



August 6, 2023

Brian Anderson
Environmental Fate and Effects Division
Office of Pesticide Programs
Environmental Protection Agency
William Jefferson Clinton East Building (WJC East)
1201 Constitution Avenue N.W.
Washington, DC 20004

Submitted to Docket EPA-HQ-OPP-2023-0327:

RE: Request for Comment: Vulnerable Listed (Endangered and Threatened) Species Pilot Project: Proposed Mitigations, Implementation Plan, and Possible Expansion Draft Plan; and Draft Technical Support for Runoff, Erosion, and Spray Drift Mitigation Practices to Protect Non-Target Plants and Wildlife

Dear Mr. Anderson:

Established in 1933, *CropLife America (CLA)* represents the developers, manufacturers, formulators, and distributors of pesticides for agriculture and pest management in the United States. CLA's member companies produce, sell, and distribute nearly all the pesticide and biotechnology products used by American farmers. CLA represents the interests of its registrant member companies by, among other things, monitoring legislation, federal agency regulations and actions, and litigation that impact the crop protection and pest control industries and participating in such actions when appropriate.

CLA appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA or the Agency) Office of Pesticide Program's Vulnerable Species Pilot Project (Pilot) and the accompanying Draft Technical Support document.

Our comments are divided into two categories, I. General Improvements to the ESA process, and II. Specific Comments on the Draft Plan and Draft Technical Support documents. We fully support the comments submitted by our member companies. Should you have any questions or comments, please feel free to contact me at mbasu@croplifeamerica.org or (202) 296-1585.

Sincerely,

A handwritten signature in black ink, appearing to read "Manojit Basu".

Manojit Basu, PhD
Vice President, Science Policy
CropLife America

CC: Ed Messina Director, OPP
Jan Matuszko, Acting Division Director, EPA
Gina Schultz, Deputy Assistant Director, USFWS
Lisa Marie Carruba, Acting Division Chief, NMFS Office of Protected Resources
Kimberly Nesci, Director, USDA OPMP

I. General Improvements to the ESA process

Response to Comments

At the outset, we urge the Agency to issue a formal response to comments submitted to the docket for the vulnerable listed species pilot project (hereafter “VSPP”). We are concerned that EPA has increasingly treated its efforts to make the pesticide program ESA compliant as a purely legal exercise with little concern with how stakeholders and regulated entities would practically implement these proposals. Stakeholders and coregulators have submitted numerous questions and raised concerns with the Agency’s plans, such as during the Agency’s revised ESA Work Plan proposal comment period,¹ for which the Agency has stated it does not plan to provide a response to comments.

Subsequent proposals, including the VSPP, contain many of the same unanswered questions, concerns, and ambiguities that were included in previous proposals. This leaves stakeholders to believe the Agency either did not consider or disagrees with comments. Yet, without a response to comments, we have no way of knowing how best to revise our feedback to address the Agency’s thoughts or concerns for subsequent proposals. The result is that stakeholders continue to lack information about how the Agency intends to implement these proposals, which may undermine their effectiveness or place regulated entities in a position of legal uncertainty. To address these challenges, we firmly request that the EPA provide a response to comments and reaffirm its commitment to work with stakeholders and coregulators to understand how it practically plans to implement its ESA proposals.

Broad mitigation measures should not supplant appropriate risk assessment

We appreciate the significant updates the Agency has made in the ESA process over the past few years. The predictive Jeopardy/Adverse Modification (J/AM) analysis is a step toward the right direction. While the Agency has relied upon the use of early mitigation measures in the ESA process, they should not supplant product-specific risk assessments that could confirm the need for a particular measure or reveal that less stringent mitigations are necessary. As such, broad mitigation measures, such as those detailed in the VSPP, should not automatically be incorporated into the ESA process. For a proper risk assessment, it is important to take toxicity, and exposure (usage) into account, otherwise proposed mitigations may be unnecessary for protecting species and detrimental for agriculture. Relatedly, it is imperative that EPA right-size mitigations early on in this process and remain open to adjusting the default mitigations as the Agency proceeds through the stages of the registration process.

