

July 22, 2024

Mr. Jake Li
Deputy Assistant Administrator
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Dear Assistant Administrator Li,

As stakeholder groups representing farmers, retailers, co-ops, crop consultants, academics, manufacturers, and state regulators, among others, we write to share our concerns and seek a dialogue with EPA on ways to improve its process for assessing potential risks that pesticides may pose to endangered species and their critical habitats. The current methods EPA uses to assess these risks are exceedingly conservative, often relying on unrefined models and very conservative assumptions in lieu of considering available relevant and reliable scientific and commercial data. As a result, these assessments can significantly overstate risks to species, concluding that pesticide users must adopt more costly, stringent restrictions than are truly necessary to protect listed species. We appreciate EPA has recently signaled its openness to discussing the Endangered Species Act (ESA) risk assessment process with stakeholders. We encourage the Agency to begin these discussions as soon as possible—by no later than September 2024—to ensure any resulting risk assessment improvements are timely adopted, thereby helping to avoid or minimize the implementation of use restrictions where they are not necessary.

In several recent ESA-related pesticide proposals, such as the draft Herbicide Strategy and Vulnerable Species Pilot, EPA has indicated it is using less refined Tier I models to predict estimated environmental concentrations (EECs) of pesticides and exposure risks to listed species and their critical habitats. The Agency often does not incorporate various available sources of real-world data that could help to better inform the exposure and effects assessments. These sources include, for example, data on pesticide usage; percent of an area cropped; percent of crop area treated; existing conservation practices that may have a protective effect for species; geospatial data; precision agriculture risk reduction benefits; more taxonomically appropriate surrogate species; and more comprehensive species sensitivity distribution, among others.

When EPA uses less refined, Tier 1 models and does not incorporate available, real-world scientific and commercial data, it leads to predictions that overstate EECs and potential risks to species. In turn, this requires greater, more costly restrictions for farmers and pesticide users to mitigate the alleged risks. The draft Herbicide Strategy, for example, may require some users to adopt five or more runoff reduction practices and spray drift buffers that are hundreds of feet in size, when the use of higher tiered models and real-world data might only require one or two practices and much smaller buffers. We have seen instances of more reliable outcomes when EPA uses actual data and refined models. For example, when EPA conducted a Tier 3 analysis of runoff exposures for the Enlist registration, it reduced the number of species predicted likely to be adversely affected from 148 to 19, and the number of critical habitats likely to be adversely affected from 86 to five.¹

¹ Farruggia, Frank T. U.S. Environmental Protection Agency. Office of Chemical Safety and Pollution Prevention. March 10, 2023. *2,4-D Choline and Glyphosate Dimethylammonium: Tier 3 Refinement of 2,4-D Runoff Exposure to Wetland Plants and Revised Effects Determinations for Federally Listed Species for the Use of Enlist One and Enlist Duo on Genetically-Modified Enlist-Tolerant Cotton, Corn, and Soybean*. P. 15. <https://www.regulations.gov/document/EPA-HQ-OPP-2021-0957-0034>

The benefits of taking a more refined, data-driven approach to the ESA risk assessment are several. First, it will reduce the workload of EPA, the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and other federal agencies involved in the ESA consultation process, as regulators will not be required to consider the effects on species found unlikely to be affected by pesticide use. This will also benefit species that may be genuinely impacted by pesticide exposures, as regulators will be able to focus finite agency resources identifying solutions to best protect those species. Finally, it will benefit farmers and other pesticide users, as they will not be required to adopt new restrictions on pesticide use that are not necessary to protect listed species from jeopardy or their critical habitats from adverse modification.

Benefits aside, we also believe EPA has a legal obligation to refine its approach to ESA pesticide risk assessments. The ESA is quite clear that in conducting biological assessments “each agency shall use the best scientific and commercial data available.”² Further, in the report for the *Consolidated Appropriations Act, FY2024*, Congress made clear that it expects, “that as [EPA] conducts Endangered Species Act (ESA) analyses, consistent with statutory and litigation requirements, it will consider best available data on pesticide usage, existing conservation practices, real-world studies on spray drift, ground water and surface water concentrations, and sub-county level species range maps.”³ Congress has repeatedly expressed that EPA must use these data in conducting its assessments.

As the Agency evaluates its approach to its ESA risk assessments, EPA should also consider the recent ruling by the D.C. Court of Appeals in *Maine Lobsterman’s Association v. National Marine Fisheries Service*.⁴ In that case, the Court ordered the vacatur of a NMFS biological opinion on the basis that the Service adopted worst-case scenario and unduly conservative assumptions in predicting the effects of an action on North Atlantic right whales. These findings are remarkably similar to the concerns we have with EPA’s approach to its ESA risk assessments for pesticide actions. While we support EPA seeking to bring its pesticide program into compliance with ESA, it is essential that the Agency meet all its statutory requirements in doing so. This includes, where available, incorporating reliable scientific and commercial data in the assessment process and avoiding using unduly conservative assumptions. This would be consistent with the statute and Congress’ intent.

