

By First Class Mail and Email

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The Honorable Gina McCarthy, Administrator
Environmental Protection Agency
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Washington, DC 20460

**PETITION FOR RULEMAKING TO THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

The American Bird Conservancy and the other signatories below hereby respectfully petition the Environmental Protection Agency (“EPA”) to revise its rules governing the incident reporting required of pesticide manufacturers under Section 6(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136d(a)(2).

We submit this Petition under the First Amendment of the United States Constitution (“Congress shall make no law * * * abridging * * * the right of the people * * * to petition Government for a redress of grievances.”), the Administrative Procedure Act, 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”), and EPA’s FIFRA-implementing regulations (40 C.F.R., Chapter I, Subchapter E, Pesticide Programs).

As we show below, the current regulatory scheme for reporting wildlife sickened and killed by pesticides is gravely ineffective for several reasons: it has absurdly high reporting triggers and thresholds; its data-submission portals are unintuitive and user-unfriendly; it offers minimal

public access to any data that are collected, preventing informed analysis and comment from the public on the effect of pesticides on the environment; and it lacks coordination with other federal agencies. These deficiencies frustrate rather than serve the congressional intent underlying Section 6(a)(2). EPA openly acknowledged the inadequacies of the current system over a decade ago, yet it has little to show for literally years of protracted “consideration” of badly needed revisions. The congressional will remains frustrated and the public remains disserved.

The Statutory and Regulatory Scheme

FIFRA generally governs pesticide regulation in the United States. See 7 U.S.C. §§ 136-136y. It regulates the sale, distribution, labeling, and use of pesticides while protecting human health and the environment from associated unreasonable adverse effects. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984).

Originally passed in 1947, FIFRA was completely revised in the Federal Environmental Pesticide Control Act, Public L. 92-516, October 21, 1971. The legislation was a response to “mounting public concern about the safety of pesticides and their effect on the environment and * * * a growing perception that the existing legislation was not equal to the task of safeguarding the public interest.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 991. “The general purpose of the FIFRA revisions in 1972 was to strengthen

the ability of the EPA to protect the environment.” *McGill v. EPA*, 593 F.2d 631 (5th Cir. 1979).

Among other things, the revisions made it clear that registration is not the end of the regulatory process: a pesticide registration may be maintained only if it does not “generally cause[] unreasonable adverse effects on the environment.” FIFRA section 6(b), 7 U.S.C. § 136d(b). Accordingly, Section 6(a)(2) of FIFRA, also added in 1972, imposes a duty on registrants to report adverse effects from their pesticides on non-target organisms after use of the pesticide has been approved. It provides: “If at any time after the registration of a pesticide the registrant has additional factual information regarding unreasonable adverse effects on the environment of the pesticide, the registrant shall submit such information to the Administrator.” 7 U.S.C. § 136d(a)(2).

EPA’s regulations implementing Section 6(a)(2) appear at 40 C.F.R. part 159. In promulgating these regulations, EPA stated:

Section 6(a)(2) provides an important function by assuring that a previous Agency decision to register a pesticide remains a correct one, and that a registered pesticide can in fact be used without posing unreasonable adverse effects to human health and the environment. * * * Section 6(a)(2) * * * recognizes that registrants may come into the possession of important information that was not anticipated by the Agency, and that without the submission of such information by registrants, EPA would remain without it. * * * Thus, section 6(a)(2) serves to provide an important ongoing check on the correctness of the original decision to register a pesticide.

62 Fed. Reg. 49369 (September 19, 1997). EPA also stated:

One of the most important routes by which adverse effects information can come to the attention of the Agency is through toxic or adverse effect incident reports. Many of the Agency's registration decisions are predictive in nature. In contrast, incident reports can provide the Agency with information depicting the practical impacts of pesticide use, including real-world effects of pesticide use. The Agency considers incident reporting to be a vital component of section 6(a)(2).

Id. p. 49381.