Adopting an overly precautionary approach, early on, as described in the VSPP, can hinder the eventual development of more appropriate and product-specific mitigations. The VSPP follows the precautionary principle approach, as it assumes harm to all 27 species and does not consider that a particular pesticide product may not be likely to jeopardize a listed species based on its use pattern and physical/chemical properties of the use site. Such an overly conservative and precautionary approach has most recently been rejected by the US Court of Appeals for the District of Columbia Circuit. *Maine Lobstermen’s Association et al. v. National Marine Fisheries Association et al.*, Case No. 22-5238 (D.C. Cir. June 16, 2023).

We encourage the Agency, the United States Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (hereafter, the Services) to greatly refine their exposure assessment to be more

¹ ESA Work Plan - <https://www.regulations.gov/docket/EPA-HQ-OPP-2022-0908>

reflective of actual pesticide use and thus allow a better determination of potential population level effects.

Industry Conducted BEs

Given the resource intense nature of the ESA risk assessment, the Agency should set a timeline to develop a process to allow registrants to develop a Biological Evaluation (BE) that includes a predictive J/AM assessment. As highlighted in the earlier paragraph, EPA has made improvements in the ESA process and reviewing a BE instead of developing a BE will allow EPA to meet its legal and regulatory obligations under ESA in a timely fashion. We, therefore, request that the Agency publishes an ESA predictive J/AM guidance document like the 2020 publication of the draft Revised Methods for national level BE.² The Agency should allow stakeholders to comment on the predictive J/AM analysis and finalize an approach that can be used by registrants to submit BEs with predictive J/AM analysis for EPA's review.

Early Coordination with Registrants

CLA believes that registrant-submitted data and information will play an essential role in supporting this effort to develop robust risk assessments, as well as manageable and meaningful mitigations. From the outset of the registration and consultation processes, pesticide registrants have a significant role to play in completing a pragmatic ESA process. To achieve efficiencies in the process, registrants and stakeholders should be included early in the discussion based on their knowledge of the product, its use patterns, and field practices. It is important for EPA and the Services to consider that, as ESA applicants, registrants must be involved at every step of the way. EPA, in its recent workplan update³ document, highlighted that product registrations, label amendments, review, and approval create additional work for the Agency, pesticide registrants, and state agencies. That is precisely why it is so important that the EPA, Services, and the registrants be included in discussions with the Agency at every step of the ESA process.

Stakeholder Engagement

The rapidly changing ESA regulatory environment requires an increased focus on communication, transparency, the use of best available data, and collaboration with applicants. CLA recognizes the importance, and legal obligation as codified by the 2018 Farm Bill⁴, of collaboration among EPA, the US Department of Agriculture (USDA), and the Services on ESA and other issues. In addition, we strongly encourage greater collaboration with individual registrants as ESA applicants, and growers and other pesticide users, as part of this process in the future. This is particularly important when EPA is making predictive J/AM determinations for individual species/critical habitats as discussed further below. CLA and its members are well positioned to provide scientific expertise, novel tools (e.g., models), agricultural knowledge, farmer/applicator interaction information, and other relevant information to assist EPA in establishing the scientific foundation for Agency findings during the BE process and to assist the Services with developing the BiOp and associated potential mitigations. As described in EPA's own Stakeholder Input Enhancement Plan⁵ for Pesticide Registration Review and ESA consultation, relevant

² Revised Methods – <https://www3.epa.gov/pesticides/nas/revised/revised-method-march2020.pdf>

³ Workplan Update – <https://www.epa.gov/pesticides/epa-advances-early-pesticides-protections-endangered-species-increases-regulatory>

⁴ 2018 Farm Bill Sec. 10115. FIFRA interagency Working Group pp. 435-438

⁵ Stakeholder Engagement - <https://www3.epa.gov/pesticides/endanger/2012/regreview-esa.pdf>

stakeholders must have meaningful opportunities to participate in a manageable, efficient, defensible, and transparent process to share information to protect vulnerable species, provide regulatory certainty, and support agriculture and pest control.

