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

MAY 22 2009

Arthur-Jean B. Williams
Environmental Fate and Effects Division
Office of Pesticide Program
United States Environmental Protection Agency
Washington, D.C. 20462

Subject: Request for Endangered Species Act Section 7 Consultation on the Environmental Protection Agency's Review of their Registration of Pesticide Products Containing the Active Ingredient Fomesafen

Dear Ms. Williams:

I am writing in response to your letter of April 22, 2009, to the National Marine Fisheries Service (NMFS) transmitting the assessment for the potential affects of pesticides registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In your letter, you requested initiation of formal consultation for ongoing and future use of pesticides containing the active ingredient fomesafen. This letter is issued pursuant to the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. §1531 *et seq.*) and the regulations governing interagency consultation (50 CFR Part 402).

The Environmental Protection Agency's (EPA) ecological risk assessments and effects determinations are conducted within the context of the registration review process. As part of this review, EPA has opened a docket (HQ-OPP-2006-0239) that provides risk assessments and effects determinations for public comment. In your letter, you refer NMFS to this docket as containing the best scientific and commercial data available relative to the potential of pesticide products containing fomesafen to affect federally listed threatened and endangered species or designated critical habitat. EPA's letter further states that the documents contained in the docket contain the information necessary to initiate formal consultation pursuant to the formal consultation regulations under 50 CFR §402.46, Optional Formal Consultation Procedures for FIFRA actions.

Given EPA's timeline to finalize the registration of fomesafen, EPA's request for formal consultation appears premature as a revised fomesafen registration review package in 2010 may trigger subsequent consultation. Also, 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 fomesafen was not prepared in coordination with NMFS, and it does not contain the information necessary to initiate formal consultation.

This letter transmits the additional scientific information and analysis that must be provided by EPA to NMFS in order for us to adequately evaluate the potential effects to listed species and critical habitat as a result of the proposed action. Therefore, NMFS requests that EPA review the initiation package that was submitted and update it to include the following information:

1. A description of the action to be considered: EPA needs to clearly identify the proposed action. EPA has solicited public comment on ecological risk assessment and effects determination and has indicated that it may alter proposed mitigation measures in response to public comment. For example, it is not clear whether EPA is proposing to require offset-distances to protect riparian vegetation and wetlands or if this is only a potential action for which EPA is seeking public comment.

   The specific registered uses of fomesafen are "the action" permitted by EPA, and the subject of any consultation. For purposes of the consultation on registered uses of fomesafen, the federal actions under review are all EPA authorized uses of fomesafen. Thus, the description of the action should include a summary of all registered uses of fomesafen in the United States and its affiliated territories. At a minimum, this summary should include 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 uses, etc).

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

2. A description of the action area: 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 [50 CFR §402.02]. Given EPA's nationwide authorization of fomesafen, the action area would encompass the entire United States (U.S.) and its territories. The action area should be used to identify all listed species and designated critical habitats that may be affected by the action.

3. A description of any listed species or critical habitat that may be affected by the action: EPA has not provided NMFS with a description of any animals or plants of which program responsibilities have been vested in the Secretary of Commerce and which have been determined by the Secretary to be endangered or threatened and which may be found within the action area.

4. A cumulative effects analysis: Please include a cumulative effects analysis for those actions likely to adversely affect listed species. Cumulative effects in the ESA is defined as the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area. Future Federal actions that are unrelated to the proposed action are not considered because they require separate

consultation. While EPA has provided NMFS with a list of non-Federal activities that may occur within the action area and which may affect listed species, it has not provided an analysis of the activities' direct and indirect effects on listed species or on the critical habitat designated for these species. EPA may refer to its National Environmental Policy Act cumulative impact analyses, but apply the narrower ESA cumulative effects definition, in identifying cumulative effects for the consultation on the registration of fomesafen. NMFS will consider EPA's analysis during consultation as per 50 CFR §402.14(g)(3) and (4).

5. An analysis of potential mixtures: EPA recognizes that the ingredients cause additive toxicity (Appendix H) but has determined that an assessment of fomesafen's potential effect on listed species when it is co-formulated with other active ingredients can be based on the toxicity of the single active ingredient fomesafen. EPA made this determination because these formulations reflect independent additive toxicity responses and not interactive effects. However, the data indicate the formulations increase the toxicity and that needs to be considered. Further, the analysis only considers formulation mixtures and not tank mixtures or environmental 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.

6. Information available on direct lethal or sublethal responses: The information in the docket lacks transparency regarding how EPA reached its conclusion that the active ingredient is essentially non-toxic to fish on an acute basis, particularly when EPA's risk assessment identifies a reported incident of a fish kill that was rated as probably related to an allowable pesticide application with application according to registered use.

7. Information and analysis of indirect effects through effects to prey and primary producers.

8. Information and analysis of indirect effects from loss of riparian vegetation: The ecological risk assessment does include the possibility of loss of riparian vegetation, but does not include an analysis of the extent to which this loss will affect listed species.

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

Absent this information, we do not currently have sufficient information to complete consultation on the active ingredient fomesafen. Pursuant to 50 CFR §402.14 and 50 CFR §402.46, the formal consultation process for the registration of fomesafen should begin once we receive 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 in the interim, please feel free to contact me at (301) 713-1401.

Sincerely,

Angela Somma, Chief
Protected Resources
Endangered Species Division

cc: Rick Sayers, U.S. Fish and Wildlife Service, Arlington, Virginia