Despite these statements of the importance of Section 6(a)(2) to the Agency's mission, EPA acknowledged in 1997 that, "[i]n comparison to previous EPA policy statements, some [of the new] reporting requirements * * * reflect increased flexibility or exemptions for reporting specific types of information." *Id.* p. 49380. As shown below, the new flexibility and exemptions have gravely compromised EPA's ability to implement Section 6(a)(2).

Part 159.184 is entitled, "Toxic or adverse effect incident report." Paragraph (a) requires that information about incidents affecting non-target organisms must be submitted if the pesticide registrant is aware that a non-target organism "may have been exposed to a pesticide" and "suffered a toxic or adverse effect" (or may do so in future) and "has or could obtain

information concerning where the incident occurred,” the pesticide involved, and “the name of a person regarding the incident.”

Paragraph (c) describes “Required information on individual incidents,” including certain detailed “Administrative” information such as dates and locations ((c)(1)); information about the pesticide ((c)(2)); the circumstances, such as a spill, drift, mislabeling, etc. ((c)(3)); other specific information, which, in the case of exposed wildlife, includes the affected species, their numbers, the adverse effects, the pesticide application rate and method of application, and a habitat description ((c)(4)(iii)).

This looks initially promising, as if registrants will be required to submit thorough and useful information to EPA about the adverse effects of their pesticides on birds, bees, and other animals. But paragraph (c) then torpedoed that promise by providing that none of that information need be reported if “aggregate reporting” is allowed: “The Administrative, Pesticide, Circumstance and Exposure Type(s) of information must be reported for individual incidents, *except where the provisions of paragraph (e) of this section allow for aggregated summary forms of reporting * * **” (Emphasis added.)

Understanding how paragraph (e) works requires an examination of paragraphs (c)(5) and (d). Paragraph (c)(5) provides for “severity category

designations.” For “fish or wildlife,” the categories are W-A or W-B. Category

W-A applies if the incident affects truly huge numbers:

(B) Fish: Affected 1,000 or more individuals of a schooling species or 50 or more individuals of a non-schooling species.

(C) Birds: Affected 200 or more individuals of a flocking species, or 50 or more individuals of a songbird species, or 5 or more individuals of a predatory species.

(D) Mammals, reptiles, amphibians: Affected 50 or more individuals of a relatively common or herding species or 5 or more individuals of a rare or solitary species.

Incidents affecting smaller numbers of fish, birds, or mammals are categorized as W-B. In adopting these threshold numbers, EPA offered no scientific rationale to support them.

Paragraph (d) addresses “Time requirements for submitting incident information.” It provides in (d)(2) that reports for category W-A incidents “may be accumulated for a 30-day period and submitted to the Agency within 30 days” after the end of the accumulation period. In (d)(3), it provides that reports for all other exposures – which includes category W-B incidents – can be accumulated for 90 days and submitted 60 days thereafter.

That brings us now to paragraph (e), “Aggregated reports.” It provides that incidents reportable under paragraph (d)(3) – which includes W-B incidents – do not have to “contain[] the information listed in paragraphs

(c)(1) through (c)(4)”—*i.e.*, the useful administrative, pesticide, circumstance and exposure types of information, including, for wildlife, affected species, their numbers, the adverse effects, the pesticide application rate and method of application, and a habitat description. Instead the report need contain only the following: “the time period covered by the report” and “a count of the number of incidents, listed by product registration number (if known) or active ingredient.”

That means, focusing just on birds, that for every incident of a pesticide poisoning or death of birds that affects fewer than 200 birds of a flocking species or 50 birds of a songbird species or 5 birds of a predatory species, the registrant need report only the time period and the number of adverse incidents, which could have occurred five months earlier. Thus the report might say: “Time period: June-July-August. Number of adverse incidents: 15.” None of the valuable information required in paragraph (c)(1) through (c)(4) is required. Indeed, the report need not even identify whether the adverse incident affected a bird or some other animal. It bears repeating that EPA has never offered any scientific or biological basis for the absurdly high threshold reporting numbers it adopted.