CLA regrets that the Agency has denied multiple stakeholder requests, including those submitted by organizations representing American farmers, for an extension to allow for a thorough review of the VSPP. CLA, and other organizations, want to assist the Agency in developing feasible approaches for pesticide use in compliance with EPA but under the current compressed timeline(s) for the various agency publications, many stakeholders, particularly growers and other pesticide users, are finding it difficult to have these meaningful dialogues. The process will not be successful without meaningful engagement with stakeholders. CLA requests the Agency to consider time for stakeholders to engage after the official comment period on the development of these strategies.

A number of agricultural stakeholder groups have submitted thoughtful and substantive comments expressing their views on the feasibility of proposed mitigation measures, the overly conservative nature of the VSPP assumptions, and their frustration at the lack of meaningful communication on issues such as implementation, exemptions and enforcement. CLA strongly encourages the Agency to carefully review and consider these grower and user stakeholder comments and incorporate the recommendations as the VSPP is finalized and implemented.

II. Specific Comments on the Draft VSPP and accompanying Technical Documents

Establish a true “Pilot”

In its current form, the VSPP proposes a set of very broad mitigations to many regions of the country, based on a narrative review of a limited number of species chosen by a subjective prioritization process while employing a limited pesticide use pattern evaluation. Thoroughly assessed mitigations assigned or contemplated by completed EPA BEs or FWS BiOps do not seem to inform the Plan. CLA suggests the pilot “small area”, or regional approach, is a more logical way to test the implementation and design of the VSPP and determine whether it produces the desired outcome(s) prior to a nationwide implementation of a vulnerable species approach.

How best to apply the mitigation sequence of avoidance, minimization, and in particular compensatory mitigation (offsets) in pesticide registration actions has been a discussion topic for years. To explore the role of offsets in mitigating the impact of pesticides, the FIFRA Endangered Species Task Force (FESTF), FWS Region 3, Bayer Crop Science, and Syngenta initiated a pilot project (pilot). This pilot explores methodologies and develops a framework to help streamline and provide efficiency to the pesticide consultation process.

As it is finalized, implemented and expanded, the VSPP should consider learnings from this pilot, which has been introduced to EPA and USDA, and for which FWS Region 3, with FWS Headquarters support, is actively engaged. FWS Region 3, covering the midwestern states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin, was selected as the geographic region for this pilot for a number of reasons. First, FWS Region 3 is the lead for upcoming listing decisions for the monarch butterfly and the American bumble bee and can therefore apply the outcomes of this pilot to these species, as deemed appropriate. It is also lead for the Rusty Patched Bumble bee, and many of the

species in EPA's pilot plan are also in this region. Second, this region has diverse land use and land cover composition which includes major row crops such as soybeans and corn, minor fruit and vegetable crops, prairies, other natural landscapes, and developed areas. The Great Lakes and associated waterways, and other areas where pesticide use is an important defense against pests are also included in this region. This diversity provides the opportunity to explore the mitigation sequence in a variety of scenarios. Third, Region 3 has current staff members familiar with the FIFRA registration and ESA consultation process at both the local and national level who can build upon this knowledge to develop a framework for the subsequent incorporation of offsets into the process in a manner that can test EPA's VSPP and, having established a workable form, can then be transferred to other regions.

Recommendations:

- (1) CLA encourages the Agency to consider testing the VSPP with a limited number of pesticides, similar to what is proposed in the Herbicide Strategy⁶, and as available to EPA in the current FWS Region 3 pilot effort.
- (2) Work out the feasibility of the elements in the VSPP within the limited scale of FWS Region 3 pilot and develop metrics to determine the VSPP's effectiveness and meaningful implementation.
- (3) Provide greater transparency on the purpose and nature of the VSPP, as well as a clear understanding of how implementation could work including proposed label language for specific products.
- (4) Establish a process to involve stakeholders to ensure EPA appreciates the impact of these proposed measures.

