MCFA

Minor Crop Farmer Alliance

Via Electronic Docket Submission http://www.regulations.gov August 6, 2023

Jan Matuszko; Director
Environmental Fate & Effects Division
Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Re: Comments of the Minor Crop Farmer Alliance Regarding the Draft White Paper on the Vulnerable Species Pilot Project; Docket ID No. EPA-HQ-OPP-2023-0327

Dear Ms. Matuszko:

These comments are submitted on behalf of the Minor Crop Farmer Alliance ("MCFA") and its members and supporters in response to the request for comments regarding the Draft White Paper on the Vulnerable Species Pilot Project ("draft VSPP" or "draft pilot") issued by the US Environmental Protection Agency ("EPA" or "Agency").[1]

MCFA is an alliance of national and regional organizations and individuals representing growers, shippers, packers, handlers, and processors of various agricultural commodities, including food, fiber, turf grass, nursery and landscape crops, and organizations involved with

[1] At the outset, MCFA believes that the 45-day comment period assigned to review and comment on the draft VSPP is woefully inadequate. MCFA was aware of the comment period extension requests that various organizations had submitted but which were denied by the Agency. The rational supporting denial of the extension requests essentially sought to minimize the impact of the draft VSPP – after all, the VSPP only concerns 27 of the more than 1,600 listed species, and those species have limited ranges so the impact of their inclusion in the VSPP would be "small." Apparently, the fact that the draft VSPP targets most conventional outdoor pesticides and the potential pesticide use limitation areas documented for many of the species in the draft pilot are greater than 1,000,000 acres were not considered consequential by the Agency. In further defense of the extension request denial, EPA offers that it was providing some StoryMaps that should make the public's review "more efficient." Finally, the Agency does set forth what appears to be the main reason for denying the extension requests, namely, to meet its administrative scheduling needs. The Agency is on a path to make certain that this Administration will have an ESA approach in place such that the environmental non-governmental organizations will be satisfied and the ESA lawsuits challenging various pesticide actions will be a distant memory. Unfortunately, the interests of the pesticide user community are apparently of lesser importance. It is believed that if MCFA or another non-governmental organization had presented the Agency with a proposal as potentially complicated and impactful as the draft VSPP, the Agency would almost certainly require more than 45-days to review and comment on it. MCFA urges the Agency to re-examine its methodology and authorize an appropriate time for comment and dialogue with affected stakeholders regarding the draft VSPP. MCFA wants to assist the Agency in the development of a responsible ESA pesticide approach, but the draft VSPP in its current form makes that difficult to do.

public health pesticides. MCFA's members are extremely interested in the development and safe use of pest management tools including crop protection chemicals that are environmentally sound, safe for applicators, workers, and the public, and do not represent an unreasonable adverse risk to the environment, including humans, endangered and threatened species and non-target organisms. While our commodities are often called "minor crops" or "specialty crops," they contribute to the diverse and highly nutritious diets available for the global population, and to safe and aesthetic surroundings for our homes, schools, and places of business. These U.S. farmers grow more than 500 types of fruit, vegetable, tree nut, flower, ornamental nursery, and turf grass crops in addition to the major bulk (row) commodity crops. Specialty crop production accounts for more than $60 billion, or approximately 40% of total U.S. crop receipts.

MCFA has a basic concern with the structure of the draft VSPP.[2] The Agency's proposal essentially reflects adoption of a precautionary approach. It correctly notes that under the ESA an agency is supposed to determine that the action under consideration is not likely to jeopardize the continued existence of federally threatened or endangered species or destroy or adversely modify designated critical habitat. The Agency is also supposed to rely on the best scientific and commercial data available in making that determination. This may ultimately be reflected in a likelihood jeopardy/adverse modification of habitat (J/AM) analysis as part of the consultation process with the Service.[3] Out of that arises what, if any, measures should be taken to avoid jeopardy.

