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Public Comments Processing
Attn: EPA-HQ-OPP-2022-0908
U.S. Environmental Protection Agency

Administrator Michael S. Regan
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

RE: North Dakota Department of Agriculture (NDDA) comments on U.S. Environmental Protection Agency (EPA) proposal to adopt the 2022 Appendix to the Endangered Species Act (ESA) Workplan Update: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions EPA-HQ-OPP-2022-0908

Dear Administrator Regan,

The EPA proposes to promulgate the ESA Workplan Update. For the reasons stated herein, NDDA strongly opposes this ESA Workplan Update. NDDA recommends EPA withdraw its ESA Workplan Update in its entirety. If EPA does not withdraw the ESA Workplan Update in its entirety, NDDA recommends that EPA substantially revise it.

North Dakota producers require safe and effective crop protection tools. NDDA supports the continued development of reliable pesticides that efficiently protect crops and that are environmentally conscious. The ESA Workplan Update is unbalanced. Its newly proposed restrictions are highly unwarranted and will have devastating impacts on growers, pesticide applicators, the state's agriculture industry¹, and food security.

¹ North Dakota agriculture contributes considerably over 30 billion dollars in economic activity annually to the state. As a prime exporter of agricultural products, North Dakota is often cited as the "breadbasket of the world." North Dakota is the country's 10th largest agricultural exporting state. North Dakota produces over 50 different commodities. North Dakota farmers lead the nation in the production of more than a dozen important commodities, among them spring and durum wheat, rye, food grains, assorted beans, barley, flaxseed, canola, honey, sunflowers, pulse crops and more. Of North Dakota's approximately 775,000 residents, only about three percent are farmers and ranchers. Nonetheless, agriculture broadly supports nearly 25 percent of the state's workforce, which is higher than the national average of 19 percent. Agriculture remains the leading industry in North Dakota.

Any workplan must be feasible and serve to help protect endangered and threatened species, while not hampering responsible and lawful use of essential crop protection tools. The proposed ESA Workplan Update was unnecessarily rushed, is consequently defectively drafted, and ultimately misses the mark.

Upon implementation, the proposed ESA Workplan Update would not provide regulatory certainty, nor would it adequately ensure growers have ready access to critical crop production tools to properly manage pests. The ESA Workplan Update serves to misuse the ESA and the effective long-established pesticide Registration Review process to unnecessarily restrict pesticides and unduly burden North Dakota farmers.

EPA's proposed interim ecological mitigation and other proposed label language.

Section III of the ESA Workplan Update details EPA's proposed interim ecological mitigation and other proposed label language. The proposed label restrictions are overly conservative and reduce availability of necessary pesticides without increased species protection.

On page 8 of the ESA Workplan Update, EPA states: "Thus, EPA will be placing a greater emphasis on addressing ecological risks while still balancing pesticide benefits and the potential impacts of mitigation." In practice, the ESA Workplan Update simply attempts to decrease EPA's statutory responsibilities regarding endangered species by highly negatively impacting responsible and safe pesticide use.

In short, EPA has casually proposed "off the shelf" mitigation measures instead of using much more effective targeted analysis of usage data, siting information, and use-specific considerations that collectively would conscientiously and scientifically eliminate many areas where such mitigation measures would be necessary.

Pesticide products currently on the market appropriately balance ecological risk-mitigation with effective pest management. Notwithstanding, there is currently still a lack of effective products to manage insects, for example in relation to sunflowers and sugar beets. Growers require critical crop protection tools that are affordable, effective, and safe. The ESA Workplan Update will promote the exact opposite.

Pesticides remain essential to protect crops. North Dakota farmers can face significant crop loss or financial ruin if they are unable to access or cannot effectively apply the only crop protection tools approved for their respective crops against targeted pests. Pesticides are also essential components to many important conservation practices, including no-till and cover crops. In many cases, the ESA Workplan Update would compel growers to use crop protection alternatives that are substantially less effective and much more expensive.

