that any alternative was either necessary or appropriate. [p. 1]
>
> The Draft mischaracterizes the Actions on which EPA initiated consultation, both specifically and broadly. First, the Draft is not consistent in describing the findings in EPA's consultation packages. [p. 2]
>
> The Draft also appears to reflect a misunderstanding of currently labeled uses in spite of the fact that it acknowledges mitigations EPA put in place to reduce potential exposure and which are reflected in Interim Reregistration Eligibility Decision (IRED) documents and Reregistration Eligibility Decision (RED) documents in the possession of NMFS. [pp. 2-3]
>
> The Draft seems to draw conclusions based on a body of data that fails to include certain studies and information provided by EPA in its consultation package while including other information. [p. 3]
>
> Further, much of the historical water quality monitoring data relied upon is outdated and inappropriate in the context of the use of these pesticides. These historical data more appropriately reflect pesticide use prior to substantive mitigation that has been put in place by EPA. [p. 3]

[6] *Dow AgroSciences v. NMFS,* No. 09-1968 (4th Cir. filed on Aug. 20, 2009); *In re: Dow AgroSciences*, No. 09-1941 (4th Cir. filed on Aug. 21, 2009).

Argument in the United States Court of Appeals on that challenge is expected this summer.

Nonetheless, EPA has notified NMFS that it intends to implement most of the RPMs and RPAs identified in the CDM BiOp without modification, and to slightly modify others, notwithstanding its severe criticisms of the NMFS draft (which NMFS failed to address). Letter from Richard P. Keigwin, Jr., EPA to James H. Lecky, NMFS (Sept. 10, 2009).

CLA is the nationwide not-for-profit trade organization representing major manufacturers, formulators and distributors of crop protection and pest control products. Its member companies produce, sell and distribute most of the active compounds used in crop protection products registered for use in the United States. The three individual companies that are Potential Plaintiffs hold numerous registrations for pesticide products containing products challenged in the cases identified in footnotes 1 and 2. Among other things, all are registrants of products containing chlorpyrifos. DAS also holds registrations for products containing many other pesticide active ingredients. MANA and its affiliates also hold registrations for products containing diazinon and many other pesticide active ingredients, and Cheminova holds registrations for products containing malathion and many other active ingredients. Cheminova, DAS, MANA and CLA's other members have invested hundreds of millions of dollars in developing products that EPA has found satisfy the FIFRA registration standard of "not generally caus[ing] unreasonable adverse effects on the environment," and also have substantial investments in pesticide production, marketing and sales.

All Potential Plaintiffs have a strong interest in ensuring that EPA fulfills its obligations under ESA in a manner that is consistent with its obligations under other laws, including FIFRA. Potential Plaintiffs believe a far more comprehensive FIFRA/ESA process than currently exists is needed to maintain the integrity of pesticide registrations and protect them against continued attack in the future. Allowing the plaintiffs in the product-and species-specific lawsuits to set EPA's agenda could erode the entire pesticide regulatory program through a process that proceeds incrementally, species-by-species and region-by-region, to the detriment of Potential Plaintiffs and the public.

Specific Failures Alleged

Should they file suit, Potential Plaintiffs will challenge as unlawful all or some of the following violations of the Endangered Species Act:

- Failure by EPA to lawfully utilize authorities in furtherance of the purposes of the ESA including without limitation Section 7(a)(2) by, among other things, not adopting procedures that assure adequate participation by registrants in ESA consultations, failing to seek or obtain recognition by the other pertinent Federal agencies of the adequacy of EPA risk analyses and failure to pursue replacement

of provisions of the "Counterpart Regulations" adopted in 2004 but held unlawful in *Washington Toxics Coal. v. DOI,* 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

- Failure to ensure the use of and reliance upon the best scientific and commercial data available in making decisions relating to protection of endangered or listed species or their critical habitat.
- Failure to meaningfully include pesticide registrants or applicants in consultation with the Services.
- Failure to assure that the Services comply with statutory and regulatory procedures in connection with the Services' statutory deadlines for action, including failure to properly obtain input and consents from pesticide registrants to extensions of consultations.
- Failure to develop and implement a program to respond to draft and final BiOps issued by the Services that would comply with FIFRA and the ESA, while allowing continued production of agricultural food and fiber commodities; to adequately implement the public participation requirements of Section 1010 of Pub. L 100-478, 105 Stat. 2306 (1988); to improve coordination between EPA and the Departments of Agriculture and Department of the Interior; to minimize the impacts of the promotion of conservation of endangered and threatened species on persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators; and to recognize and respond to the impacts on public health protection programs when integrating its obligations under FIFRA and ESA.
- Failure to address certain ESA requirements with regard to some pesticide products identified in the ESA citizen suit notice letter sent to you by the Center for Biological Diversity on January 27, 2010.