After outlining its responsibilities under the ESA in the draft VSPP, the Agency then announced it is not going to follow that approach. Instead, apparently because it is a far less burdensome, the Agency concluded that to justify the draft, it just needs to focus on implementing mitigation measures to reduce potential pilot species exposures to conventional pesticides from nonresidential outdoor uses of those pesticides.[4] The Agency currently focuses in on species that are "particularly vulnerable to the potential effects of pesticides due to a combination of factors including a limited geographic range small population size and general susceptibility to environmental stressors."[5] In those circumstances the Agency concludes that "even affects to a small number of individual species may be highly impactful to species populations or the entire species." The Agency then goes on to conclude that consequently "these species face a higher likelihood of future jeopardy or adverse modification determination for certain pesticide uses." Again, it comes to this conclusion without conducting any specific J/AM analysis of any

[2] At the outset, as noted above, comprehensively commenting on the draft VSPP and its supporting document is a daunting/impossible task within the comment period allotted by the Agency. More time is needed to analyze and comment on the draft. That said, we must deal with the timeframe the Agency has allotted or choose not to participate. MCFA has decided to continue to try to participate in the process. MCFA reserves the right to submit additional comments to the Agency after additional review of the draft VSPP and the supporting materials.

[3] It is worth noting that more recently in some instances, the Agency has developed predictions of the likelihood of J/AM to assist the Services with their reviews. To date, those predictive analyses have reflected a substantial reduction in the number of potentially affected species from those identified in the biological evaluations that were initially conducted.

[4] If there is interest in conducting a true "pilot" why not structure it to focus on just a few species and develop a framework on how to make adjustments and receive practical feedback?

[5] It should be noted that only 5 of the 27 species involved have a defined critical habitat. The rest have just a "habitat", which leads to large avoidance/minimization areas. In many cases, EPA has not provided the necessary detail on habitat definitions. Apparently, it will be up to the grower or applicator to work with the Service or EPA on habitat definitions. This adds another layer of complexity.

pesticide on a particular species included in the pilot or having engaged in a consultation with the Services. Instead, the Agency justifies its approach in the pilot on the need to proactively address the situation. It is the **potential** for reducing possible pesticide exposure, not the **need** to do so to avoid likely jeopardizing the species, that is the driving principle of the draft VSPP. This presents the appearance that the Agency's current proposal reflects the unnecessary and inappropriate adoption of a precautionary principle approach. The draft pilot assumes harm across the board, failing to consider the toxicity of a chemical and the fact that a particular product may not be likely to jeopardize a listed species.

In other words, in the absence of detailed risk assessment directed towards assessing the use of pesticides in accordance with general agricultural practices to likely jeopardize a listed species or adversely modify critical habitat, the Agency decided that it needs to adopt a precautionary mitigation approach, focusing on implementing use restrictions or conditions for multiple types of registered pesticides to avoid non-target organism exposures in areas where the pilot species are expected to occur. From the Agency's perspective the solution seemingly presents itself "by incorporating these early measures to avoid and minimize exposure EPA expects to reduce the likelihood of future jeopardy or adverse modification determinations and to minimize the potential take for the pilot species from the ongoing use of registered conventional pesticides."

However well-intentioned the Agency is, respectfully it is believed that this approach is inconsistent with either the provisions of the ESA or the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"). The approach cannot be ESA-based because the necessary ESA J/AM analysis and consultation steps are being bypassed. It certainly is not based on best scientific and commercial information available. The approach also does not appear to be FIFRA-based because the Agency has not conducted an appropriate risk assessment or considered the impacts on affected users from the precautionary mitigation measures being proposed. Consequently, it is not clear what authority EPA is relying on in implementing the VSPP.[6]

The draft VSPP involves a cascading set of conservative assumptions that in our opinion may not reflect probable outcomes from use of pesticides. For example, the Agency relies on maximum rates in determining potential exposures. The Agency has previously noted that maximum rates are typically not used for many pesticide products. This fact is also supported by USDA National Agriculture Statistics Service data. Further, EPA acknowledges that the models and approaches they are using in the VSPP are very conservative, e.g., "EPA used standard methods and models to develop conservative analyses of the potential effects of these pesticides on the pilot species and their prey, pollination, habitat and/or dispersal."