REASONS FOR THE RULEMAKING

The EPA Incident Data System was established to track the effects of pesticide use on people, animals, plants, and waterways. Given the vast

universe of species and chemical combinations, incident reporting plays a critical role in bringing to light pesticide effects on birds and other non-target species. It serves as an important addition to laboratory testing, which provides only limited information. Registrant-submitted tests on Mallards and Northern Bobwhite quails, for example, often fail to illuminate pesticide impacts on other birds given the huge variation in avian vulnerabilities, ecology, and metabolic systems. The data in incident reports can help guide decision-makers in determining necessary mitigation measures and best practices as well as future research needs. Documented sick and dead wildlife give EPA scientists and risk managers a clear window into the real-world impacts of chemical exposures on humans (especially farmworkers) and wildlife, including effects on Threatened and Endangered species and the plant and animal populations that sustain them.

As EPA has itself recognized, “incident reports can provide the Agency with information depicting the practical impacts of pesticide use, including real-world effects of pesticide use.” 62 Fed. Reg. 49381, *supra*. Hence “[t]he Agency considers incident reporting to be a vital component of section 6(a)(2).” *Id.*

Moreover, as EPA increasingly makes use of modern scientific methods such as theoretical modeling and computational toxicology, incident reporting data provide a critical means of testing the actual performance of

these new methods. They are an important component in the transition from animal testing and resource-intensive section 158 data requirements (40 CFR Part 158).

An effective incident reporting system will also provide clues on pesticide synergism. Single pesticides are rarely used alone. Many wildlife incidents involve pesticide mixtures or geographically proximate uses, which sometimes lead to more toxic combined impacts. Indeed, the Ninth Circuit Court of Appeals recently revoked approval of the herbicide Enlist Duo, which contains both glyphosate and 2,4-d, because of its possible synergistic effects. A sophisticated incident reporting system will help reveal the impacts of multiple pesticides acting simultaneously.

The current incident reporting regime is undermined by the following glaring deficiencies, which EPA has recognized for years (see below) and which make achievement of the congressional intent underlying Section 6(a)(2) impossible:

- Unrealistically high threshold numbers of dead animals needed to trigger reporting requirements, such that very few wildlife incidents are properly recorded;
- the absence of a user-friendly go-to reporting portal;
- the lack of public access to data without time- and resource- intensive Freedom of Information Act requests; and
- the missed opportunity to coordinate EPA's pesticide incident system with that from other agencies.

Moreover, the existing regulatory scheme is incompatible with EPA's obligations under the Endangered Species Act, 16 U.S.C. 1531 *et. seq.* Section 2(c)(1) of the Act provides that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter," and section 7(a)(1) requires that each federal agency "shall, in consultation with and with the assistance of [the Fish and Wildlife Service and the National Marine Fisheries Service] utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species * * * ." 16 U.S.C. 1531(c)(1), 15136.¹ Allowing reporting that does not even identify when ESA-listed species are being killed or otherwise harmed by EPA-approved pesticides is contrary to the ESA's conservation purposes.

Finally, the existing thresholds are inconsistent with the EPA's obligations under the Migratory Bird Treaty Act, 16 U.S.C. 703-712, and Executive Order 13186, effectuating that Act. Allowing reporting that does not even identify individual migratory bird species being

¹ "The heart of the Endangered Species Act lies in section 7." *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222, 1226 (S.D. Fla. 1994).

affected so that appropriate conservation measures can be adopted disregards the MBTA's overarching goal of conserving migratory birds. Nor is it consistent with the Executive Order directing all federal agencies to take appropriate actions to conserve migratory bird populations.

AGENCY ACTION REQUIRED

1. Abandon The High Thresholds For Reporting

The current regulatory scheme's principal fault is the threshold numbers of dead animals of a single species that must be found in one location to trigger a W-A reporting requirement, *i.e.*, the detailed information required in paragraphs (c)(1) through (c)(4). The current thresholds are so absurdly high that a cynic might suppose they were drafted by a pesticide lobbyist to discourage reporting on pesticides' negative impacts. Thus:

- For herding mammals, no W-A reports required unless at least 50 mammals of a species are killed;
- For birds, no W-A reports required unless 200 of a "flocking" species, 50 songbirds, or 5 raptors are killed;
- For fish, no W-A reports required unless 1,000 of a schooling species are killed; and
- For bees, no W-A reports required no matter how many are found dead.