In addition, although not required by the ESA citizen suit provision, Potential Plaintiffs also hereby provide notice that their complaint would include challenges to EPA under the APA 5 U.S.C. §§ 701-706, for having failed to comply with Section 1010 of Pub. L 100-478, 105 Stat. 2306, and for having failed to act in a timely and lawful manner in implementing its ESA obligations in coordination with and in a manner consistent with its FIFRA obligations.

Section 1010(a) requires the Administrator to conduct a program to inform and fully involve both agricultural and pesticide supply interests in its implementation of requirements under ESA. This is an ongoing obligation. Its purposes, and thus the required nature of the program, are informed by Section 1010(b) and (c), which required the Administrator to study (in conjunction with the Departments of Agriculture and the Interior), how to implement an ESA pesticide labeling program that would minimize the impacts on production of agricultural food and fiber commodities of steps being taken to promote the conservation of endangered or threatened species. Although EPA has developed certain procedures that appear intended to fulfill a portion of this obligation,

recent experience with the CDM BiOp has confirmed that those procedures are inadequate. Furthermore, they are not embodied in promulgated rules.

In addition, under the court rulings and settlements cited in footnotes 1 and 2 above, EPA has made threshold findings initiating a number of pesticide product-specific consultations with the Services. However, the Services have systemically violated their duty under ESA Section 7(b) to conduct and complete consultations on the registrations on which EPA has requested consultation.[7] EPA has accepted this noncompliance and adopted a *de facto* policy of responding on an *ad hoc* basis to lawsuits and political pressures. Instead, EPA was obliged to take aggressive and meaningful steps to enforce upon the Services their obligations under the ESA including, but not limited to, insisting on further interagency discussions and elevating the matter within the government. Pertinent Congressional investigation committees also should have been appropriately notified.

EPA's conduct also violates FIFRA, which in several provisions and its history makes clear Congressional policy that required ecological and other reviews be undertaken expeditiously, efficiently and on the basis of sound science.

Taken together, the foregoing policies and failures have resulted in a disruption of the pesticide regulatory program, to the direct injury of potential plaintiffs; the misallocation of limited resources; the arbitrary prioritization of regulatory attention to certain combinations of species, pesticides and critical habitat rather than others; and unreasonable determinations with regard to at least one pesticide whose continued registration is of central importance to maintaining public health. These failures constitute a failure by EPA to meet its statutory obligations. Under the APA, a reviewing court thus may compel agency action. 5 U.S.C. § 706(1).

Conclusion

For all of the foregoing reasons, the Potential Plaintiffs put EPA on notice of their intention to file suit if the Agency does not satisfactorily act within sixty days to correct the violations described.

---

[7] Once EPA refers a pesticide registration to FWS or NMFS and requests consultation, the Service has a duty under the ESA to conduct the consultation and to complete it in a timely manner. Under ESA § 7(b)(1)(A), the Service must conclude consultation "within the 90-day period beginning on the date on which initiated," or within such other time as is agreed upon by the Service and the action agency. 16 U.S.C. § 1536(b)(1)(A). However, when the agency action involves a "license" (such as a pesticide registration), the licensee too has a role: the 90-day period cannot be exceeded without written notice and explanation to the licensee (if the consultation period would end before the 150th day after initiation) or obtaining the licensee's consent (if the proposed consultation period would end 150 or more days after the date of initiation). 16 U.S.C. § 1536(b)(1)(B); *see* 50 C.F.R. § 402.14(e).

If you have any questions, or would like to discuss the issues raised by this letter, please contact Mr. Weinberg on our joint behalf.

Sincerely,

Douglas T. Nelson
General Counsel
Crop Life America
(202) 872-3880

David Menotti
Pillsbury Winthrop Shaw Pittman
Counsel to Cheminova, Inc
(202) 663-8675

David B. Weinberg
Wiley Rein LLP
Counsel to Dow AgroSciences LLC and
Makhteshim Agan of North America, Inc.
(202) 719-7102