[6] It is suggested that if the Agency wishes to pursue a precautionary approach, it works with Congress to seek its approval for a change in the applicable laws before implementing it. That does not mean to suggest that MCFA supports such an approach. Precautionary principle based regulatory systems (such as reflected in the pesticide regulatory program in the European Union) are not necessary or appropriate to effectively regulate pesticides and are an anathema to our members.

Another example involves the 2,600-foot additional protective extension zone the Agency is employing to address potential spray drift issues in certain locations. The Agency states that:

> EPA is proposing a 2600 ft extension area around the range or designated critical habitat to address spray drift that **may** come in from outside the species range or designated critical habitat (*e.g.,* fields just adjacent to the species habitat but outside the range or designated critical habitat). EPA is proposing this distance as **it is the farthest extent that pesticide spray drift is estimated to transport** and, therefore, accounts for drift that may occur from applications adjacent to the species habitat that would otherwise contribute exposures to the pilot species (emphasis added). EPA is not proposing a 2600 ft spray drift or runoff/erosion buffer. EPA is also proposing to use this distance to expand the PULA for the Lake Wales Ridge species. This is because for malathion, FWS extended the original spatial extent of the Lake Wales Ridge area by 200 ft to account for the malathion specific spray drift distance. EPA is proposing to extend this PULA by 2400 ft to be consistent with the maximum spray distance used for the other species included in this pilot.

Again, this simply highlights the Agency's overall approach is to implement precautionary measures that will essentially remove the possibility of any exposure. In situations where such exposure might occur, the impacts from such exposure are not relevant to the Agency under the draft plan.[7]

It is suggested that the recent decision of the US Court of Appeals for the District of Columbia Circuit[8] is instructive concerning the inappropriateness of an action agency relying on its most pessimistic assumptions in formulating its ESA approach. The plaintiffs in the case were challenging a rule and BiOp issued by the National Marine Fisheries Service involving the North Atlantic Right Whale. The Court notes at page 3 that:

> In this case, we decide whether, in a biological opinion, the Service must, or even may, when faced with uncertainty, give the "benefit of the doubt" to an endangered species by relying upon worst-case scenarios or pessimistic assumptions. <u>We hold it may not</u>. The ESA and the implementing regulations call for an empirical judgment about what is "likely." The Service's role as an expert is undermined, not furthered, when it distorts that scientific judgment by indulging in worst-case scenarios and pessimistic assumptions to benefit a favored side ….

---

[7] What appears to be particularly confusing is that even though malathion was the subject of a Biological Opinion ("BiOp") issued by the US Fish & Wildlife Service ("FWS"), EPA believes it is appropriate in the draft pilot to substantially extend the PULA by 2,400 feet for all conventional pesticides. That appears to be completely unnecessary and arbitrary. Clearly extending the PULA in this manner will have impacts on the affected stakeholders who because of such extension, may find their operations fall within this extended PULA. Further, MCFA believes that the PULAs reflected in the draft VSPP are overbroad in general. In the FWS Malathion BiOp, the Service significantly reduced the initial PULAs based on the reliable data and information supplied by the registrant. MCFA strongly recommends that EPA refine the PULAs in the draft pilot (as well as other pilots or registration reviews the Agency may conduct) in accordance with that approach. Such refinements will reduce the potential impact to some growers.

[8] *Maine Lobstermen's Association et al. v. National Marine Fisheries Association et al*., Case No. 22-5238 (D.C. Cir. June 16, 2023).

