UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

MAY 22 2009

Ms. Arthur-Jean Williams
Associate Director
Environmental Fate and Effects Division (7507P)
Office of Pesticide Programs
U.S. Environmental Protection Agency
Washington, DC 20460

Subject: Environmental Protection Agency Request for Endangered Species Act Section 7 Consultation for Registration of Pesticide Products Containing Clomazone throughout the United States and its Affiliated Territories

Dear Ms. Williams:

The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS) received your letter dated April 22, 2009, requesting formal consultation for the registration of pesticide products containing clomazone in the United States (U.S.) and its affiliated territories under the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*). The Environmental Protection Agency's (EPA) national registration of clomazone is in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

On that same date, EPA created public docket EPA-HQ-OPP-2006-0113 as part of the registration review process. This docket contains supporting information on the registration review package for clomazone which are available for public review over a 90-day comment period ending on June 22, 2009. Your letter states that these documents contain information necessary to initiate formal consultation pursuant to the formal consultation regulations under 50 CFR §402.46, Optional Formal Consultation Procedures for FIFRA actions. EPA expects to complete consultation with NMFS and the U.S. Fish and Wildlife Service by September 2009. Following EPA's review of received comments and completed consultations, it will complete the risk assessment and make a final decision on the registration of clomazone on January 2010. Your letter further states that applicants, such as FMC (the sole technical registrant for clomazone), and any entities to whom they sell technical clomazone for use in manufacturing pesticide products registered under FIFRA, will provide information to NMFS during the consultation period.

Given EPA's timeline to finalize the registration of clomazone, EPA's request for formal consultation appears premature as a revised clomazone registration review package in 2010 may trigger subsequent consultation. Additionally, NMFS is unclear on the total number of identified applicants beyond FMC for this consultation and when additional relevant information from all applicants will be provided to NMFS. Finally, pursuant to

50 CFR §402.46, when effects determinations are prepared without advance coordination under 50 CFR §402.44, NMFS may determine that additional information would provide a better information base for the effects determination and notify EPA of that determination within 45 days of receipt of the effects determination. The effects determination for clomazone was not prepared in coordination with NMFS and does not contain the information necessary to initiate formal consultation. We identify additional information and analysis that must be provided by EPA to NMFS in order to adequately evaluate the potential effects of clomazone to listed species and their designated critical habitat. Therefore, NMFS requests that EPA review the initiation package that was submitted and update it to include the following information:

1. A complete effects determination for all listed species under NMFS' jurisdiction. EPA made three separate effect determinations for 58 listed species and their designated critical habitat under NMFS' jurisdiction for clomazone uses on non-rice, dry seeded, and wet seeded rice (Appendices I, J, and K). These determinations were based on differences in application timing, cultural practices, and label use location restrictions. As these determinations were not coordinated with NMFS, we recommend EPA work with us to effectively assess effects determinations for listed species identified in the March 2009 ecological risk assessment and additional NMFS listed resources and critical habitat not covered in the assessment. They include the Totoaba (*Totoaba macdonald*), Black abalone (*Haliotis cracherodii*), and designated critical habitat for the elkhorn coral (*Acropora palmata*) and staghorn coral (*Acropora cervicornis*). Please also confirm whether the Habitat Modification of No Concern and the Habitat Modification of Potential Concern effects determinations used in the March 2009 ecological risk assessment serve as EPA's equivalent for assessing whether the effects of the proposed action are not likely to adversely affect designated critical habitat under the ESA.

2. A complete description of the action. EPA identified registered uses for clomazone on certain crops (Appendix A) and distance limit prohibitions on section 3 labels for towns, subdivisions, commercial vegetable production, commercial fruit production, commercial nurseries, commercial green house and desirable plants. However, information on section 18 (emergency uses) and 24(c) Special Local Need labels, and other uses of clomazone from potential applicants for this consultation are lacking.

In order to fully analyze the proposed action, EPA should provide a summary of all registered uses of clomazone in the U.S. and its affiliated territories. At a minimum, information on all allowable application methods, maximum single application rate, number of applications, minimum application interval, and maximum application rate/year for each EPA authorized use (*e.g.*, crop type, residential use, commercial use, etc.) should be provided in the revised registration review package.

NMFS further requests EPA provide information on the inert ingredients, adjuvants, surfactants, applied to a site either as part of the product formulation or as a mixture in the applicator's tank.

3. A complete description of the action area. As per 50 CFR §402.09, the Action Area includes all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action. Given EPA's nationwide authorization of clomazone, the Action Area encompasses the entire U.S. and its affiliated territories. The Action Area should be used to identify all listed species and designated critical habitats that may be affected by the action.

4. A complete cumulative effects analysis: Please include a cumulative effects analysis for the 11 categories of activities provided in your letter that are likely to adversely affect listed species. Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered under consultation. EPA's analysis of these activities should include their direct and indirect effects on listed species or their designated critical habitat. EPA may refer to its National Environmental Policy Act analyses for the proposed action. EPA may further apply the narrower ESA cumulative effects definition for identifying cumulative effects for the registration of clomazone. NMFS will consider EPA's analysis during consultation as per 50 CFR §402.14(g)(3) and (4).

5. An analysis of potential mixtures: Please include, where appropriate, consideration of active ingredients that share a common mode of action, and other active ingredients that have been shown to result in additive or synergistic responses to listed species or their habitat. Appendix D of the March 2009 ecological risk assessment reports formulation toxicity for multiple active ingredients is enhanced by the additive effects of clomazone with trifluraline and with propanil in Strategy formulations. Also, the Commence EC formulation is more toxic than clomazone with trifluraline. NMFS requests the revised assessment evaluate potential mixture effects coupled with the existing environmental baseline conditions of impacted aquatic systems to better assess risk to listed species.

6. Information available on direct lethal, sublethal, and potential habitat responses.

7. Information and analysis of indirect effects through effects to prey and primary producers. For example, marine mammals such as the Southern resident killer whale eat listed salmonids as food. Potential effects of clomazone to salmonid survival and their availability as prey items for other listed mammals via the food web should also be assessed.

8. Other relevant available information on the action, the affected species, or critical habitat.

Absent the above-listed items, NMFS lacks sufficient information to complete consultation on EPA's registration of pesticide products containing clomazone. Pursuant to 50 CFR §402.14 and 50 CFR §402.46, the formal consultation process for the registration of clomazone should begin once we have received the necessary information. Given NMFS' current consultation schedule and considering that EPA will need additional time to address the information needs identified in this letter, we do not expect the consultation to be completed by September 2009 as requested by EPA.

We look forward to your continued cooperation in the conservation of listed species. If you have any questions or concerns, please contact me at (301) 713-1401.

Sincerely,

Angela Somma, Chief
Protected Resources
Endangered Species Division

Cc: Rick Sayers, USFWS, Arlington, Virginia