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October 20, 2023

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

Submitted electronically via Federal eRulemaking Portal

RE: Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides (EPA-HQ-OPP-2023-0365)

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) Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides (EPA-HQ-OPP-2023-0365). 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 supports the agency's effort to come into compliance with ESA, we remain very troubled by numerous elements of the proposed herbicide strategy and the underlying FIFRA/ESA workplan.

In addition to concerns previously outlined in our comment to the Vulnerable Species Pilot Project, state departments of agriculture are troubled by the impacts that the draft herbicide strategy will have on state lead agencies (SLAs) if this effort were to move forward without significant modification. Our concerns include a lack of sufficient resources, lack of transparency in mitigation measure selection, the complexity of compliance, and the enforceability of these measures.

NASDA encourages the Agency to formally respond to comments made on both the Vulnerable Species Pilot as well as this herbicide strategy. We know that the Agency is under deadlines voluntarily agreed to for implementing this strategy and other ESA-related strategies. However, as co-regulators who were not part of the litigation settlement but will nevertheless be tasked with enforcement responsibilities as these strategies are applied to registration and re-registration decisions, our concerns and questions necessitate a comprehensive explanation. This includes how the agency intends to address the myriad of concerns presented by state departments of agriculture as well as the pesticide users who will be negatively impacted by these proposals.

Resource Scarcity

Among the many troubling aspects of the proposal is at best an apparent failure to recognize that SLAs have limited resources. If EPA were to move forward with this effort, it is incumbent upon the agency to ensure SLAs have the necessary resources and guidance in order to reasonably enforce these measures.

In addition to SLAs not having the necessary resources to appropriately communicate and enforce the proposed requirements presented in this strategy, NASDA is concerned with the tremendous cost to growers to comply with these proposed mandates on their operations. We anticipate that if implemented as proposed, this strategy would also result in a surge of applicators seeking funding through state and federal conservations programs which are already oversubscribed. The agriculture community as well as other pesticide users need a flexible and realistic approach that protects threatened and endangered species while also providing the pesticide-user community with a program that clearly and fairly facilitates compliance.

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 are 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. 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.

NASDA additionally encourages more robust engagement with the United States Department of Agriculture (USDA) as the Agency navigates defining regionally appropriate conversation mitigations tailored to unique cropping systems. By engaging with USDA early and often, we anticipate that the Agency can better account for strategies that protect the environment, while maintaining applicators ability to remain compliant.

Compliance Complexity

NASDA is concerned that the strategy represents an unreasonably complex path forward for pesticide users to implement as they strive for compliance. While we appreciate that the Agency has attempted an entirely new approach to mitigations through proposals like efficacy points, these efforts do not compensate for the highly complex nature of proposed measures that users will need to interpret. Input from impacted groups has made it clear that many do not fully understand their compliance obligations under this proposal, let alone possess the ability to implement it throughout their operations.

Compliance obligations is another concern for farmers. Specifically, when considering the size and/or complexity of some agricultural operations, it is unreasonable for the EPA to expect farmers to fully understand the nuances of the draft strategy as it relates to the selection and implementation of runoff or drift requirements on each acre of their operations. It is inconceivable to determine how SLAs will deal with this enforcement challenge.

The EPA's proposed reliance on the internet-based compliance tool, Bulletins Live! Two is unrealistic. To appropriately and effectively utilize Bulletins Live! Two, particularly with such a drastic increase in complexity, farmers and other applicator groups will require substantial outreach, education, and Internet access. According to the Federal Communications Commission approximately 14.5 million Americans do not have broadband access and USDA reports only 51 percent of farms can connect to the Internet through a broadband connection.¹ We are concerned that the agency has not addressed this matter in a meaningful way. We also request that technical challenges beyond connectivity have been raised by stakeholders in regards to Bulletins Live! Two are also addressed.

¹ "Technology Use (Farm Computer Usage and Ownership)," USDA, Aug. 2023.
<https://downloads.usda.library.cornell.edu/usda-esmis/files/h128nd689/4j03fg187/fj237k64f/fmpc0823.pdf>

Enforcement

As the SLA in 43 states that will be charged with the enforcement of these measures, NASDA is concerned this proposed strategy will not 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 incongruency will result in the erosion of trust between the regulated community and state departments of agriculture.