We understand that considering additional data and developing higher tiered models to conduct more realistic ESA assessments may be challenging given the staffing and resource constraints facing the Agency. Fortunately, as reflected in the regulations, EPA does not need to conduct this work itself, but may instead designate non-federal representatives to develop draft biological assessments.⁵ This authority is frequently used by federal agencies, including other programs within EPA, to fulfill their ESA requirements in a way that does not overextend Agency resources.⁶

In addition to facilitating a process that better allows EPA to meet its ESA statutory requirements, designating non-federal representatives to help conduct various biological assessments may carry

² 16 U.S.C. § 1536(a)(2)

³ U.S. Congress. House of Representatives. Committee on Appropriations. 2024. *Consolidated Appropriations Act, 2024, Committee Print of the Committee on Appropriations, U.S. House of Representatives on H.R. 4366/Public Law 118-42 [Legislative Text and Explanatory Statement]*. P. 897. Washington: U.S. Government Publishing Office. <https://www.govinfo.gov/content/pkg/CPRT-118HPRT55007/pdf/CPRT-118HPRT55007.pdf>

⁴ *Maine Lobsterman’s Association v. National Marine Fisheries Service*. No. 22-5238. (D.C. Cir., 2023)

⁵ 50 C.F.R. § 402.08

⁶ Montgomery, Mike. U.S. Environmental Protection Agency, Region 9. July 22, 2016. *Letter to National Marine Fisheries Service Designating a Non-Federal Representative under Section 7 of the Federal Endangered Species Act and Section 305(b)(2) of the Magnuson-Stevens Act*. https://www.epa.gov/sites/default/files/2020-10/documents/esa_and_msa_designation_cwsrf_and_dwsrf_central_valley_office-2016-07-22.pdf

another significant benefit for the Agency. In recent years, EPA's pesticide program has struggled to meet its statutory PRIA deadlines for completing pesticide registration actions. Since EPA does not have to conduct draft biological assessments within the Agency, the program will free up significant staff resources to carry out other important work. It can also allow pesticide registrants to conduct or commission draft assessments prior to the registration process, which will not count against PRIA deadlines. This could allow reductions to PRIA timelines by months or even years and would help decrease the significant backlog of PRIA actions EPA has accumulated.

We appreciate EPA has recently stated it is willing to discuss with stakeholders potential improvements to its ESA risk assessment process. However, we have significant concerns with the late 2024 timeline the Agency has signaled to initiate these conversations. EPA has committed via court settlement to release its draft Insecticide Strategy by July 30, 2024, finalize its Herbicide Strategy by August 30, 2024, and possibly expand the Vulnerable Species Pilot by late 2024. In meeting its October 1, 2026 registration review statutory deadline, we anticipate EPA requiring adoption of ESA-based restrictions for registrants of existing pesticides soon thereafter. This would be consistent with what the Agency has informed Congress.⁷ If EPA is only beginning to discuss potential ESA risk assessment improvements with affected stakeholders at the end of 2024, refinements may not be adopted timely, until well after the Agency has begun to require implementation of ESA label restrictions on products through the registration review process. To avoid this unsettling possibility, we urge the Agency to initiate conversations with stakeholders on ESA risk assessment improvements no later than September 2024.

Thank you for considering our concerns, and we stand ready to assist EPA in bringing its pesticide program into compliance with the ESA in a manner that will protect species, is feasible for farmers and other pesticide users, and is consistent with the law.

Sincerely,

African American Farmers of California
Agribusiness Council of Indiana
Agricultural Council of Arkansas
Agricultural Retailers Association
Alabama Agribusiness Council
Alabama Farmers Federation
Alabama Soybean & Corn Association
Alaska Farm Bureau
Almond Alliance
American Cotton Producers
American Dairy Coalition
American Farm Bureau Federation
American Horse Council
American Mosquito Control Association
American Mushroom Institute
American Pistachio Growers
American Pulse Association
American Seed Trade Association
American Soybean Association
American Sugar Alliance

⁷ U.S. Environmental Protection Agency. March 2024. *United States Environmental Protection Agency Fiscal Year 2025 Justification of Appropriation Estimates for the Committee on Appropriations*. P. 87, 515.
<https://www.epa.gov/system/files/documents/2024-03/fy-2025-congressional-justification-all-tabs.pdf>