Further the Court goes on to state:

> On the merits, we decide whether the Service must (or even may) indulge in worst-case scenarios and pick "pessimistic" values in order to give "the benefit of the doubt" to the species. We begin with an overview of the text, structure, and history of § 7. We then consider the Service's arguments ….
>
> Section 7 imposes some duties on the action agency (here the Fisheries Division), and other duties on the Service (here the Protected Resources Division). The action agency must ensure an action is "not likely to jeopardize the continued existence of" a protected species. 16 U.S.C. § 1536(a)(2). A key term limiting this duty is "likely." Id. We give the term its "ordinary, contemporary, common meaning." Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019).
>
> In 1979, when the term was added to the ESA, "likely" meant "probable" or "[i]n all probability." Black's Law Dictionary 834 (5th ed. 1979). Indeed, elsewhere in the ESA, the Service has read "likely" to mean "more likely than not. Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671, 684 (9th Cir. 2016). We see no reason to depart from that usage. Section 7, therefore, requires the action agency to avoid acts that will more likely than not jeopardize a species. No more, and no less ….
>
> In so doing, the action agency must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). This empirical mandate ensures the law is not "implemented haphazardly, on the basis of speculation or surmise," and thus "avoid[s] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." Spear, 520 U.S. at 176–77.
>
> So far, we have described the role of the action agency. How about the Service? The Service must consult with the action agency and provide expert "assistance." 16 U.S.C. § 1536(a)(2). The Service must then write an opinion "detailing how the agency action affects the species." Id. § 1536(b)(3)(A). Lastly, the Service must ("shall") issue a license permitting incidental harm to a species if the Service concludes the action or the incidental take "will not" violate § 7 (and, in the case of endangered marine mammals, 16 U.S.C. § 1371(a)(5)). Id. §1536(b)(4). The Service's role is thus a limited one. The Service must lend expert assistance to the action agency, make a prediction about effects and, if the agency cannot reject the null hypothesis (no jeopardy) as unlikely, then grant a license. For our purposes, what matters is that the core of the Service's remit in the decisionmaking process is to "form a scientific judgment." Massachusetts v. EPA, 549 U.S. 497, 534 (2007). Nothing in § 7 requires "distorting the decisionmaking process by overemphasizing highly speculative harms" whenever the available data is wanting. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 (1989) (holding NEPA does not require a "worst case analysis) ….
> *Id.* at 20-21

When answering public comments the Service blamed the Congress, insisting that "Congressional guidance on implementation of the ESA," – that is, the legislative history – required it to deal in worst-case scenarios because "we need to give the benefit of the doubt to the species." In other words, "need" means must. Nor is this the first time the Service has said its hands are tied by legislative history. In other biological opinions, the Service has similarly claimed its presumption is a "direction from the U.S. Congress." See, e.g., ESA Section 7 Consultation No. F/NER/2012/01956 201 (2013), available at https://repository.library.noaa.gov/view/noaa/27911. The Service has even enshrined this reading of legislative history in its Endangered Species Consultation Handbook 1-7 (1998), https://perma.cc/FN22-UXCV, which it expressly followed here.

For 80 years it has been a clear precept of administrative law that an agency action "may not stand if the agency has mis-conceived the law." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Furthermore, "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) (internal quotation marks omitted). Here, the Service misconceived the law, **wrongly claiming the legislative history of the ESA had ordained – if legislative history could ever ordain – a precautionary principle in favor of the species. The Service therefore gets no deference, and its action cannot stand.**

Indeed, the Service's legal reasoning was not just wrong; it was egregiously wrong. The Service's argument rested entirely upon a half-sentence in the legislative history. This "approach is a relic from a bygone era of statutory construction." Food Mktg. Inst., 139 S. Ct. at 2364 (internal quotation marks omitted); see, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) (stating that because the legislative history "is ambiguous," courts "must look primarily to the statutes themselves to find the legislative intent"). Under the Service's approach, legislative history may supply duties that, as the Service now concedes, are not found in the enacted law. As the Supreme Court recently said, "We cannot approve such a casual disregard of the rules of statutory interpretation." Food Mktg. Inst., 139 S. Ct. at 2364. For "legislative history is not the law." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018). The reason is obvious; as any high school Civics student should know, legislators vote on and the president signs bills, not their legislative history. U.S. Const. Art. I, § 7, cl. 2. Legislative history therefore cannot bind the executive branch and compel a presumption in favor of the species not required by statute.
Id. at 24-25 (emphasis added).