Numerous aspects of the proposed strategy provide unclear next steps for co-regulators, who take seriously their role in upholding actions set in place by the EPA. If this strategy 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 Table 6-10 “Potential Exemptions from Needing to Follow the Mitigation Menu” of the Draft Herbicide Strategy Framework, the proposed language states:

Exemption	Justification
Follow recommendations from Conservation Specialist or Certified Expert to Reduce Runoff/erosion ¹	Growers may work with an expert to develop mitigation plans that are designed for their field and are efficacious in reducing offsite transport of pesticides substantially. While conservation programs are not specifically designed for reduction of offsite transport of pesticides, the same types of measures used for reducing offsite transport of nutrients and erosion of soil from the field also reduce offsite transport of pesticides. Evaluating a field for ways to reduce nutrient runoff and erosion are likely to result in similar recommended measures as those in the proposed runoff/erosion mitigation menu. EPA is currently developing criteria where this option would be considered functionally equivalent to relying on the mitigation menu. EPA requests feedback on the types of experts, conservation programs, and appropriate criteria that could be relied upon to ensure that this is an effective measure, including for pesticides that need a high level of reduction of offsite transport to be protective of listed species. EPA will develop specific definitions and criteria for programs and experts based on feedback received on this exemption. Preliminarily, if the expert/conservation program evaluated a field

	for potential areas where runoff/erosion could occur and supported the grower in the development of those conservation practices in the field to reduce that offsite transport, those mitigations may be more likely to be effective and well maintained.
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We commend the Agency for exploring exemption options, which, for many growers, will be the only way to attempt to achieve compliance. However, we have concerns that as the herbicide strategy is rolled out, SLAs will not have enough specificity to clearly credit applicators to qualify for this exemption. Additionally, even once guidance is provided on what constitutes a “conservation expert” and acceptable practices, this represents an additional hurdle state regulators will have to overcome as they navigate needing to track conversations, paperwork, and more.

NASDA recommends that the Agency consider conservation expertise that is found within state departments of agriculture, and that the Agency creates clear guidance on how applicators may incorporate this exemption into their practice.

Additionally, NASDA is 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.

Given the numerous questions that have been raised during recent calls with the agency, and the admission by senior leaders from EPA that the proposed requirements are inherently subjective, it is clear that the agency has failed to provide the necessary flexibility and transparency that will enable the successful implementation of the proposed strategy.

Unintended Consequences

NASDA is also concerned with a number of unintended consequences that may result from the implementation of the strategy as proposed.

One of our many concerns relates to our ongoing efforts to address invasive species. Invasive species, including weeds, cause immense environmental and economic damage. The damage they cause is estimated at over \$120 billion annually and they are the primary driver of risk to approximately 42 percent of all threatened and endangered species. As USDA’s National Invasive Species Information Center (NISIC) notes, pesticides are an important part of integrated pest management (IPM) strategies for controlling invasive species. Both public and private land managers judiciously utilize herbicides to limit the spread of invasive weeds. However, if land managers lack access to herbicides, it may permit the wider spread of invasive weeds which pose a tremendous threat to listed species and their habitats.

Additionally, we are concerned that proposed mitigation measures such as significant rate reduction will not only prove ineffective in controlling weed pressures necessary to maintain viable cropping systems but will also result in resistance management issues increasing in pest populations.

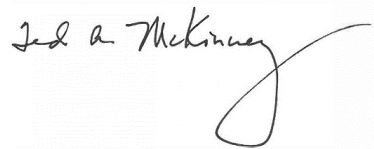
Conclusion

NASDA reiterates to EPA our support of its effort on ESA compliance within FIFRA. However, we would be remiss to not implore EPA to ensure the feasibility of the various ESA compliance strategies is fully evaluated to ensure that growers can comply with these strategies, SLAs can adequately enforce these strategies, and that whatever is required does not negatively impact food security in the United States.

We look forward to working with the agency toward positive outcomes for farmers, endangered and threatened species, and our environment alike, and we request to meet with the Agency to find a reasonable plan to achieve these goals in the near future. Should you have any questions, please contact Josie Montoney-Crawford, Manager of Public Policy, at 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 a McKinney". The signature is written in a cursive style with a large, looping flourish at the end.

Ted McKinney
Chief Executive Officer
NASDA