



Jan Matuszko  
Director, Environmental Fate and Effects Division  
Office of Pesticide Programs  
U.S. Environmental Protection Agency,  
1200 Pennsylvania Ave. NW, Washington, DC 20460-0001

Submitted via regulations.gov

Re: **Comments on EPA's Vulnerable Listed (Threatened and Endangered) Species Pilot Project (Docket EPA-HQ-OPP-2023-0327)**

Dear Ms. Matuszko:

The National Association of State Departments of Agriculture (NASDA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) Vulnerable Listed (Threatened and Endangered) Species Pilot Project (Docket EPA-HQ-OPP-2023-0327). NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all 50 states and 4 U.S. territories. State departments of agriculture are responsible for a wide range of programs, with conservation and environmental protection among our chief responsibilities. In 43 states, the state departments of agriculture are co-regulators with EPA and are responsible for administering, implementing, and enforcing the production, labeling, distribution, sale, use, and disposal of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

As co-regulators, NASDA acknowledges the agency has challenges with implementing timely and effective strategies that protect listed species in a way that is both practical for pesticide users to implement and protective of species, particularly as litigation pressures escalate. With increasing economic and environmental pressures, it is more important than ever to ensure farmers and other pesticide user groups maintain access to safe and effective products. The ability of the agency to execute a robust pesticide registration, registration review, and, when applicable, an Endangered Species Act (ESA) consultation process based on the best available science is a critical step in achieving this goal. While NASDA appreciates the agency's effort to come into compliance with ESA, we remain troubled by numerous elements of the proposed vulnerable species pilot and the underlying FIFRA/ESA workplan.

NASDA is generally aligned with the concerns raised by the pesticide user community on issues related to insufficiency of USDA/EPA coordination, the availability of data related to ecological risk and pesticide usage that EPA does not appear to be considering, as well as complicated compliance obligations and cost. We likewise share concerns with the scarcity of mitigation options that EPA is making available to producers along with the accompanying efforts within EPA to redefine many conservation practices in a manner inconsistent with USDA and industry standards.

In addition to concerns outlined by other stakeholders, state departments of agriculture are also troubled by the impacts that the proposed pilot will have on state lead agencies (SLAs) if this effort were to move forward. These concerns included a lack of sufficient resources, lack of quantification and consideration of benefits as required under FIFRA, lack of transparency in mitigation measure selection, the complexity of compliance, and the enforceability of these measures.

## **Resource Scarcity**

From the perspective of state departments of agriculture, among the many troubling aspects of the proposal is an apparent failure to recognize that state lead agencies are already strapped for resources. If EPA were to move forward with this effort, it is incumbent upon the agency to ensure states have the necessary resources and are able to enforce these measures.

In addition to SLAs not having the necessary resources to appropriately communicate and enforce this proposed pilot, NASDA is concerned with the tremendous cost to growers to comply with these proposed mandates on their operations. We anticipate that this proposal would also result in a surge of applicators seeking funding through programs like NRCS, which will place an additional strain on USDA. We need a flexible and realistic approach that protects vulnerable species while also providing the pesticide-user community with a program that allows them to comply. Given the numerous questions that have been raised during recent calls with the agency, it is not entirely clear that the agency has provided the necessary flexibility or transparency that will enable a successful pilot.

## **Departure from FIFRA Risk Assessment**

NASDA has long held that pesticide regulation must be driven by the best available data and rely exclusively on quantitative risk assessment. While the proposed Vulnerable Species Pilot Project is on its surface an attempt to address risks to threatened and endangered species and critical habitats under the Endangered Species Act, proposing advanced mitigation measures for the use of pesticides is inherently an exercise of authority under FIFRA which clearly requires fact-based decision making and a complete analysis of costs and benefits. To do less would put state regulators in the unenviable position of having to enforce rules that are at best arbitrary and capricious, but more likely mirroring the European Union's regulatory approach through their so-called Precautionary Principal. Specifically, NASDA is concerned that through the proposed Vulnerable Species Pilot Project, EPA is abandoning the statutory mandate to base decisions on pesticide sale, distribution, and use on an initial analysis of pesticide risk in favor of arbitrary mitigation mandates that would represent a tremendous challenge on the part of state pesticide regulators to explain and enforce.

## **Mitigation Availability and Transparency**

While NASDA appreciates EPA's efforts to document the likely benefits to threatened and endangered species and critical habitats that proposed mitigation measures could have if employed by producers and applicators, we are concerned with the process by which the proposed mitigation measures have been chosen, the means by which EPA has defined these proposed measures, and the absence from this list of the hundreds, if not thousands of measures farmers are already employing that would benefit species and habitat. As cooperative partners in pesticide regulation, we strongly encourage EPA to provide a clear and transparent explanation of why the agency has chosen to include only a small fraction of the conservation measures available and frequently used by growers. Additionally, we encourage the agency to provide a well-defined path, with transparent requirements, through which additional mitigation measures and their well-documented benefits can be considered. To do less exposes EPA and SLAs to challenges that our enforcement actions would be arbitrary and capricious.

