



February 6, 2023

Ms. Melanie Biscoe  
Pesticide Reevaluation Division  
Office of Pesticide Programs  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460-0001  
*Submitted via regulations.gov*

**RE: EPA-HQ-OPP-2022-0908**  
**ESA WORKPLAN UPDATE: Nontarget Species Mitigation for Registration Review  
and Other FIFRA Actions**

Dear Ms. Biscoe:

The North Dakota Grain Growers Association (NDGGA) has been serving the state's wheat and barley producers through representation, education, and proactive advocacy for more than 50 years. North Dakota is the nation's top producing state of spring wheat and ranks number two in overall wheat production. The state ranks 3<sup>rd</sup> in production of barley. Our growers rely on crop protection tools and support efforts to make their introduction more efficient and timelier, meets new challenges, and protects species and the environment. These goals are not mutually exclusive. While we strongly support efforts to ensure a more certain, stable, and effective Endangered Species Act and Registration Review process, we have significant issues with EPA's latest Endangered Species Act Workplan Update and offer the following comments:

- **We are concerned about EPA proposal's that** *"You must obtain a Bulletin no earlier than six months before using this product."* This would place our growers in an untenable position since it does not address the sometime late breaking needs for pesticide applications. We believe this would be both impractical and unworkable for wheat and barley producers in North Dakota, and we would suspect elsewhere, particularly in neighboring states. What is a grower to do in an emergency pest outbreak with his or her crop?

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Phone: 701-282-9361 | Fax: 701-404-5187 | 1002 Main Ave W. #3 West Fargo, N.D. 58078

- **Further, growers and other stakeholders should have a role with EPA** in providing feedback into the registration and consultation process. We would envision growers' role to provide best practices, by focusing on protecting vulnerable species, providing regulatory certainty, and supporting agriculture and associated pest control. We believe, for instance, that county-level bans are ineffective and overly broad and ultimately ineffective in encouraging growers to engage proactively on avoiding exposure to nontarget species. Further early mitigation measures also should allow for grower input.
- **While NDGGA agrees with EPA that surface water runoff should be avoided**, where possible; some provisions, however, are not practical – for instance, prohibiting application within 48 hours following “when a storm event likely to produce runoff from the treated area.” This is not workable given the frequently uncertain and changing forecasts, let alone, weather patterns in North Dakota. EPA also provides little in the way of instruction regarding what items may or may not be more effective in certain regions.
- **On registration review, we are concerned about EPA’s approach to mitigation...**where “pesticides have similar exposure pathways, uses, and ecological risk profiles.” If the agency plans to use that approach mitigations adopted for an entire group could result in unnecessarily burdensome measure for certain chemistries. Such a conservative approach can hinder the development of more appropriate and product-specific mitigations.
- **Moreover, grouping chemicals together may not result in viable outcomes**, and EPA instead should focus on attempts to develop groups of ESA-listed *species* that may respond in similar ways to chemical exposure, so that they can be addressed at the outset and narrow the range of listed species for which individual consultation is required.
- **NDGGA appreciates the additional information EPA** has provided regarding its approach to developing an herbicide strategy—including developing multiple suites of mitigation measures and applying criteria to determine when mitigation is needed based on physical-chemical-fate properties and potential effects. EPA should not wait until summer 2023, however, to take suggestions from stakeholders; rather, EPA should be open to receiving feedback leading up to the proposal, so that the proposal can be better-informed from the start.
- **Overall, NDGGA supports EPA’s efforts to working more closely with the “Services”** (U.S. Fish & Wildlife Service and the National Marine Fisheries Service) to achieve more “no effect” determinations for species. We also support industry efforts that establish a more efficient process for certain species and pesticide reviews, leading to shorter reviews where repeated analyzes are not needed.

- **Regarding EPA's "pick list" for growers' ecological mitigation efforts**, the agency does not provide detail on how it will engage in a risk/benefit analysis for these measures. EPA also describes general attributes of pick list measures but does not provide data regarding efficacy or necessity.
- **While NDGGA supports a pick-list approach** to provide upfront mitigations for the ESA process while maintaining a certain level of flexibility for growers, some of the practices suggested on the pick list may not be viable in certain parts of the country or with certain agronomic practices. For example, the Update explains that "[t]he cover crop must be planted and remain on the field up to the field preparation for planting the crop." This requirement does not consider various agronomic practices adopted by many American farmers like those in North Dakota, which is in the center of the nation's Prairie Pothole region and has unique growing conditions.
- **We believe EPA must document the benefits from these mitigations** with respect to the species and habitat protection goal(s). Mitigation evaluation should be based on reasonable and realistic assumptions, conducted using refined methods, and thus provide the means to focus on the most effective forms of mitigation. The focus should also be on operationalizing these practices and including what is already being accomplished by growers.
- **Prioritize development of programmatic consultations.** All parties to the pesticide registration process, from registrants to regulators to end-users, could be well-served by developing programmatic consultations on a pesticide-class basis (herbicides, insecticides, etc.) that include practices which might avoid jeopardy for all species. Individual products, however, and especially newer chemistries may behave differently, and be more likely to have a narrower spectrum of activity than some older chemistries or otherwise present a different potential risk profile. Therefore, while considering programmatic consultations, EPA assessments that group pesticides together, individual registration assessments may need to evaluate and account for these distinctions.
- **Finally, NDGGA believes the proposed EPA label language:** *"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."* is regulatory overreach and unrealistic to enforce. What happens when a producer follows the label and unknown to them a "threatened or endangered species" is found on their premises? To subject that farmer to a "federal offence" in that instance would be terribly unfair. Furthermore, who will enforce this EPA label language, and given the number of pesticides applied throughout U.S. agriculture in any one year, how can the agency possibly monitor harm to a threatened or endangered species?

NDGGA thanks EPA for the opportunity to provide comments. If you or the agency has any questions, please feel free to contact NDGGA Executive Director Dan Wogsland at [danw@ndgga.com](mailto:danw@ndgga.com) or 701.282.9361.

Sincerely,



Edward Kessel  
President  
North Dakota Grain Growers Association