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JEFFREY DUNCAN
DEMOCRATIC STAFF DIRECTOR

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

TODD YOUNG
CHIEF OF STAFF

April 5, 2011

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

We write to request information regarding the Environmental Protection Agency's (EPA) plans to implement protections for endangered salmon populations that are being adversely impacted by the use of certain pesticides. Under Section 7 of the Endangered Species Act (ESA), the EPA, like all federal agencies, is required to consult with the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service (FWS) to ensure that no agency action will jeopardize the continued existence of a species protected under the ESA.

Under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), EPA is responsible for registering pesticides and setting mandatory labeling requirements for how they may be safely used. In response to litigation, EPA agreed for the first time to initiate an ESA consultation on the effects of 37 commonly used pesticides on salmon populations in the Northwest. Since then, NMFS has completed two Biological Opinions (BiOps) that concluded that continued use of the pesticides in question would jeopardize the existence of listed salmon species. The first of these was issued in November 2008 and determined that current use practices for Chlorpyrifos, Diazinon, and Malathion jeopardized the continued existence of 27 listed salmon species.¹ The second BiOp was issued in April 2009, when NMFS concluded that the use of Carbaryl, Carbofuran, and Methomyl was likely to result in jeopardy for 22 listed salmon species.² In BiOp 3, issued August 2010, NMFS found that 25 listed salmon species are likely to be put in jeopardy, directly or through adverse effects on their habitat, by Bensulide,

¹ http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biop.pdf

² <http://www.nmfs.noaa.gov/pr/pdfs/carbamate.pdf>

Dimethoate, Ethoprop, Methidathion, Naled, Phorate, and Phosmet.³ EPA's response to BiOp 3 is expected in August, 2011.

As required under Section 7 of the ESA, NMFS included Reasonable and Prudent Alternatives (RPAs) for the re-registration of these pesticides in its BiOp determinations, which would alleviate the risk of jeopardy to the impacted salmon species. These RPAs required changes to the labels of each pesticide setting forth how the pesticides are used, required the creation of buffer zones between where the pesticides are applied and salmon habitat, set forth weather-related limitations on when the pesticide can be safely applied, and required pesticide registrants to report incidents of fish kills. Both BiOps 1 and 2 provided EPA with a one year window for action, in which EPA could modify the regulatory requirements for the application of these pesticides. This one year window for action has now passed for BiOps 1 and 2. We are concerned that by failing to implement changes to pesticide use, as recommended by NMFS, EPA has jeopardized nearly every endangered salmon species in the Northwest and is holding ransom the potential billions of dollars in economic benefits that would come from the full recovery of salmon species.

We are concerned that EPA's delays in implementing the RPA's will lead to irreversible damage to the salmon populations in the Northwest and adversely affect the vibrant ecosystem and economic activity of the region. In order to better understand EPA's plans and progress with implementing protections for the Northwest endangered salmon species, we ask that you respond to the following questions and requests for information no later than April 22, 2011:

- 1) It is our understanding that under FIFRA, the Administrator must initiate cancellation procedures to nullify the registration of a pesticide when its use, in accordance with commonly recognized practice, causes unreasonable adverse effects on the environment. In your opinion, does jeopardizing the continued existence of most of the Pacific Northwest salmon populations qualify as an unreasonable adverse effect on the environment? If not, please explain.
- 2) It is our understanding that in lieu of canceling the registration for the pesticides in question, EPA has attempted to make alternative arrangements with the pesticide registrants regarding voluntary changes to their labeled use, but that the EPA has been unable to find common ground with the registrants, and no additional discussions have taken place since May of 2010. Please describe what, if any, other options remain for EPA to pursue short of cancellation of the pesticide registrations for Chlorpyrifos, Diazinon, and Malathion, as well as Carbaryl, Carbofuran, and Methomyl. If EPA believes it has other legal options available to it, please provide a detailed timeline of when such options will be presented to the registrants. If no other options remain, please provide a detailed timeline for the development of a notice of intent to cancel the above listed pesticides' registrations.
- 3) It is our understanding that when companies apply for the registration of new pesticides and as existing pesticides are up for the re-registration process, EPA will be

³ http://www.nmfs.noaa.gov/pr/pdfs/final_batch_3_opinion.pdf . NMFS determined that the use of five other pesticides would not cause jeopardy for any listed salmon species.

required to consult with NMFS and/or the U.S. Fish and Wildlife Service whenever their use could adversely impact threatened or endangered species. How does EPA plan on addressing the nationwide backlog of pesticide registrations or re-registrations that will require consultations, and ensure that reasonable and prudent alternatives are implemented in a timely manner so as not to further jeopardize the existence of a species?