American Sugar Cane League
American Sugarbeet Growers Association
AmericanHort
Aquatic Ecosystem Restoration Foundation
Aquatic Plant Management Society
Arizona Cotton Growers Association
Arizona Crop Protection Association
Arizona Farm Bureau Federation
Arkansas Certified Crop Advisers
Arkansas Crop Protection Association
Arkansas Farm Bureau Federation
Arkansas Rice Federation
Arkansas Rice Growers Association
Arkansas Soybean Association
Associated Oregon Hazelnut Industries
Association of Equipment Manufacturers
California Alfalfa & Forage Association
California Apple Commission
California Association of Wheat Growers
California Association of Winegrape Growers
California Blueberry Commission
California Cattlemen's Association
California Citrus Mutual
California Citrus Quality Council
California Cotton Ginners & Growers Association
California Farm Bureau
California Fresh Fruit Association
California Grain and Feed Association
California Safflower Growers Association
California Specialty Crops Council
California Sweetpotato Council
California Warehouse Association
California Wild Rice Advisory Board
Carolinas Cotton Growers Cooperative
Cherry Marketing Institute, Inc.
Colorado Association of Wheat Growers
Colorado Cattlemen's Association
Colorado Farm Bureau
Colorado Fruit And Vegetable Growers Association
Colorado Livestock Association
Colorado Nursery and Greenhouse Association
Colorado Potato Legislative Association
Colorado Sorghum Growers
Connecticut Environmental Council
Connecticut Farm Bureau Association
Council of Producers and Distributors of Agrotechnology
Delaware Farm Bureau
Delaware-Maryland Agribusiness Association
Delta Council
Empire State Council of Agricultural Organizations
Far West Agribusiness Association

Florida Cotton Growers Association
Florida Farm Bureau Federation
Florida Fertilizer & Agrichemical Association
Florida Nursery, Growers & Landscape Association
Food Producers of Idaho
Georgia Agribusiness Council
Georgia Cotton Commission
Georgia Farm Bureau
Georgia Fruit and Vegetable Growers Association
Georgia Green Industry Association, Inc.
Georgia Urban Agriculture Council
Georgia-Florida Soybean Association
Grain and Feed Association of Illinois
Great Plains Canola Growers Association
Grower-Shipper Association of Central California
Hawaii Cattlemen's Council
Hawaii Farm Bureau
Hop Growers of America
Idaho Alfalfa Clover Seed Commission
Idaho Alfalfa Clover Seed Growers Association
Idaho Farm Bureau Federation
Idaho Grain Producers Association
Idaho Hay and Forage Association
Idaho Hop Growers Association
Idaho Mint Growers Association
Idaho Noxious Weed Control Association
Idaho Nursery & Landscape Association
Idaho Oilseed Commission
Idaho Onion Growers' Association
Idaho Pest Management Association
Idaho Potato Commission
Idaho-Eastern Oregon Seed Association
Illinois Corn Growers Association
Illinois Farm Bureau
Illinois Fertilizer and Chemical Association
Illinois Soybean Growers
Indiana Corn Growers Association
Indiana Farm Bureau
Indiana Soybean Alliance
Insure America Project
International Fresh Produce Association
Iowa Corn Growers Association
Iowa Farm Bureau
Iowa Soybean Association
Kansas Agribusiness Retailers Association
Kansas Association of Wheat Growers
Kansas Corn Growers Association
Kansas Cotton Association
Kansas Farm Bureau
Kansas Grain and Feed Association
Kansas Sorghum Producers

Kansas Soybean Association
Kentucky Soybean Association
Louisiana Agricultural Consultants Association
Louisiana Cotton & Grain Association
Louisiana Farm Bureau Federation
Louisiana Nursery & Landscape Association
Maine Farmers Coalition
Maine Potato Board
Maryland Farm Bureau
Massachusetts Arborists Association
Massachusetts Association of Landscape Professionals
Massachusetts Association of Lawn Care Professionals
Massachusetts Farm Bureau Federation
Michigan Agri-Business Association
Michigan Apple Association
Michigan Asparagus Association
Michigan Bean Commission
Michigan Farm Bureau
Michigan Nursery & Landscape Association
Michigan Soybean Association
Michigan State Horticultural Society
Michigan Vegetable Council
Mid Atlantic Soybean Association
Midwest Food Products Association
Midwest Forage Association
Minnesota AgriGrowth Council
Minnesota Association of Wheat Growers
Minnesota Canola Council
Minnesota Crop Production Retailers
Minnesota Farm Bureau Federation
Minnesota Soybean Growers Association
Minor Crop Farmer Alliance
Mint Industry Research Council
Mississippi Farm Bureau Federation
Mississippi Soybean Association
Missouri Agribusiness Association
Missouri Farm Bureau
Missouri Rice Council
Missouri Soybean Association
Montana Agricultural Business Association
Montana Farm Bureau Federation
Montana Grain Growers Association
Montana Nursery & Landscape Association
National Agricultural Aviation Association
National Alfalfa & Forage Alliance
National Alliance of Independent Crop Consultants
National Association of Landscape Professionals
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Barley Growers Association
National Black Growers Council