⁶ Herbicide Strategy - <https://www.regulations.gov/document/EPA-HQ-OPP-2023-0365-0001>

Vulnerable Species Selection Process and Spatial Extent

The VSPP views the species selection criteria as including species with “limited ranges,” and “generally small range sizes” but as shown in Figure 1, many ranges consume major portions of some states. The potential pesticide use limitation areas (PULAs), which may be greater than 1,000,000 acres for many of the VSPP species, cannot be considered “small” or inconsequential.

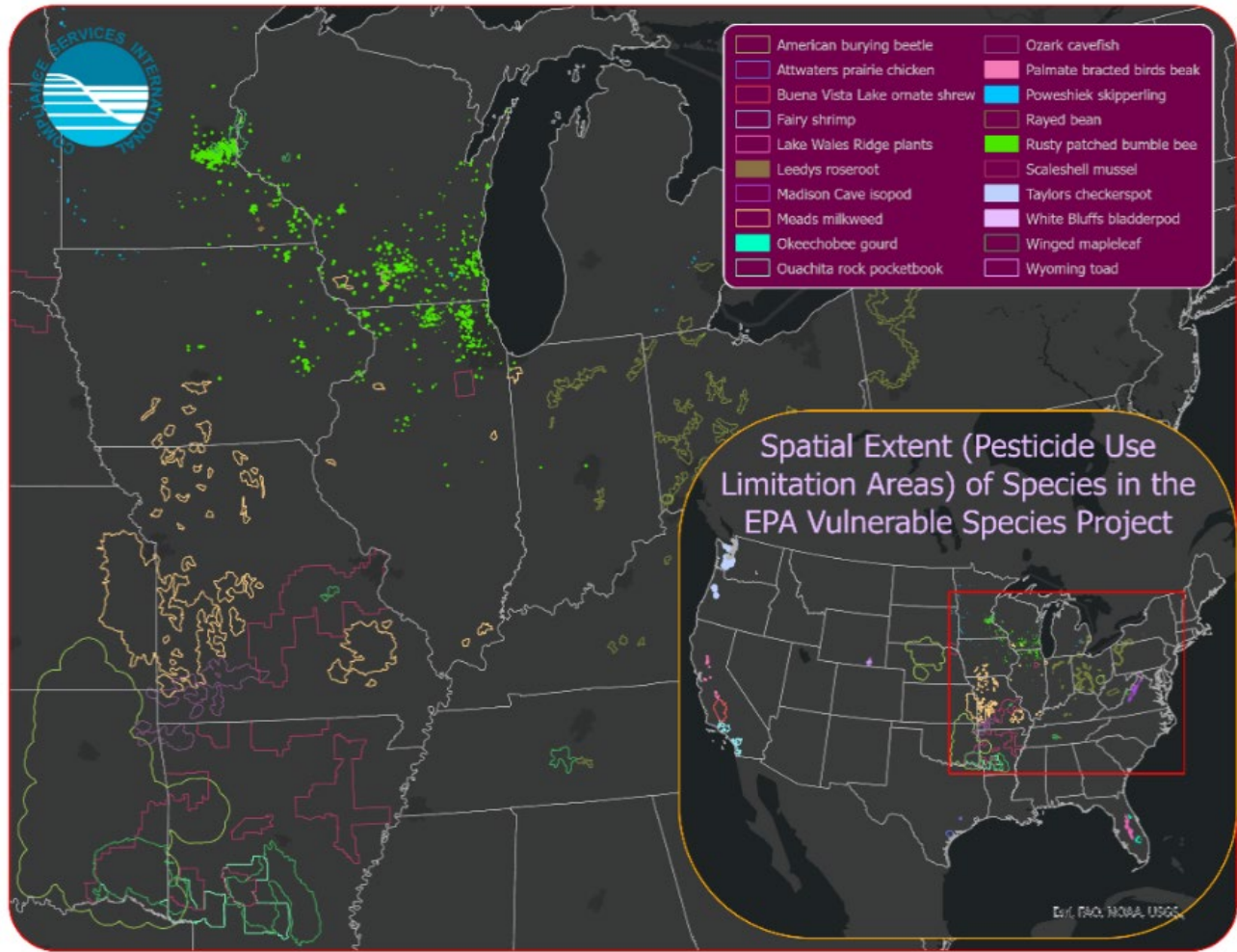


Figure 1. Spatial Extent of Species in the EPA Vulnerable Species Project