MCFA appreciates that conducting an appropriate analysis is very difficult for the Agency. However, the answer cannot be to ignore such responsibility and fast forward to identifying mitigation measures to be implemented by affected pesticide users. The Agency has made clear its intention of extending the pilot to other vulnerable species. As such it is difficult to determine the extent of potential holistic impacts of the pilot. The user community must anticipate that this program will ultimately cover all listed species, impacting many more agricultural operations than those subject to the current draft pilot. The potential to disrupt those operations, particularly for specialty crops is significant. If mitigation measures are required as reflected in the draft

plan, substantial economic impact on specialty crop growers must be anticipated. Those who find themselves in a PULA may have to face protecting their farm operations from various plant pests and diseases without being able to avail themselves of the tools they have historically used unless they are enrolled in a recognized conservation program such as one developed by the USDA National Resources Conservation Service ("NRCS"). What is particularly problematic is that as MCFA has explained to the Agency in previously submitted comments, that most specialty crop producers have very little interaction with NRCS, and it is believed that significant time and resources would need to be available for NRCS to craft conservation programs appropriate for specialty crops.[9]

Large and indiscriminate buffers will have a disproportionally negative impact on specialty crop production over row crops. According to the most recent USDA-NASS Census of Agriculture, the average specialty crop farm is 64.5 acres while corn and soybeans average farm sizes are 249.4 and 297.3 acres, respectively.[10] For specialty crops in particular, the land values make it difficult to take land out of production and put it into things like vegetative buffer strips, windbreaks, hedgerows, and holding ponds. A 200-foot on-field and downwind buffer, which would be required in some PULA scenarios, would results in a 12% loss of land productivity for the average specialty crop farmer, while the same buffer applied to the average corn and soybean farmer would result in about a 6% loss. Even a 6% loss in potential productivity is dramatic but we highlight this to help bring attention to the impact of these overly conservative approaches on smaller acreage crops.

MCFA has some comments on the proposed minimization of runoff/erosion minimization provisions of the draft VSPP. MCFA appreciates the potential for exemptions from the runoff/erosion mitigation measures. They are a good starting point; however, additional refinement is needed to make them clearly understandable and capable of implementation. MCFA would like to work with the Agency in better understanding the standards that a "recognized conservation program" would need to meet to fall within the exemption. The reference to groups such as the National Alliance of Independent Crop Consultants as well as potentially enlisting the services of certified crop consultants, may provide a viable means for such exemption to be secured. However, the details needed for a grower to be able to eligible for the exemption are not clear. From MCFA's perspective, if an appropriately knowledgeable third party can determine that the grower's operation is such that there is a low probability that pesticides applied will move offsite through runoff or erosion (thereby determining there is a low probability of the grower's use of pesticides in their operations impacting listed species or their critical habitat), the condition of the exemption should be satisfied.

MCFA notes that the list of proposed mitigation measures in the draft VSPP includes "Fields with < 2% slope." In its Workplan Update comments, MCFA had suggested that appropriate slope be $\leq$ 3%. It is not clear why the Agency decided to substantially reduce the acceptable slope as a mitigation. From our perspective a 3% slope is essentially flat ground. The likelihood

[9] Please see *Comments of the Minor Crop Farmer Alliance on the "Appendix to the ESA WorkplanUpdate: Proposed Label Language for Public Comment,"* Docket Identification Number EPAHQ-OPP-2022-0908, which are incorporated by reference in the instant comment, and which are referred to herein as "Workplan Update comments".