National Christmas Tree Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Onion Association
National Pest Management Association
National Potato Council
National Sorghum Producers
National Sunflower Association
Nebraska Agri-Business Association
Nebraska Farm Bureau Federation
Nebraska Soybean Association
Nevada Farm Bureau Federation
New England Sports Field Management Association
New Jersey Farm Bureau
New Jersey Green Industry Council
New Jersey Nursery & Landscape Association
New Mexico Farm & Livestock Bureau
New York Corn & Soybean Growers Association
New York Farm Bureau
New York Green Industry Council
New York State Agribusiness Association
New York State Turfgrass Association, Inc.
Nezperce Prairie Grass Growers Association
Nisei Farmers League
North American Blueberry Council
North Carolina Christmas Tree Association
North Carolina Cotton Producers Association
North Carolina Egg Association
North Carolina Farm Bureau
North Carolina Grange
North Carolina Nursery and Landscape Association
North Carolina Peanut Growers Association
North Carolina Soybean Producers Association
North Carolina Sweetpotato Commission
North Central Weed Science Society
North Dakota Agricultural Association
North Dakota Corn Growers Association
North Dakota Grain Growers Association
North Dakota Soybean Growers Association
Northeast Agribusiness & Feed Alliance
Northeast Dairy Producers Association
Northeastern Weed Science Society
Northern Canola Growers Association
Northern Pulse Growers Association
Northwest Agricultural Cooperative Council
Ohio AgriBusiness Association
Ohio Corn & Wheat Growers Association
Ohio Farm Bureau Federation
Ohio Soybean Association
Oklahoma Farm Bureau

Oklahoma Soybean Association
Olive Growers Council of California
Oregon Association of Nurseries
Oregon Cattlemen's Association
Oregon Dairy Farmers Association
Oregon Farm Bureau
Oregon Hop Growers Association
Oregon Seed Council
Oregon Wheat Growers League
Oregon Women for Agriculture
Oregonians for Food & Shelter
Pacific Northwest Canola Association
Pacific Seed Association
PennAg Industries Association
Pennsylvania Cooperative Potato Growers
Pennsylvania Corn Growers Association
Pennsylvania Farm Bureau
Plains Cotton Growers, Inc
Potato Growers of Michigan, Inc.
Red River Valley Sugarbeet Growers Association
Rhode Island Farm Bureau Federation
Rolling Plains Cotton Growers
Snake River Sugarbeet Growers Association
South Carolina Corn and Soybean Association
South Carolina Farm Bureau
South Dakota Agri-Business Association
South Dakota Association of Cooperatives
South Dakota Farm Bureau Federation
South Dakota Soybean Association
South Dakota Wheat Growers Association
South Texas Cotton & Grain Association
Southern Crop Production Association
Southern Idaho Potato Cooperative, Inc.
Southern Kansas Cotton Growers Coop
Southern Rolling Plains Cotton Growers Association
Southern Weed Science Society
Southwest Council of Agribusiness
Sports Field Management Association
Synergistic Hawaii Agriculture Council
Tennessee Corn Growers Association
Tennessee Farm Bureau Federation
Tennessee Nursery & Landscape Association
Tennessee Soybean Association
Texas Farm Bureau
Texas Grain Sorghum Producers Association
Texas International Produce Association
Texas Rice Council
Texas Soybean Association
Texas Vegetable Association
Texas Wheat Producers Association
The Cranberry Institute

The Fertilizer Institute
The Midwest Council on Agriculture
U.S. Apple Association
U.S. Beet Sugar Association
U.S. Canola Association
U.S. Durum Growers Association
U.S. Pea and Lentil Trade Association
US Rice Producers Association
USA Dry Pea & Lentil Council
USA Rice
Vermont Dairy Producers Alliance
Virginia Agribusiness Council
Virginia Cattlemen's Association
Virginia Farm Bureau
Virginia Grain Producers Association
Virginia Peanut Growers Association
Virginia Soybean Association
Washington Asparagus Commission
Washington Association of Wheat Growers
Washington Blueberry Commission
Washington Farm Bureau
Washington Friends of Farms and Forests
Washington Mint Growers Association
Washington State Dairy Federation
Washington State Potato Commission
Washington Turfgrass Seed Association
Weed Science Society of America
West Virginia Farm Bureau
Western Agricultural Processors Association
Western Alfalfa Seed Growers Association
Western Growers
Western Peanut Growers Association
Western Plant Health Association
Western Pulse Growers Association
Western Society of Weed Science
Wisconsin Agri-Business Association
Wisconsin Potato & Vegetable Growers Association
Wisconsin Soybean Association
Wyoming Ag Business Association
Wyoming Association of Irrigation Districts
Wyoming Crop Improvement Association
Wyoming Farm Bureau Federation
Wyoming Wheat Growers Association