Furthermore, some ranges may completely overlap small acreage that represents high value specialty crops, or crops grown for seed. For example, the Taylor’s Checkerspot range and mitigation area in the Pacific Northwest includes nearly all areas where ornamental bulbs, a high value but small acreage crop, are grown (Figure 2). Even greater impact is presented for seed production in this area, in some cases supplying 75% of the U.S seed supply for Cole crops⁷.

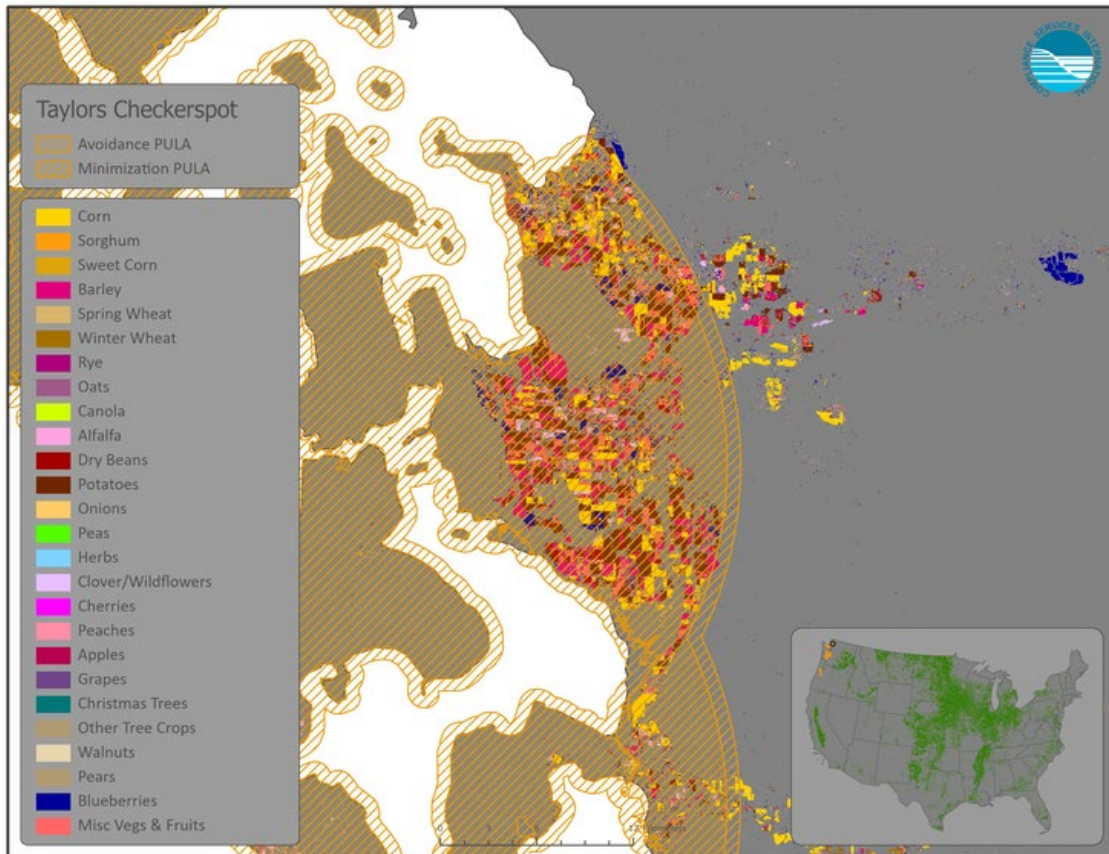


Figure 2. Taylor’s Checkerspot and Proposed Avoidance and Minimization Areas

In the VSPP, the proposed PULA for Attwater’s prairie-chicken is based on the PULA developed in the FWS malathion BiOp⁸. In the FWS malathion BiOp, FWS developed species-specific measures and PULAs based on:

“specific areas of the species range, critical habitat, key habitat types/areas, or other important features to reduce the risk of exposure and adverse effects. For each species requiring specific or refined avoidance areas, we qualitatively assessed which areas were either the most vulnerable to malathion use or most important to preserve for the conservation and recovery of the listed species and their critical

⁷ US Seed supply, Cole crops - <https://s3.wp.wsu.edu/uploads/sites/2073/2022/01/2020-Ag-Stats.pdf>

⁸ FWS Malathion BiOp - <https://www.epa.gov/system/files/other-files/2022-03/finalmalathionbiop.zip>

habitats. Examples of refined areas that require specific avoidance areas [PULAs] include springs, sinkholes, or other low flow and low volume aquatic habitats, which can aggregate malathion residues from a broad drainage area and other habitat features that are important for breeding, nesting, or reintroductions” (pg. 184).

In contrast, the proposed PULA for minimization measures for the Lake Wales Ridge plants is a 2400 ft expansion to the PULA produced in the malathion BiOp. Proposed PULAs for all other species in the VSPP are based on designated critical habitat (Powesheik skipperling) or range (17 species). PULAs that are based on range do not follow the process used by FWS in the malathion BiOp and are likely to include areas where the species does not reside, that are not key protection or recovery areas for the species, or that do not include habitat. Even when the avoidance or minimization measures proposed by EPA include a habitat component, with the goal of limiting the impact to growers in terms of acres impacted and where restrictions on pesticide use are needed, requiring pesticide use limitations in areas by overstating the spatial extent does not enhance protection of the species. In fact, it places an unnecessary burden on growers, causes confusion when no habitat or species is observable by the users, and ultimately may not provide the intended protection level for the species in question. An example is the vernal pool habitat specialists, the San Diego Fairy Shrimp and the Riverside Fairy Shrimp. The proposed PULA for both species in the VSPP consist of ranges that are greater than 2 million acres. However, the vernal pool habitat within this area covers less than 2.5% of the range, based on spatial data that identifies where the vernal pools occur⁹. The PULA for these species should be based on this specialized habitat and if deemed necessary due to product risk, expansion from vernal pools can be undertaken.

The relevance of the selected species – and how they inform the mitigations or any proposed expansion of the VSPP – needs to be understood and fully explained. For example, only 4 of the species have designated critical habitats, which is not representative of the ratio of listed species that have designated critical habitats. Additionally, one of the selection criteria was for the species to have “pesticides” (or agriculture) named as a stressor. Very often the list of stressors is intended as subjective, or suspected, causes of species decline. As such, the mention of pesticides as a possible stressor should not be given more weight than, for example, invasive species, which were identified in studies cited by the FWS BiOp for malathion and the draft BiOp for Enlist¹⁰ as the number one factor contributing to endangerment in the U.S. This provision is especially important for species that are documented in FWS recovery plans¹¹, such as the Taylor’s checkerspot butterfly, to *benefit* from pesticide use to recover habitat or reduce invasive species spread. Finally, selection of listed species for this pilot also does not seem to consider results from previous BEs or BiOps, where protection solutions—or even the determination of whether the species was Likely to be Adversely Affected — do not completely correlate (Table 1).

⁹ Vernal Pools – South Coast Ranges - <https://map.dfg.ca.gov/metadata/ds0948.html?5.61.11>

¹⁰ Enlist Draft BiOp – <https://www.epa.gov/system/files/other-files/2023-05/enlistdraftbiop.zip>

¹¹ Taylor's Checkerspot Butterfly Draft Recovery Plan - [https://ecos.fws.gov/docs/recovery_plan/SIGNED%20-%20TCB%20dRP%20\(20221109\).pdf](https://ecos.fws.gov/docs/recovery_plan/SIGNED%20-%20TCB%20dRP%20(20221109).pdf)