[10] 2017 Census of Agriculture. Specialty Crops. Volume 2, Subject Series, Part 8.

of any significant pesticide runoff from operations on such land is minimal. The Agency should reconsider the slope factor.

Requiring four mitigations, particularly since there are not four mitigations realistically available to specialty crop growers, is arbitrary. Why four mitigations? Why not three, two, one, or none? In the absence of determining impacts on the listed species including their critical habitat as required by the applicable statutory authority, how can the Agency mandate implementation of any mitigations?[11] These mitigations will involve substantial time, expense, and potential disruption to the affected grower to the extent a grower is not already incorporating them in their farm operations. These are not simple measures to implement. The Agency must take this into account in its analysis as it considers how it intends to proceed with the draft pilot, including its implementation.

MCFA has discussed the draft VSPP with several of its members. Each has indicated that as presently crafted, the draft VSPP will have potential significant impacts on their grower operations.[12] The following is a sample of their comments.

For Florida growers, the Florida Fruit & Vegetable Association has indicated that it is deeply concerning that the maximum PULA for the Lake Wales Ridge plants alone could impact "Greater than 1,000,000 acres" of land area. Some of these affected land areas have been in agricultural production since Florida initially started its commercial citrus industry. Such an area represents a significant portion of the overall agricultural production lands in that geographical region. Growers would also like to see more clarification with respect to credits given to growers who enroll in state-run Best Management Practice (BMP) programs. The Florida Department of Agriculture and Consumer Services (FDACS) Office of Agricultural Water Policy (OAWP) has a decades-long collaboration in place with Florida's agricultural landowners and producers to implement BMPs for limiting runoff of pesticides, nutrients, and sediment, while protecting water resources. Such runoff elimination practices should also be considered applicable for protecting threatened and endangered species. FDACS OAWP can document that during 2022 nearly 425,000 acres of citrus crops are already enrolled in and following these runoff prevention BMPs, as are more than 1,000,000 acres of row/field/vegetable crops. Cumulatively, more than 1.8 million agricultural acres are enrolled in and adhering to Florida BMP programs. Yet apparently under the draft pilot, farmer participation in Florida's BMP programs currently provides no consideration whatsoever for runoff management and species protection from an ESA VSPP perspective.

[11] The imposition of four mitigation measures to avoid runoff is arbitrary. No consideration is given for the physical/chemical properties of the active ingredient. The draft pilot fails to reflect that there are already label mitigations for buffers to waterbodies. It also fails to reflect that many specialty crop growers are already utilizing precision application tools in an effort to help assure no meaningful offsite movement of the pesticide. The Agency needs to do a more thorough job in explaining how these mitigations help and under what circumstances. Extensive outreach efforts with affected growers regarding further clarification/scope of the proposed mitigation measures is necessary.

[12] Comments on the draft VSPP are being submitted by the FIFRA Endangered Species Task Force, including an analysis of the acreages impacted by the current PULAs. MCFA endorses those comments and requests the Agency to make the suggested modifications to the PULAs. Again, this would help mitigate against unnecessary impacts to growers.

Florida farmers are also confused since the VSPP focuses on implementing early protections even before EPA has made necessary/basic effects determinations or completed any of the necessary consultations. Confusion also extends to the fact that EPA is proposing one set of mitigations for all outdoor-use pesticides, regardless of differences in exposure or potential effects. While the notion of "exemptions" is intriguing, we also remain concerned about the uncertainties surrounding the potential exemptions, what they mean, and how they could be implemented.

