

June 10, 2016

Via Email and Docket Submission

Ms. Yu-Ting Guilaran, PE
Director, Pesticide Re-Evaluation Division
Office of Pesticide Programs
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
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Washington, DC 20460

Re: Comments Regarding “Chlorpyrifos, Diazinon, and Malathion Registration Review;
Draft Biological Evaluations”; Notice of Availability, Docket No. EPA-HQ-OPP-2016-
0167

Dear Ms. Guilaran:

These comments on the subject draft Biological Evaluations (“BEs”), the notice of availability of which was published in the Federal Register on April 11, 2016 (81 Fed. Reg. 21341-43) are submitted on behalf of our client, the Minor Crop Farmer Alliance (“MCFA”).

MCFA is an alliance of national and regional organizations and individuals representing growers, shippers, packers, handlers and processors of various agricultural commodities, including food, fiber, turf grass, nursery and landscape crops, and organizations involved with public health pesticides. Our members are extremely interested in the development and safe use of pest management tools including crop protection chemicals that are environmentally sound, safe for applicators and workers, and do not represent an unreasonable adverse risk to the environment, including humans.

While our commodities are often called “minor crops” or “specialty crops,” they contribute to the diversity and highly nutritious diets available for the global population and to safe and aesthetic surroundings for our homes, schools, and places of business. U.S. farmers grow more than 500 types of fruit, vegetable, tree nut, flower, ornamental nursery and turf grass crops in addition to the major bulk (row) commodity crops. Specialty crop production accounts for more than \$60 billion, or approximately 40% of total U.S. crop receipts.

Overview

MCFA appreciates that the Agency has been working for years to determine the best methods that should be used to evaluate the potential effects that pesticides may have on endangered and threatened species protected under the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 *et seq.* In the more recent past, that effort included the 2011 request, together with the Department of the Interior and the Commerce Department, to the National Academy of Sciences (“NAS”) to review tools and approaches for assessing the potential effects of proposed pesticide actions on these species and their critical habitats. Two years later, NAS issued its report. It is recognized that EPA then had to perform its own additional review to determine how to actually perform an assessment in light of the NAS report. That took an additional two years and led to the release of the subject draft BEs. The Agency then published the subject Federal Register notice, providing only 60 days for public comment on the draft BEs for chlorpyrifos, diazinon, and malathion.

Many of MCFA’s members rely on these three organophosphate insecticides in the production of their crops. Consequently, they will suffer direct adverse impacts if the Agency finalizes the draft BEs without corrections, modifications and refinements. MCFA’s members are also concerned that the approaches adopted by the Agency for the assessments of these pesticides will be used by the Agency in evaluating other compounds. Thus, the potential impacts of the Agency’s approaches in the subject BEs will extend well beyond the three pesticides. Accordingly, given that the methods and approaches EPA is using in the BEs will likely be applied to other compounds, there is even a greater need that the Agency take the time necessary to “get it right.” However, based upon our limited review of the draft BEs that has been afforded, it appears that the Agency has a substantial amount of work to do before it can legitimately be said that EPA has “gotten it right”. As more fully discussed below, the 60 day comment period provided by the Agency is wholly inadequate. Seemingly, while it took years to develop the policy approaches reflected in the subject BEs, the Agency is not comfortable providing the necessary time for stakeholders to adequately review and develop their comments on the proposed BEs. As a result, MCFA’s members and other interested stakeholders have not been afforded the necessary time to fully evaluate the draft BEs. We also suggest that before the BEs are finalized, the Agency present them to the Science Advisory Panel for their evaluation regarding the methodology being used.

Many of MCFA’s members will be submitting their own comments regarding the use practices associated with each of the three subject pesticides, and indicate the importance of these products to them. Registrants of each of these products also will be submitting as detailed comments as possible under the time constraints established by the Agency. MCFA supports those substantive comments, and requests that the Agency take the time necessary to fully and objectively consider those comments and modify the draft BEs accordingly.

The Comment Period is Inadequate

As an initial matter, it is presumed that the Agency is most interested in receiving robust comments on the three draft BEs. This requires the Agency to allow sufficient time for the preparation of those comments. If so, the 60 day comment period is wholly inadequate to allow stakeholders to fully and meaningfully review and develop comments on the draft BEs. As you know, the supporting material associated with the BEs that the Agency has made available totals approximately 12,000 pages. In turn, those supporting materials link to even more files. Additionally, most of the material is highly technical in nature. It is unreasonable to expect that stakeholders can review that material within the current 60 day comment period. Considerable additional time is needed to thoroughly analyze the supporting material and prepare meaningful comments for the Agency's consideration.

