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August 29, 2008

HAND DELIVERED

Ms. Arthur-Jean Williams
Environmental Protection Agency
Environmental Fate & Effects Division
Office of Pesticide Programs
2777 S. Chrystal Drive
South Building – 12th Floor #724
Arlington, VA 22203

Ms. Angela Somma
National Marine Fisheries Service Office
Office of Protected Resources
1315 East-West Highway
13th Floor
Silver Spring, MD 20910

Re: Initial Meeting Regarding Draft Chlorpyrifos, Diazinon and Malathion
Biological Opinion

Dear Ms. Williams and Ms. Somma:

We write on behalf of our clients Makhteshim Agan of North America, Inc. (“MANA”) and Dow AgroSciences, LLC (“DAS”) and Cheminova, Inc. USA (“Cheminova”), to express their appreciation for the prompt scheduling of today’s meeting regarding the referenced draft Biological Opinion, to urge that follow-up meetings be held, and to transmit the PowerPoint slides used today. MANA, DAS and Cheminova are also working on more comprehensive written comments, which will be provided to you as promptly as possible.

MANA, DAS and Cheminova deeply regret, and strongly object to, the procedure that NMFS and EPA have followed with regard to this draft BiOp. By making this draft available to the public before allowing the registrants an opportunity to work with the Service and Agency and comment on an earlier draft, EPA and NMFS failed to obtain the best scientific and commercial data available. The Service also has failed to comply with Section 7 of the Endangered Species Act, the Service’s applicable regulations and the procedures described in the NMFS-FWS Endangered Species Consultation Handbook (March 2008).¹

¹ Both DAS and MANA are members of Crop Life America, and endorse the views set forth in the letter sent by Mr. Douglas Nelson of Crop Life to Messrs. Balsinger, Johnson and Tenpas on August 21, 2008. For your convenience, a copy of that letter is enclosed.

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In this connection, we trust that neither NMFS nor EPA will make public any proposed reasonable and prudent alternatives (“RPAs”) or measures (“RPMs”) until NMFS has had an opportunity to consider all the information the registrants have now provided and will be providing in their further written comments, has discussed its anticipated revisions of the BiOp with the registrants and EPA, and has provided the registrants and EPA with a meaningful opportunity to discuss with NMFS any RPA’s or RPMs that NMFS then may be contemplating.

As the enclosed slides preliminarily document, the draft BiOp has very serious flaws. Among other things, it ignores the substantial restrictions that have been put on use of chlorpyrifos, diazinon and malathion as a result of EPA’s reregistration procedures and the State of California’s regulations governing use of dormant season sprays, as well as the extensive water monitoring data that have been collected (in the case of chlorpyrifos and diazinon) since implementation of those restrictions. The draft BiOp also wholly fails to recognize that much of the monitoring data on which it is based, and the assumptions that underlie the NMFS modeling it reports, are inapplicable to current and future registrations.

MANA, DAS and Cheminova are particularly troubled by the draft BiOp’s apparent effort to blame EPA for NMFS’ failure to collect and analyze the best scientific and commercial data available. Both the Service’s regulations and the case law confirm that this obligation ultimately rests with NMFS.

Specifically, the Service’s regulations require NMFS to review all relevant information, whether provided to it by EPA or not, so long as the information is otherwise available. *See* 50 C.F.R. § 401.14(g)(1). Courts have interpreted this to mean that NMFS cannot ignore available biological information and must review all relevant scientific data. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). If NMFS continues to refuse to consider the best scientific and commercial data available, the final BiOp will be invalidated and enormous resources will have been wasted. *See Bennett v. Spear*, 520 U.S. 154, 174 (1997) *See also Sierra Club v. United States Army Corp. of Eng’rs*, 295 F.3d 1209, 1216 (D.C.Cir. 2002). (A BiOp is invalid if, among other criteria, it fails to consider an important aspect of the problem or offers an explanation for the decision that runs counter to the evidence.) The typical remedy for such a service failure is to require the Service to complete an entirely new BiOp.

By ignoring the substantial changes that have been made to product labels in recent years, and will be imposed on all future diazinon, chlorpyrifos and malathion labels, NMFS also has failed to properly characterize the action at issue. NMFS cannot mischaracterize the agency action in an effort to relieve itself of its obligations. *See Greenpeace v. National Marine Fisheries Service*, 80 F. Supp. 2d 1137, 1146 (W.D. Wash. 2000). Moreover, to be acceptable, a BiOp must give “appropriate consideration to any beneficial actions taken by the . . . applicant.” 50 C.F.R. § 402.14(i)(8). Thus, for example, NMFS must

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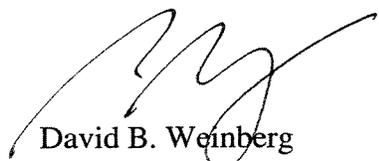
consider (in addition to the label changes) the extensive user education programs being sponsored by registrants in Northern California.

The sudden release of this draft BiOp, without advance notice, during the summer vacation season and in the face of extensive additional regulatory and litigation activity pertaining to EPA's registration of these products, has made it impossible for the registrants to prepare comprehensive comments on the draft before today. Teams from both companies are hard at work on such comments, however, and they will be provided to you as promptly as possible. In light of the Services' obligation to give full and meaningful attention to those comments, we trust you will wait for them before moving forward and give them serious attention once they are submitted.

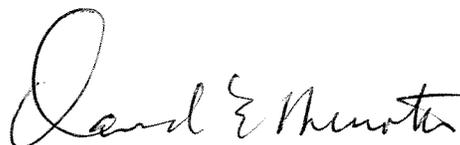
In this regard, we recognize that NMFS retained the right, in its recently signed settlement of the *NW Coalition for Alternatives to Pesticides* case, to revisit the arbitrary deadline it set for publication of a final BiOp by October 31, 2008. The Service should act immediately to assure it has adequate time to undertake the extensive reevaluation that is necessary.

Thank you.

Sincerely,



David B. Weinberg
Counsel to Makhteshim Agan of
North America, Inc. and
Dow AgroSciences LLC



David E. Menotti
Counsel to Cheminova, Inc. USA

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