In California, the draft pilot would negatively impact growers including citrus growers. Specifically, 200-to-300-foot buffers for aerial applications are too great to make applications to a significant portion of impacted citrus groves. In some cases where the dimensions of the grove are narrow or a grove is small, it could be impossible to make applications to that acreage. During the winter months when there can be significant rainfall, growers make aerial fungicide applications to comply with quarantine protocols that are mandated by foreign governments as a condition for market access. If the Agency maintains these buffers, impacted growers would be unable to make applications and could lose access to important export markets which are desirable for their high revenue as compared to shipments to the domestic market.

Additionally, the Agency's requirement to use four mitigation measures for runoff or erosion control and the requirement to introduce a 2,600-foot extension area beyond the species range or critical habitats before calculating the application of any buffer zones will make it very difficult if not impossible for impacted growers to use any pesticides in the restricted areas designated by EPA. If the regulations are applied to all threatened and endangered species, it could mean the loss of thousands of acres of productive citrus acreage and the loss of income for many growers who are already under financial strain.[13]

Further, the proposed mitigations for three species located in California will impact a wide number of specialty crop growers in important agricultural production regions with significant export markets and produce quality standards. Specialty crop growers must ensure high quality standards for fruits and vegetables to meet customer demands, address food loss and food safety requirements, including for long-distance markets. A comprehensive conservation agreement may be much better suited to address concerns regarding mitigation on specialty crop acres.

The nursery industry has advised that few, if any of the mitigations can apply to container-based plant nurseries. An ornamental plant grower in California and located within one of the PULAs (though the StoryMap wrongly suggests they are on uncultivated lands), doubts their ability to continue to operate if the VSPP is implemented as described. Avoiding the use of insecticides as a mitigation option is not an option at all. Treating for insect pests, when necessary, is paramount to producing a marketable ornamental crop. Using a 40% reduction in a pesticide rate may lead to reduced effectiveness thereby requiring additional applications potentially resulting in pest resistance issues for the grower.

[13] Many specialty crop growers are required to implement practices for vegetative control to address food safety requirements and buyer demands. Imposing the proposed 2,600-foot protective extension zone and timing restrictions during peak production periods has the potential to negatively impact these growers as it can be contrary to best food safety practices. As expressed in MCFA's Workplan Update comments, this area needs further consideration.

Container operations typically are produced on gravel or ground cover cloth to prevent erosion and water runoff, while also providing easy access to the plant material. Proposed mitigation practices like contour farming, cover crops, mulching, vegetative strips, conservation tillage and grassed waterways, do not apply in these production scenarios. Terrace farming has some potential but would require significant re-grading and county permit approvals that may or may not be granted. While utilizing a conservation plan would exempt a grower from having to meet the four runoff mitigation measure requirements, nursery growers have no or very limited experience working with NRCS or other government entities on conservation programs. Further, the VSPP provides no insights into what the expectations of a hypothetical conservation agreement would look like.

The proposed protected zones also represent significant challenges in requiring growers to identify species habitat, often in subjective terms. Furthermore, growers may not know if a listed species habitat is on a neighbor's property, thereby placing their production area within the protected range. For example, one particular grower produces on 26 acres within a PULA and downwind habitat could reduce their productive lands by 10 – 28%. The reduced production and associated economic impact would almost certainly result in the closure of this operation.

In the avoidance PULAs, the Agency holds out a glimmer of hope to affected growers that there is a path that could lead to use of a pesticide. That path however is something of an illusion. Specifically, the proposed approach would require the applicator, at least three months prior to a pesticide application, to coordinate with the local FWS ecological services field offices to seek the approval of that office to use a pesticide despite being within the avoidance PULA. Such approach is not likely practical. Growers/applicators may not know all the pesticide applications that they may need to make three months before the actual application, and this also runs counter to long-adopted integrated pest management (IPM) practices. Product and timing decisions are made based on weather, as well as identified pest and/or disease pressures, and are rarely made three months in advance. With the anticipated disruptions that come with climate change, we can only expect less predictability when it comes to planting decisions. Requiring growers to obtain FWS approval three months before application of a pesticide is not feasible for many growers. Further, it is not clear that the local FWS offices will be equipped to handle the number of requests that may be submitted and do so in a timely manner. Throughout the pesticide ESA process, FWS has made clear it lacks resources to carry out its current responsibilities under the ESA as it impacts pesticide use, and now it appears that their responsibilities will be expanding. Will those FWS personnel have any background in agricultural operations, and what standards will those personnel use in making their determinations? Any delay in the review process can significantly impact the affected growers.