These thresholds lead to obvious results: very few W-A reports are ever filed. The fact is that even though large numbers of birds are killed by pesticides, it is rare to find carcasses of 200 "flocking" birds, 50 songbirds, or five raptors – of a single species -- all at once. That is because, among other

reasons, each and every bird loss from a single incident may be difficult to spot amidst the debris of farm fields and forests where they rapidly decompose or are picked apart by scavengers, and because birds are both highly mobile and highly dispersive and rarely succumb immediately to pesticide effects. Given the enormous scale on which some pesticides are used, the poisoning of even a few breeding songbirds per acre can amount to a large yearly kill. Yet most wildlife pesticide incidents go unreported. *See, e.g.,* Mineau 2004, *Birds and Pesticides: Are Pesticide Regulatory Decisions Consistent with the Protection Afforded Migratory Bird Species Under the Migratory Bird Treaty Act?* William & Mary Environmental Law and Policy Review, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1152&context=wmelpr>.

Reports of incidents involving fewer than the threshold numbers – *i.e.*, W-B “aggregated” reports – are so cursory as to be virtually useless. As shown above, instead of the details required by paragraphs (c)(1) through (c)(4), required of W-A reports, a W-B report need only state the time period of the report and the number of adverse incidents, which may have occurred five months earlier. The report provides no other details – not even the type of organism affected.

We understand that EPA receives roughly 50 to 100 of these aggregate reports for birds, mammals, and other wildlife every year. *EPA has no idea*

whether they are for frogs or elk or owls. Hence there is nothing useful to be learned from these reports. Yet in fact there is much to learn from these wildlife and domestic animal kills but, without better reporting requirements, the government (and the public) remains in the dark.

For birds, this is critically important in light of: **(1)** the significant reduction in songbird populations in recent decades (*see, e.g., The State of the Birds, 2013, <http://www.stateofthebirds.org>*); **(2)** the documented links between toxic pesticides and grassland bird declines (*see Mineau and Whiteside, 2013, [Pesticide Acute Toxicity Is a Better Correlate of U.S. Grassland Bird Declines than Agricultural Intensification, www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0057457](http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0057457)*); **(3)** the ongoing poisonings of raptors from anticoagulant rodenticides (*see EPA Statement of Reasons and Factual Basis for Notice of Intent to Cancel Registrations for * * * Certain Rodenticide Bait Products, 2013, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2013-0049-0003>*); and **(4)** the high toxicity to birds of the nation's most-used insecticides, neonicotinoids (*see Mineau and Palmer, 2013, [The Impact of the Nation's Most Widely Used Insecticides on Birds, http://www.abcbirds.org/abcprograms/policy/toxins/Neonic_FINAL.pdf](http://www.abcbirds.org/abcprograms/policy/toxins/Neonic_FINAL.pdf)*).

In an attempt to gather more information on bee kills, in July 2013 OPP directed specific neonicotinoid registrants to provide full reports on *any*

bee kills. See <http://www.epa.gov/sites/production/files/2013-11/documents/bee-july2013-letter.pdf>. That's a positive step, but not nearly enough to fix the aggregate reporting system now in effect under Section 6(a)(2). Aggregate reporting needs to be abolished for *all* non-target animals. Given how few poisoned animals are now reported, and what a wealth of data each one may represent, the current wildlife thresholds should be jettisoned.

For aquatic and terrestrial invertebrates, moreover, EPA should impose an additional reporting category: the *absence* of expected biota. The ecological importance of invertebrates is in inverse proportion to their size. They pollinate flowering plants, filter the waterways, compost and turn the soil, and provide critical nutrition for birds and other wildlife. Yet invertebrates rarely get counted in their dead or dying state. If a farmer who regularly tests surface waters near his organic fields finds that the waterways have been depleted of aquatic invertebrates, and test high for pesticide active ingredients, EPA databases should capture that information. These findings would offer one more piece of important information among the many variables that risk managers could weigh in their assessments.