Continually exaggerating ecological risks will result in over-complicated and difficult to understand pesticide labels, more pesticide-use exclusion areas, and increased pest resistance. The ESA Workplan Update will adversely impact North Dakota producers and applicators, and result in lost revenue, future difficulties in managing resistant pests, and potentially even foster improper pesticide use.

Instead of advancing and promulgating its proposed ideological ESA Workplan Update, EPA should instead consistently strive to maintain a fair, reasonable, and balanced scientific approach to pesticide registration decisions – one that fully considers actual risks, crop protection benefits, and targeted pest resistance.

FIFRA interim ecological mitigation measures.

Section III of the ESA Workplan Update discusses a menu of FIFRA interim ecological mitigation measures for conventional and biological pesticides used on agricultural crops. It proposes a mitigation measure requiring surface water protection statements for pesticide users, when precipitation occurs or is forecasted, professedly to reduce ecological risk from movement of pesticides off the field through runoff or erosion.

This proposed artificial mitigation measure would be of exceedingly limited usefulness and should be either entirely deleted or substantially revised. Moreover, as a practical matter, this proposed mitigation measure generally would be unenforceable by a FIFRA inspector.

Overbroad spray drift buffers.

The ESA Workplan Update also proposes numerous overbroad spray drift buffers:

- Spray drift buffers from aquatic habitats (e.g., lakes, reservoirs, rivers, permanent streams, wetlands or natural ponds, estuaries, and commercial fish farm ponds) and conservation areas (e.g., public lands and parks, Wilderness Areas, National Wildlife Refuges, reserves, conservation easements).
- Conservation buffers (small areas or strips of land in permanent vegetation designed to intercept pollutants and manage other environmental concerns) and other conservation measures to reduce ecological risk from movement of pesticides off the field through runoff or erosion.

This proposed label statement is not authorized under FIFRA. EPA should not propose broad, vague, and unenforceable drift label language such as "could cause harm" and "could cause an adverse effect," etc., or "do not drift," which would be utterly impossible to achieve under all reasonable circumstances. EPA should instead propose to implement a general straightforward, informative, and enforceable drift statement such as "Follow label directions to reduce the potential for drift incidents."