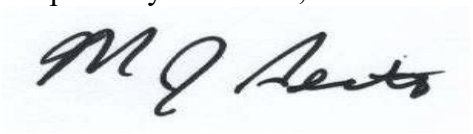
Additionally, the draft pilot does not consider the challenges growers within PULAs will face in trying to determine if they have habitat within their operation. Traditionally, to be a successful a grower must wear many hats, but ecologist is typically not one of them. Under the draft pilot, the affected growers will have to add ecologist to their repertoire. This is simply another example of the Agency shifting responsibility for appropriately managing ESA issues to growers.

Finally, in its supporting information, the Agency has at least acknowledged that "some mitigation practices considered may also take years to establish, and the practice would require alteration of the field. Many agricultural producers rent or lease the land that is farmed and may not be able to develop mitigation practices associated with changes to the land. This may reduce the number of mitigation options available to them." While EPA has acknowledged the problem, much more effort needs to be directed towards these growers. Again, MCFA would like to further discuss this issue with the Agency.

Conclusion

In summary, it is clear that in establishing the draft VSPP, the Agency would like to shift the burden for protecting listed species to the pesticide user community, focusing on mitigations that the user would potentially have to adopt to address the perceived problem. Growers do have a role in following label directions to help minimize the potential for negatively affecting listed species, including their critical habitat. MCFA would like to work with the Agency in developing appropriate measures to achieve that goal. However, the Agency has a responsibility to conduct the appropriate analyses based on the best available scientific and commercial information to determine that additional measures are needed, i.e., such measures, are necessary to assure that the pesticide use is not likely to jeopardize the existence of listed species or adversely modify its critical habitat. It may be hard, resource intensive and time consuming, but it is a necessary step under the framework governing pesticide regulation.

Respectfully submitted,



Michael J. Aerts
Co-Chair; MCFA Technical Committee

On Behalf of:
Almond Board of California
American Farm Bureau Federation
American Horticultural Society
AmericanHort
American Pistachios
American Seed Trade Association
California Apple Commission
California Association of Winegrape Growers
California Avocado Commission
California Citrus Quality Council
California Fresh Fruit Association
California Garlic and Onion Research Committee
California Prune Board
California Specialty Crop Council
California Walnut Commission

California Sustainable Winegrowing Alliance
California Wine Institute
Certified American Grown
Cherry Marketing Institute
Colorado Potato Legislative Association
Consolidated Central Valley Table Grape Pest Control District
Cranberry Institute
Empire State Potato Growers
Florida Citrus Mutual
Florida Fruit and Vegetable Association
Florida Nursery, Growers, & Landscape Association
Florida Strawberry Growers Association
Florida Tomato Exchange
Idaho Potato Commission
International Fresh Produce Association
Maine Potato Board
Massachusetts Nursery and Landscape Association
Michigan Corn
Michigan Farm Bureau
Michigan Vegetable Council
National Association of Landscape Professionals
National Onion Association
National Potato Council
North Carolina Potato Association
Northland Potato Growers Association
Northwest Horticultural Council
Oregon Association of Nurseries
Oregon Potato Commission
Potato Growers of Michigan
Society of American Florists
Texas Citrus Mutual
US Apple Association
US Potatoes
USA Cherries
USA Dry Pea & Lentil Council
Washington Hop Commission
Washington State Potato Commission
Washington Wine Grape Growers Association
Western Growers
Wild Blueberry Commission of Maine
Wisconsin Potato & Vegetable Growers Association