In sum, the aggregate reporting system and its absurdly high thresholds disable EPA from properly discharging its statutory responsibilities under FIFRA Section 6(a)(2). EPA has stated that the purpose of the post-

registration reporting requirement adopted by Congress is to ensure that circumstances have not changed sufficiently to affect the agency's initial registration decision. Yet the current reporting thresholds bear no rational relationship to (and even contradict) what the EPA must consider in making a registration decision in the first instance. Thus, for example, if the EPA had evidence that a particular pesticide would likely kill 49 members of an Endangered Species Act listed songbird species in a single incident, or 199 members of an imperiled flocking species, EPA could not likely justify registration of the pesticide based on the "unreasonable adverse effects" standard – at the very least, EPA would have to concede that such evidence would be highly material to its registration determination.

EPA cannot rationally establish a threshold for reporting that deprives it of the essential information sought by Section 6(a)(2). Accordingly, aggregate reporting should be disallowed. Registrants should be required to report promptly any animal mortality that may reasonably be associated with pesticide exposure.

2. Revise The Reporting Portal

The reporting system should be more user-friendly and transparent. Few people know what to do when they find sick or dead organisms. EPA funds the relatively obscure National Pesticide Information Center (NPIC) portal, but it is not clear that NPIC is adequately fulfilling EPA's needs. See <http://npic.orst.edu/incidents.html>.

Those who do manage to find NPIC confront assorted suggestions on how to proceed. The Reporting Pesticide Incidents page directs people to start with their state agency, but that appears to be where many people stop. Many states lack the resources to track and share incident records, let alone investigate, test, enforce pesticide labels, etc. The website gives the impression that reporting pesticide incidents to EPA is a low-priority, secondary measure, something extra to do if you want, with the result that only limited reports make it to EPA via states or through NPIC. Yet NPIC serves as the Agency's primary incident reporting portal.

EPA does have its own incident reporting pages, as well. *See* www.epa.gov/pesticide-incidents/report-pesticide-incidents-involving-wildlife-or-environment. The site includes a bulleted list of suggestions covering data collection by NPIC; when to contact state agencies; and information on fish and game authorities. Buried near the bottom of the list are options to submit incident information to EPA. The website assumes knowledge about pesticide laws and an understanding of which incidents are violations. The tone ranges from agnosticism about submissions to actively warding them off, highlighting "What Not to Report."

EPA's website also includes a page describing Common Causes of Pesticide Incidents, describing how people inadvertently expose themselves or pets or livestock to chemicals by failing to follow label instructions or by

other careless behavior. See <https://www.epa.gov/pesticide-incidents/common-causes-pesticide-incidents>. Rather than acknowledge that many pesticides are inherently dangerous when applied as directed, the site gives the false impression that poisonings are generally user-blameworthy, potentially further discouraging reporting.

EPA should welcome incoming data and explain why it is useful, with a statement such as: *If you have encountered a poisoned animal or carcass, this is potentially valuable data that can aid EPA in assessing pesticide risks. Agency scientists appreciate any details you can provide to help us determine how chemicals are affecting wildlife and people in the real world.*

3. Provide Ready Public Access To Incident Reports

EPA's system should share its data with scientists, NGOs, and other members of the public. Deaths of frogs or owls or pronghorns cannot be treated as industry or state secrets. That is because FIFRA Section 10(d) provides that certain information, including "any information concerning the effects of [a] pesticide on any organism or the behavior of such pesticide in the environment, including but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil" shall be available for disclosure to the public. Section 10 makes clear that information concerning the effects of a pesticide on humans or the environment cannot be withheld from the public on grounds of trade secrecy or business confidentiality.