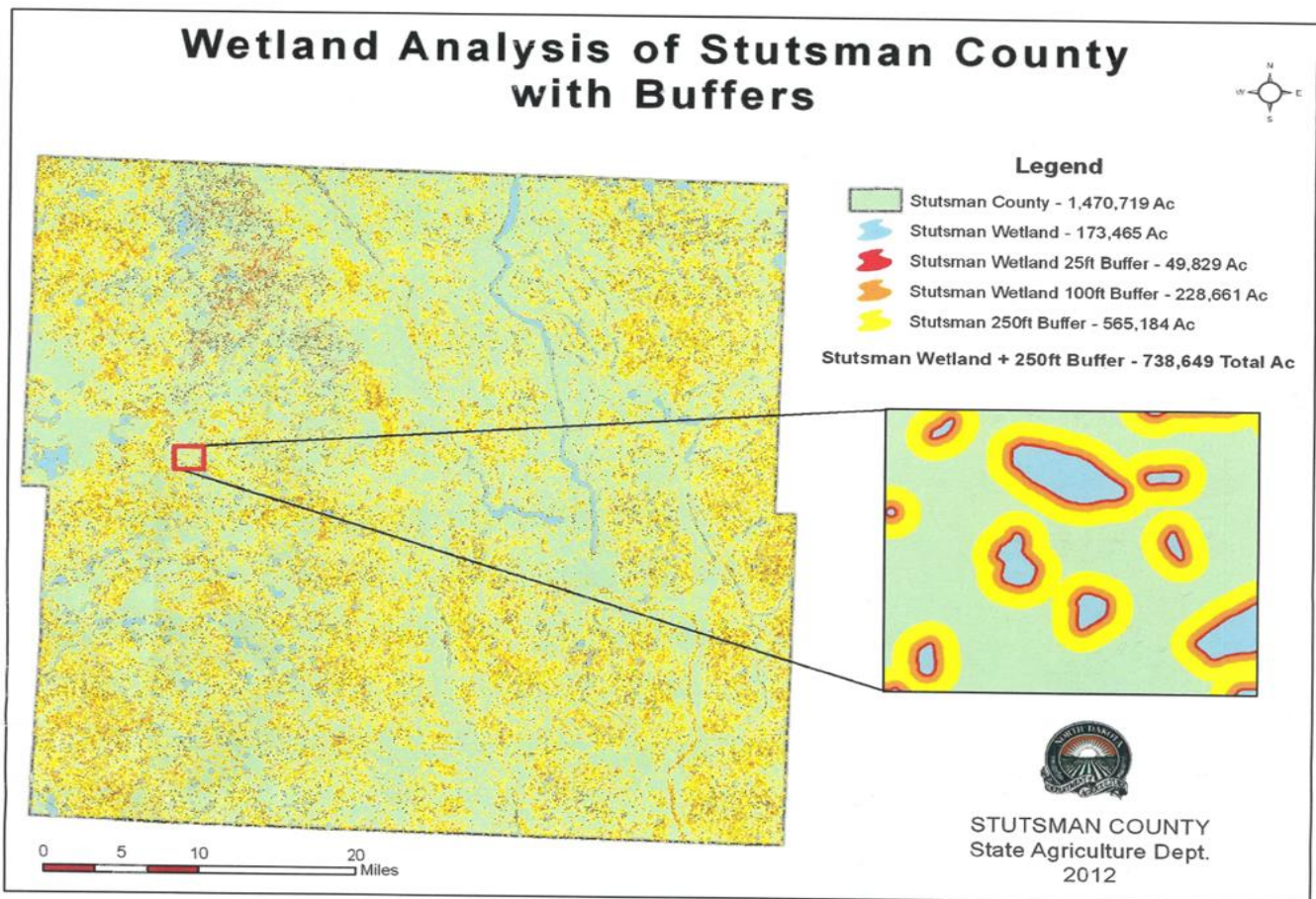
What's more, buffers around some waters in North Dakota might be appropriate for a small number of pesticides. However, applying this label language broadly to almost all pesticides is highly unwarranted and accordingly very problematic.

It is vital that EPA realistically characterizes and quantifies the risks associated with pesticide drift specific to particular terrain, and consequently takes proper and limited

regulatory actions that avoid negative, unnecessary impacts to agriculture. A one-size-fits-all conservation buffer approach is entirely unworkable.

Mitigation measures that might work in Hawaii or New York probably are much less likely to be of any significant benefit within Nebraska or Florida. In this vein, EPA-proposed mitigation measures such as spray drift buffers are almost entirely unworkable in North Dakota. For example, North Dakota is home to the prairie pothole region with more acres of small surface waterbodies than many states combined.

The below map provides additional context as to why mitigation measures must be better tailored to specific localities and why general national standards are not practical. This map displays acreages in just one county of North Dakota. Stutsman county contains over a million acres of high-quality farmland and lies directly in the heart of the prairie pothole region.



Stutsman county contains 1,470,719 total acres. There are 173,465 acres of wetlands in Stutsman county. Mandating a 25-foot buffer around all waterbodies in Stutsman county would equate to a buffer land use of 49,829 acres. This is nearly 50,000 acres of land taken out of effective agriculture production.

Even more impractical, requiring a 100-foot buffer around all waterbodies would equate to 228,661 acres of land solely used for spray drift buffers. That would comprise well over 15% of the total acreage in the county and over 17% of the total land area in Stutsman county – essentially taking almost one quarter million acres of agricultural land taken out of viable production in one North Dakota county alone.

To be sure, this is just one example of one county taken out of North Dakota's 53 counties. The ESA Workplan Update would inevitably result in unnecessary negative impacts to all counties throughout the state and throughout the country.