We understand that the Agency received a request for extension of the comment period from numerous stakeholders, that among other things, identified certain infirmities in the information the Agency made available to support its draft BEs. The Agency quickly rejected those requests, noting that it had placed some of the information that forms the basis of the draft BEs on the Agency's website in December 2016 (which was not noted in the Federal Register nor entered into a formal Agency Docket such as the one utilized here) and that there is litigation pressure (a "court-ordered deadline of December 2017 to finalize the biological opinions for the three chemicals"). The Agency believes there has been enough time for stakeholders to comment because of the total amount of time since the availability of the material as noted. The Agency also stated that if it extended the comment period, it would not have sufficient time to review the comments, revise, and finalize the BEs and complete the biological opinions by the court-imposed deadline.

The rationale relied on by the Agency does not support denying the requested extensions for comment. The Agency has served-up the "court-ordered deadline" explanation repeatedly lately as justification for establishing relatively short public comments periods for a number of regulatory actions. To the extent a policy matter is difficult – and particularly in areas where science issues are involved and especially when, as here, the Agency is for the first time actually developing the science and methodology necessary to assure a robust Agency decision – we are confident the Agency's and Justice Department lawyers can explain to a court the need for additional time to complete the review process. If the Agency was not making an effort to timely address these issues, arguably a reviewing court would have difficulty entertaining the Agency's request for additional time to complete its review. However, that is certainly not the case in this instance. There is no reasonable basis for a court to determine that the Agency will not continue to diligently address this situation.

The Agency's assertion that some of the materials had been placed on the Agency's website is equally deficient as a basis to decline to extend the comment period. While Agency personnel may, as part of their normal assignments, check the Agency's website, many stakeholders rely on what the Agency publishes for comment in the Federal Register. Rather than the public relying

on what is published in the Federal Register for comment, the Agency expects that the public should be monitoring the Agency's website pages with the understanding that they immediately will identify the parts of the puzzle they are interested in and then from that, divine how the Agency will ultimately assemble those parts in making its proposed decision. We believe the Agency's approach is not supported by law or by reality. Stakeholders do not scan the Agency's website in the hopes of identifying actions to be taken by the Agency. Nor should that be expected of them.

The net effect of the foregoing is that stakeholders, including MCFA's members, have not been afforded the Administrative Procedure Act required opportunity to fully participate in a meaningful way in this process.

The Agency Should Use the Best Available Science in Finalizing the BEs

MCFA believes that any decisions concerning the potential effects of pesticides, including but not limited to chlorpyrifos, diazinon, and malathion, should be based on the best scientific data and information available. The Agency should not unduly rely on assumptions and models. In view of the potential impacts from the Agency's decisions involving the ESA, particular care should be taken so that reliable information is incorporated into the decision-making process. In these cases the Agency should be certain that the effect levels it uses are accurate and appropriate, and typical actual use/application rates for each of the three pesticides are reflected in the modeling rather than the highest label use rates (which the Agency has historically recognized are generally not used in practice). For example, regarding species in California, there is mandatory California pesticide use reporting. In fact, there are several decades of such pesticide use data readily available to the Agency. This information should be incorporated into the Agency's modeling. Further, MCFA believes the Agency will be receiving additional input from stakeholders in the current comment period regarding the extent of use of these products, including use rates and geographic areas of use. Once supplied, the information should be incorporated into the revised BEs.

Conclusion

Chlorpyrifos, diazinon and malathion serve important roles in producing various agricultural commodities including those used for food and for horticultural purposes. They also play important roles in helping to protect against various public health diseases, including Zika, West Nile, etc. They are key components of various IPM programs. Consequently, if the Agency is taking action that ultimately may constrict the use of these products, the Agency must be certain that it has done its analysis correctly. Even where schedules revolve around court-imposed deadlines, there are opportunities available for good cause, to seek adjustments to those deadlines. There is ample good cause in the instant situation. Likewise, the fact the Administration will be changing in approximately seven months should not influence how much time the Agency needs to produce robust BEs.

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Given the relatively short comment period, MCFA regrets we are not able to provide additional substantive comment on the subject draft BEs. Again, MCFA strongly believes that the drafts BEs are not suitable for finalizing and warrant substantial revisions.

Respectfully submitted,



Edward M. Ruckert

cc: Docket No: EPA-HQ-OPP-2008-0850
Docket No. EPA-HQ-OPP-2008-0351
Docket No. EPA-HQ-OPP-2009-0317

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