- 4) Section 7(a)(1) of the ESA directs Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of endangered species. Included within BiOps 1 and 2 were conservation recommendations that NMFS suggested to minimize adverse effects of listed salmon. Given EPA's lengthy delays in implementing the RPAs, please describe to what extent EPA has implemented the conservation programs that were recommended. Specifically, has EPA (1) conducted mixture toxicity analysis in screening-level and endangered species biological evaluations; (2) developed models to estimate pesticide concentrations in off-channel habitats; (3) developed models to estimate pesticide concentrations in aquatic habitats associated with non-agricultural applications, particularly in residential and industrial environments?⁴ If yes, please provide detailed information about the status of each of these efforts. If not, why not?
- 5) On March 10th, the EPA together with the FWS, NMFS, and USDA requested that the National Academy of Sciences (NAS) review the scientific and technical issues involved in ESA consultations on FIFRA registration activities.⁵ While we strongly support a rigorous scientific framework, we do not believe that this review should be utilized to stall any pending actions or the implementation of current and potentially forthcoming RPAs that would reduce risk to listed salmon species. It is our understanding that this NAS review would at a minimum take 18 months. Given that Section 6(d) of FIFRA contemplates a 60-day NAS review as part of any cancellation procedure, an 18 month NAS review for the already completed BiOps at this point would be an unreasonable delay. Please explain what actions EPA plans on taking during the NAS review period to comply with the deadlines established in the law and ensure that listed salmon species are not further jeopardized by use of the pesticides in question.
- 6) As a part of the requested NAS study, we encourage the EPA to support a full review of its practices during the preparation of Biological Assessments, which too often fail to account for the sub-lethal, indirect, synergistic, and cumulative impacts of both the active and inert ingredients in pesticides. As the NAS study design process progresses, please report on the research plan that will be submitted to the NAS, and how the results of this study will be utilized with respect to future consultations under FIFRA, the already completed BiOps, and the soon to be completed BiOp 4.

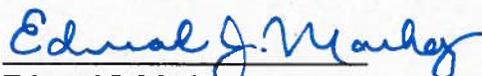
Thank you for your assistance and cooperation in responding to this request. We ask that you please provide a full and complete response to the questions and information requests

⁴ http://www.nmfs.noaa.gov/pr/pdfs/final_batch_3_opinion.pdf p. 810.

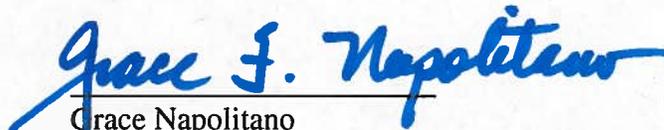
⁵ <http://www.epa.gov/oppfead1/endanger/nas-esa-letter.pdf>

contained in this letter by close of business on Friday, April 22, 2011. With respect to the requests relating to the NAS study design process and research plan, please direct your staff to contact the Committee's Democratic staff regarding the timetable for submission of your response. Should you have any questions about this request, please have your staff contact Brett Hartl of the Natural Resources Committee Democratic Staff at 202-225-6065 or Dr. Avenel Joseph of Rep. Markey's staff at 202-225-2836.

Sincerely,



Edward J. Markey
Ranking Member
Natural Resources Committee



Grace Napolitano
Ranking Member
Subcommittee on Water and Power



John Garamendi
Member
Natural Resources Committee

cc: The Honorable Gary Locke
Secretary
U.S. Department of Commerce
Fourteenth Street and Constitution Avenue, N.W.
Washington, D.C. 20230