

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.<sup>1</sup>

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<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup> 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*.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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

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<sup>2</sup> 16 U.S.C. § 1536(a)(2)

<sup>3</sup> 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>

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

<sup>5</sup> 50 C.F.R. § 402.08

<sup>6</sup> 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](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.<sup>7</sup> 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

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<sup>7</sup> 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