Prohibiting responsible pesticide use on tens of millions of acres of agricultural land in North Dakota, by creating arbitrary and unnecessary buffer zones, would substantially lower crop production, greatly decrease profitability for producers, create pest resistance, and potentially even foster irregular or irresponsible pesticide use.

Application of similar ecological mitigation to pesticides with similar exposure pathways, uses, and risk profiles.

Page 10 of the ESA Workplan Update states:

Applying similar ecological mitigation to pesticides with similar exposure pathways, uses, and risk profiles also ensures that, when choosing pesticide products, pesticide users have repeated and consistent incentives to use pesticides with fewer ecological risks overall. This is because, in general, the mitigation options are more stringent for pesticides with higher ecological risks than for those with lower ecological risk.

This above statement is highly disingenuous. Pesticide users already responsibly utilize Integrated Pest Management (IPM) and consequently choose applicable products based upon such germane factors as efficacy on target pests, terrain, persistence, weather conditions, ease of application, soil conditions, manufacturer service and support, and cost. Myopically compelling a pesticide user to use only those products with purported lower "environmental risk" would consequently lead to significantly increased costs, increased pests, and decreased yields.

Mitigation measures to apply broadly to herbicides with similar fate and effects profiles.

Page 16 of the ESA Workplan Update states "Because individual herbicides do not necessarily share the same fate properties and potential for effects, EPA expects to develop two or more suites of mitigation measures to apply broadly to herbicides with similar fate and effects profiles."

Applying merely a couple of overly broad "one size fits all" mitigation measure suites will lead to unnecessary and unrealistic restrictions in large parts of the country. Two suites of mitigation measures would be far from adequate, would be exceedingly ineffective, and would unavoidably frustrate both FIFRA regulators and pesticide users.

EPA should include many more flexible mitigation measures when there is a lack of other products with similar efficacy and/or cost available for that pest and/or that crop. Additionally, EPA should develop realistic mitigation measures that consider and appropriately balance the benefit of the pesticide in relation to its potential impact to nontarget species.

Feedback on standardized Bulletins Live Two (BLT) language.

Page 21 of the ESA Workplan Update requests feedback on standardized Bulletins Live Two (BLT) language. Applicators have used the longstanding BLT system for years. It allows small scale, precise restrictions to protect specific threatened and endangered species rather than imposing heavily conflated blanket restrictions. EPA should prioritize BLT instead of attempting to create overly broad, nationwide, complicated multi-chemical label restrictions.

EPA should significantly improve the BLT system by:

- (1) Working directly with states when designing bulletins;
- (2) Having more precise and locality specific restrictions at the county level; and
- (3) Permitting growers more time to plan for planting needs, given that most growers plan and decide on pesticide use at least 9-12 months in advance.
 - Six months is entirely insufficient for growers to purchase inputs or necessary equipment to change tillage, planting, or application methods. EPA should provide a minimum of 12 months, so producers can reasonably and effectively plan at least a year in advance.

Additional criteria for proposing mitigation that EPA should consider.

Page 24 of the ESA Workplan Update requests specific feedback on several questions:

- Regarding the surface water protection statements, are there additional criteria for proposing mitigation that EPA should consider?

Yes. Specifically, if a state has current, accurate pesticide monitoring data showing the chemical in question is not an issue in that state, EPA consequently should sensibly remove unnecessary related pesticide restrictions entirely.

Descriptions of the pick list mitigation measures.

The ESA Workplan Update requests the following feedback:

- Are the descriptions of the pick list mitigation measures in Section 4 clear? If not, please suggest alternative language.

If EPA does not responsibly withdraw its proposed ESA Workplan Update, the pick list mitigation measures require substantial revision. Several of the descriptions in the picklist are entirely unworkable in North Dakota.

Field terracing, contour farming, grassed waterways, riparian buffer zones, runoff retention ponds, strip cropping, and ally cropping are highly impractical, and in many cases, impossible to utilize in numerous areas of North Dakota – given its unique landscape and terrain, current farm technology, and equipment limitations.