Accordingly, such data should be publicly mapped and monitored, and ultimately used to inform EPA in its re-registration decision-making. Scientists in academia and the nongovernmental sector have much to offer in these efforts. A robust public discourse on pesticide-caused wildlife injury and mortality would be facilitated by a more transparent system. The public should not have to go through the time-consuming, resource-intensive Freedom of Information Act process for wildlife necropsy reports. EPA has recently reviewed all of the wildlife incidents in the Ecological Incident Information System (EIS) to scrub any confidential business information (CBI) or personal identifiable information (PII), and this should serve as a prelude to the creation of a publicly accessible reporting system.

4. Coordinate Incident Reporting Among Agencies.

EPA should accelerate efforts to coordinate its Incident Data System (IDS) with injury-and-mortality data collected by other agencies. EPA's IDS database is just one of several federal repositories for incident information.

The Department of Interior's Fish and Wildlife Service has a newly-launched Injury and Mortality Reporting System (IMRS), which includes incidents involving bird species and also a generic category for bats. Inter-agency coordination of data repositories is one of the goals envisioned in the Migratory Bird Treaty Act draft MOU between EPA and FWS. See <http://archive.epa.gov/pesticides/news/web/html/birdtreaty.html>. Other wildlife incident databases that could be coordinated with IDS are the US

Geological Survey's Contaminant Exposure and Effects – Terrestrial Vertebrates Database (<http://www.pwrc.usgs.gov/contaminants-online/pages/CEETV/CEETVintro.htm>) and the National Wildlife Health Center's Wildlife Health Information Sharing Partnership (WHISPers) databases (<https://www.nwhc.usgs.gov/whispers/>). There may also be opportunities to coordinate incident information with the Coast Guard, Department of Energy, Department of Defense, National Oceanic and Atmospheric Administration, and National Park Service, as well as international partners. Incident records can also be coordinated with state and county agencies, non-governmental organizations, veterinarians, animal rescue facilities, poison-control hotlines, and private sector entities.

THE AGENCY HAS LONG ACKNOWLEDGED THE PROBLEM

The EPA has long acknowledged the deficiencies in the current system. EPA worked with ABC and others in the early 2000s to create "AIMS" – an Avian Incident Monitoring System database and a set of procedures for collecting, investigating, and sharing data on pesticide poisoning of birds. Though it did not amend the high thresholds under FIFRA 6(a)(2), for several years this system gave academic scientists and NGOs ready access to bird mortality incident data. More recent efforts to upgrade EPA's incident system aim to consolidate the agency's overlapping databases; to increase efficiencies (*e.g.*, through paper submissions); and to remove personal

identifiers and CBI. Intra-agency workgroups and the Pesticide Program Dialogue Committee federal advisory group are discussing priority data elements with a goal of more standardized voluntary submissions.

In its July 5, 2016 response to the May 9, 2016 letter from ABC and 69 other environmental, animal welfare, and conservation groups urging changes to the current incident reporting scheme, EPA again acknowledged the need for reform. It mentioned its “goal of a streamlined approach to incident reporting” and of “creating a publicly available framework that improves the reporting, quality and effective use of pesticide incident data to ensure high-quality science-based regulatory decisions” (page 1). We applaud this work, but more is urgently needed, now rather than later.

CONCLUSION

FIFRA Section 6(a)(2) is a critical part of Congress’ regulation of pesticides to prevent unreasonable risk of exposure to humans or the environment, including wildlife. EPA has recognized that Section 6(a)(2) “serves to provide an important ongoing check on the correctness of the original decision to register a pesticide.” 62 Fed. Reg. 49369 (September 19, 1997). Yet the current regulations under the statute have proven to be grossly inadequate to provide the Agency and the public with information about adverse pesticide effects necessary to make reasoned judgments about risk. EPA itself has long acknowledged this failure in implementing Section

6(a)(2). Accordingly, EPA should discharge its duty under Section 6(a)(2) to engage in rulemaking to revise the existing scheme, as recommended above.

The undersigned also request that EPA promptly publish this Petition and solicit public comment on it.

Respectfully submitted,

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