EPA has stated that this pilot project and the underlying FIFRA/ESA workplan is driven by efforts to avoid costly litigation. If that is truly the goal, then NASDA recommends that EPA pivot to developing and making available a comprehensive library of producer-driven conservation practices; providing clear guidelines and data requirements regarding how the agency is evaluating the benefits of the conservation practices that are or will be included; and providing clear, reasonable and accountable timelines for such evaluations. As stated previously, NASDA appreciates EPA's desire to account for the mitigation

benefits of conservation measures adopted by producers. To properly account for these measures, NASDA encourages EPA to ensure that all pesticide registration and registration review decisions consider the statutorily mandated analysis of costs and benefits in the development of quantitative risk assessments.

Regarding other aspects of the mitigation measures provided by EPA, NASDA urges the EPA to fully utilize standards and definitions already established by USDA and industry stakeholders. Likewise, NASDA is troubled by the seemingly arbitrary nature of aspects of the mitigation pick-list already provided. As examples, EPA is mandating that producers employ 4 listed mitigations. How was the number 4 determined? Is there an analysis that EPA can provide that demonstrates that 1, 2, or 3 are insufficient? Likewise, EPA has determined that production on land with a 2% slope can be an optional mitigation to choose from. Does EPA have a quantifiable risk assessment that clearly demonstrates that as slope of 2.1% is insufficient? What about a 3% slope? How did EPA determine that 3% slope creates an insurmountable risk to listed species?

### **Compliance Complexity**

In addition to the questions listed above, NASDA is concerned that at its core, the proposed pilot represents an unreasonably complex path forward for pesticide users that will need to implement as they strive for compliance. While we commend the agency for the development of tools like StoryMaps that provide helpful information, these efforts do not compensate for the highly complex nature of proposed measures that users will need to interpret.

In order to appropriately and effectively utilize Bulletins Live! Two, particularly with such a drastic increase in complexity, producers and other applicator groups will require substantial outreach and education. Given resource concerns outlined earlier, NASDA remains concerned that SLAs will not be able to provide the robust education and awareness necessitated by this proposal. If this proposal were to move forward, we encourage the agency to include land-grant universities and the Agricultural Resource Service as a part of ecosystem that will be providing support and messaging to users.

### **Enforcement**

As the SLA in 43 states that will be charged with the enforcement of these measures, NASDA members are concerned that at the core of this pilot is a fundamental inability to effectively enforce measures in a way that benefits all impacted stakeholders. We are troubled that we are not able to reasonably enforce what cannot be reasonably implemented and that this incongruity will result in the erosion of trust between the regulated community and state departments of agriculture.

Numerous aspects of the proposed pilot provide unclear next steps for co-regulators, who take seriously their role in upholding actions set in place by the EPA. If this pilot were to move forward, NASDA requests that the EPA work closely with their SLAs to provide specific, clear answers to questions surrounding enforcement.

For instance, in Section 4.2.1 “Avoidance” of the draft, the proposed bulletin language says:

*Pesticide applications are prohibited within this area unless the applicator coordinates with the local FWS Ecological Services field offices to determine appropriate measures to ensure the proposed application is likely to have no more than minor effects on the species. The applicator must coordinate with FWS at least 3 months prior to the application. FWS points of contact are available through the Information, Planning, and Consultation (IPaC) website (<https://ecos.fws.gov/ipac/>). If a permit has been granted by FWS, no additional coordination with FWS is needed if a pesticide application is made in accordance with an existing FWS permit.*

This language lacks the specificity that SLAs will need in order to ensure that applicators have undergone the appropriate consultation with local FWS field offices; a challenge that will be further complicated as the field offices have nowhere near the necessary resources and staffing to appropriately address the large volume of requests we anticipate them to receive.

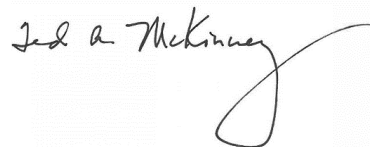
Additionally, NASDA members are concerned that many of the mitigation measures suggested by this proposal will not result in physical evidence of compliance by the time SLA staff is present. Meaningful consideration of these challenges must be addressed by the agency, and additional training and resources will likely become necessary for compliance staff.

## **Conclusion**

As regulatory partners with EPA, the National Association of State Departments of Agriculture stands ready to assist EPA in ensuring U.S. farmers and public health officials have access to a broad range of technologies and pesticides, reviewed and approved in a scientifically sound and transparent manner. NASDA is eager to work with the EPA on reasonable, prudent and feasible practices that can mitigate the impact on vulnerable species under the pilot project, and any other actions originating from the ESA Workplan.

Should you have any questions, please contact Josie Montoney-Crawford, Manager of Public Policy, at [josie.montoney-crawford@nasda.org](mailto:josie.montoney-crawford@nasda.org). Thank you for your consideration of our comments on this important topic.

Sincerely,

A handwritten signature in black ink that reads "Ted McKinney". The signature is fluid and cursive, with a large loop at the end.

Ted McKinney  
Chief Executive Officer  
NASDA