However, when these several pick-list options are consequently *de facto* removed from the list because they are not feasible, North Dakota growers consequently have few to no remaining available remaining choices. Accordingly, EPA should provide many more applicable alternative realistic mitigation options for producers to accommodate these risk reduction measures.

Moreover, the listed pick list mitigation measures are highly suspect. EPA does not adequately quantify or otherwise explain any cognizable benefits to the environment obtained through using any of these proposed mitigation measures. EPA does not provide any technical evidence of efficacy or necessity for any of them. To bolster its credibility and foster better cooperation by producers, EPA should thoroughly explain its reasoning and solidly detail the science underlying such measures.

North Dakota has a robust pesticide surface water monitoring program and many pesticides that may utilize this label language are not problematic in our state and accordingly these proposed label restrictions remain entirely unnecessary in the state. EPA should explicitly exempt North Dakota, and all other such inapplicable states, from all unnecessary label restrictions.

Other measures that are effective in controlling dissolved runoff.

The ESA Workplan Update further asks:

- Are there other measures that are effective in controlling dissolved runoff that should be included in the pick list? Please include supporting data with any suggestions.

Yes. If a state has monitoring data or a practical method to evaluate the pesticide and can show the applicable chemical has minimal or no risk, EPA should reasonably entirely forego the proposed pick list mitigation measure requirements. As mentioned earlier, North Dakota has a robust pesticide surface water monitoring program and many pesticides that may utilize this label language are not problematic in the state and consequently these label restrictions are completely unnecessary.

North Dakota, and many other states, readily have data and practical methods to evaluate pesticides and related risks. EPA should accordingly rightly defer to state assessments and not pursue its proposed overly broad one-size-fits-all proposed structure.

Overly detailed and complex requirements for mitigation measures.

Furthermore, placing the burden on FIFRA inspectors to inspect and enforce complex, overly detailed requirements for these mitigation measures as part of pesticide labeling is inherently irresponsible. For example, in the vegetative filter strip language, the ESA Workplan Update says:

Establish and maintain vegetative filter strips such that the area immediately upslope must eliminate or substantially reduce concentrated flow and promote surface sheet flow runoff. The design and maintenance must consider a 10-year lifespan for the vegetative filter strip. Where there is water moving across a field that is likely to move soil, structural elements must be added within the field to prevent erosion and promote sheet flow across the filter strip.

This requirement would be impossible to effectively and fairly enforce. A field inspector would be unable to verify all of these conditions during a field visit. Nor would a field inspector be able to verify similar applicable conditions for other mitigation measures proposed in the ESA Workplan Update.

Additionally, neither the EPA, nor states, should issue FIFRA violations for failing to use, or improperly implementing, these types of mitigation measures. This proposed verbiage is well outside the scope of acceptable pesticide label language, pesticide use, and likely outside many states' legal authorities.

Mitigation checklist is not readily available.

Moreover, EPA laxly referring pesticide users to an external website to view a checklist is unnecessarily confusing and inconvenient to the user. EPA can do much better. All pertinent information regarding pesticide use and regulation should be clearly written, understandable, and readily accessible to the pesticide applicator or user.

Superfluous ecological risk reductions from spray drift – spray drift buffers.

Page 39 of the ESA Workplan Update discusses ecological risk reductions from spray drift. Spray drift is already unlawful and it is not an issue when pesticide products are used per label requirements by competent, trained applicators. NDDA concurs with reasonable drift reducing label restrictions such as wind speed restrictions and release height restrictions.

However, NDDA does not support spray drift buffers around aquatic habitats or wildlife conservation areas. As previously discussed, a large portion of North Dakota contains tens of thousands of prairie potholes. Unnecessary no-spray buffers around aquatic habitats would take substantial amounts of cropland in North Dakota out of production. It would increase pest pressure, drive pest resistance, and understandably frustrate producers.

Exemption 4, regarding proposed exemptions for the no-spray buffers around wild conservation areas, is unworkable, and raises serious concerns. The purely bureaucratic

requirement to obtain a consultation, when the wildlife conservation area is not critical habitat for any threatened or endangered species, is pointless.

Moreover, the U.S. Fish and Wildlife Service (USFWS) is not adequately staffed to timely conduct and provide this huge number of additional consultations. This buffer requirement would only serve to create hostility between the USFWS and landowners adjacent to USFWS-managed lands.

Any requirement to mandate no-spray buffers around wildlife conservation areas is exceedingly short-sighted and inevitably would lead to antagonism from adjacent landowners and producers, foster improper pesticide use, cause land devaluation, reduce yields and revenue, and hinder relationships between growers, FIFRA agencies, and the USFWS.

NDDA strongly recommends EPA remove from ESA Workplan Update the proposed no-spray buffers language in its entirety.

Feedback on example language for mitigation.

Page 40 of ESA Workplan Update states “EPA seeks feedback on the example label language for this mitigation detailed in the table below. Additionally, EPA is requesting specific feedback on the following questions:”

- EPA is exploring using wind-directional buffers more broadly as they are less impactful to users by reducing the instances where spray drift buffers are needed to minimize ecological risk. A wind-directional buffer means that a user need only apply a drift buffer in the direction the wind is blowing, rather than all sides of a fields. Should EPA shift to requiring wind-directional buffers to reduce spray drift associated with aerial, ground boom, and/or airblast applications? Why or why not? Please be specific and support your position with data where available.

Further, are there circumstances where it is more desirable to have wind-directional buffers than others? Historically, to address ecological risk (and human health risk) under FIFRA, EPA has required spray drift buffers that apply to all sides of a field that are adjacent to a water body and/or conservation area, regardless of the wind direction.

More recently, however, wind-directional buffers have been proposed as mitigation measures to address listed species exposure (e.g., methomyl PID) and have been included in FWS and NMFS biological opinions for malathion.

The spray drift buffers in the table below apply to all sides of a field that are adjacent to aquatic habitats and/or conservation areas; however, pending public comment on wind directional drift buffers, EPA may propose wind-directional buffers. Example language for a wind-directional buffer would be the following:

- “Do not apply within [X] feet of aquatic habitats (such as, but not limited to, lakes, reservoirs, rivers, permanent streams, wetlands or natural ponds, estuaries, and commercial fish farm ponds) when the wind is blowing toward the aquatic habitat.”
- “Do not apply within [X] feet of any conservation areas (e.g., public lands and parks, wilderness areas, national wildlife refuges, reserves, conservation easements) when the wind is blowing towards the conservation area.”

In almost all instances, NDDA opposes mandated no-spray buffers and recommends they not be implemented. Buffers are impractical, frustrating for applicators, do little to protect neighboring areas, and create increased pest pressure and pest resistance. NDDA strongly recommends they not be required.

In the alternative, if buffers are going to be required, they must be wind-directional only and not hinder effective crop protection. EPA must fully recognize that certified pesticide applicators receive extensive training and conscientiously already consistently and responsibly utilize drift reduction best practices.

Reduced distances for spray drift buffers when other drift reduction technology is used.

EPA in its ESA Workplan Update further asks if it should consider reduced distances for spray drift buffers when other drift reduction technology is used (e.g., drift reducing agents/adjuvants). It then asks, if so, to what extent do other drift reduction technologies reduce spray drift such that buffer distances can be reduced?

Of course, EPA must consider this. This appears to be a strawman request for predetermined feedback. EPA asks feedback for the obvious in an apparent artificial attempt to bolster its ultimate proposal for spray drift buffer requirements.

In this regard, the requested and utterly obvious feedback follows:

Growers and applicators conscientiously expend substantial time and resources investing in precision agriculture and should consequently be properly incentivized for doing so. Growers routinely utilize precision agriculture and integrated pest management (IPM). They apply precise amounts of pesticide in specific GPS-mapped areas to best mitigate risk. If precision agriculture and IPM is utilized, any mandated buffer area should be accordingly concomitantly proportionally reduced.

However, to emphasize once again, mandating spray drift buffers is entirely unworkable in North Dakota. North Dakota should be fully exempted for any such requirement. Easements, land-use agreements, and any other conservation program with enrolled acres on private land must be expressly excluded. If any spray drift buffers are

promulgated, they should be modified to include only wildlife conservation areas under exclusive federal jurisdiction or management.

Pesticide-treated seed.

Page 46 of the ESA Workplan Update discusses pesticide-treated seed. EPA considers additional labeling requirements and seeks a FIFRA section 3(a) rule to allow for enforcement of the misuse of pesticide-treated seeds. NDDA opposes any such changes to the current pesticide-treated seed laws, rules, or practices. EPA must be much clearer regarding requirements to manage treated seed.

Farmers should not be responsible for seed company practice requirements in terms of adding dust reduction or fluency agents or be responsible for any additional seed treatment additives creating unintended contamination of farm fields, especially given the current sensitivity toward some chemical additives like PFAS. EPA-listed proposed burial depths for spilled seed are entirely impractical and should be substantially revised. Producers should continue to be permitted to recover spilled seed.

Proposed ESA pesticide label language.

EPA proposes the following overstated language be included on all pesticide labels:

It is a Federal offense to use any pesticide in a manner that results in an unauthorized "take" (e.g., kill or otherwise harm) of an endangered species and certain threatened species, under the Endangered Species Act section 9.

In proposing this overbroad language, EPA patently seeks to weaponize the ESA in order to significantly unnecessarily restrict pesticide use or even *de facto* ban certain pesticide use. The language is also deliberately misleading without the inclusion of additional pertinent language of what would specifically constitute an "authorized take" in the use of the pesticide.

The ESA requires EPA to ensure that registered pesticides do not unreasonably harm federally listed threatened or endangered species. However, it also requires that species conservation should be accomplished in a way that responsibly minimizes adverse impacts to agriculture production.

This above EPA-proposed label language is ill-conceived scaremongering. It is designed to highly exaggerate threats of criminal prosecution, needlessly stoke public fear, foment regulatory uncertainty, and create legal vulnerability among agriculture producers and pesticide applicators. EPA should withdraw this proposed extremely over-stated and irresponsible label language in its entirety.

Conclusion and recommendation.

NDDA opposes EPA's proposed ESA Workplan Update.

Without certain pesticide products, North Dakota producers will have substantial difficulty growing crops that feed Americans and public health agencies will lack the essential tools needed to combat insect-borne diseases. EPA's workplan, as currently proposed, overly streamlines ESA consultations and accordingly does not operate to better balance wildlife protection with responsible and safe pesticide usage.

This proposed ESA Workplan Update does not serve to conserve wildlife while allowing North Dakota producers ready access to the safe, affordable, and critical tools they require to produce our nation's food, feed, fuel and fiber dependably and efficiently.

ESA-based pesticide labeling restrictions must be precise, detailed, effective, and common-sense mitigation measures, not a nationwide over-broad one-size-fits-all approach that makes crop protection applications much more difficult while providing negligible if any benefit to threatened and endangered species.

NDDA strongly recommends that EPA withdraw its ESA Workplan Update in its entirety. If EPA unreasonably declines to do so, NDDA recommends EPA significantly revise its proposed ESA Workplan Update to make it much less ideological and instead much more scientific, balanced, effective, enforceable, and workable.

NDDA strongly recommends EPA return back to the drawing board and coordinate closely and in good faith with agriculture producers as well as with other core agriculture stakeholders such as pesticide manufacturers, distributors, and applicators. NDDA recommends that EPA then conscientiously develop and consequently propose a substantially modified and much more effective ESA Workplan that will protect endangered species while fully recognizing and supporting the responsible use of pesticides.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doug Goehring". The signature is fluid and cursive, with a large initial "D" and "G".

Doug Goehring
North Dakota Agriculture Commissioner