Table 1. Species in EPA's Vulnerable Species Pilot with a No Effect Determination in the Most Recent Biological Evaluation

Common Name	Product	Species Determination – Justification
Riverside fairy shrimp	Propazine ¹	NE - Outside Action Area
	Inpyrfluxam ²	NE – No toxicity
San Diego fairy shrimp	Propazine	NE - Outside Action Area
	Inpyrfluxam	NE – No toxicity
Buena Vista Lake ornate Shrew	Propazine	NE - Outside Action Area
	Inpyrfluxam	NE - <1% overlap
White Bluffs bladderpod	Propazine	NE - Outside Action Area
Taylor's (=whulge) Checkerspot	Propazine	NE - Outside Action Area
Winged Mapleleaf	Imidacloprid ³	NE – No Effects anticipated
	Thiamethoxam ⁴	NE – No Effects anticipated
Scaleshell mussel	Imidacloprid	NE – No Effects anticipated
	Thiamethoxam	NE – No Effects anticipated
Rayed Bean	Imidacloprid	NE – No Effects anticipated
	Thiamethoxam	NE – No Effects anticipated
	Propazine	NE – Outside Action Area
American Burying Beetle	Enlist One/Duo	NE - <1% overlap
	Inpyrfluxam ⁵	NE – No toxicity

¹Propazine determinations from the Draft Biological Evaluation

(<https://www3.epa.gov/pesticides/nas/propazine/appendix4-1.xlsx>)

²Inpyrfluxam determinations from the Final Biological Evaluation (EPA-HQ-OPP-208-0038-0093) ³Imidacloprid determinations from the Final Biological Evaluation

(<https://www3.epa.gov/pesticides/nas/neonicdraftbe/imidacloprid/appendix4-1.xlsx>)

⁴Thiamethoxam determinations from the Final Biological Evaluation

(<https://www3.epa.gov/pesticides/nas/neonicdraftbe/thiamethoxam/appendix4-1.xlsx>)

⁵Enlist One/Duo determinations from decision to extend registration (EPA-HQ-OPP-2021-0957-0019).

The species selection process also does not appear to acknowledge the FWS’s own conclusions about the condition of the species – for example, due to positive steps toward recovery, the American Burying Beetle (ABB) was downlisted from Endangered Status to Threatened in 2019¹². In the change of listing notice, FWS noted that:

“The risks for American burying beetle populations are different for each region of the country, and risks that may be minor for one population could affect the resiliency of others. For

¹² Endangered and Threatened Species: Reclassifying the American Burying Beetle from Endangered to Threatened <https://www.regulations.gov/docket/FWS-R2-ES-2018-0029/document>

example, urban expansion is a minor risk for larger populations in Oklahoma but is a substantial risk for the small Block Island population in Rhode Island.”

EPA claims that wide-ranging species were generally not included. However, the ABB is wide-ranging. Furthermore, FWS recognizes that needs for protection of this species vary with geography. FWS has also noted “most of the existing ABB range does not experience any widespread pesticide applications” and that “potential effects vary with the pesticide and application method, scale, and timing.”¹³ Based on this information, the mitigations for the ABB may be unnecessary or should vary depending on the population. This species illustrates that “one size” in mitigation does not fit, is not necessary to, and may not even be required for species protection all over its wide range.

Recommendations:

- (1) **EPA should revise the PULAs according to the method outlined by FWS in the malathion BiOp and should not expand PULAs that have already been defined by FWS.** Additionally, it is not transparent if FWS, the species experts, provided input into the development of the PULAs or measures for species other than those that rely on the PULAs from the malathion BiOp. Referring to the text from the malathion BiOp related to the development of species-specific measures above, FWS defined areas and features to “reduce the risk of exposure and adverse effects.” They did not seek to avoid the risk entirely across the PULA. The measures in the VSPP should be based on the same directionally correct principle.
- (2) If pilot species are selected for their vulnerabilities, to serve as a worst-case for mitigations needs, then their characteristics need to be assessed and documented as FWS did in the Malathion BiOp.
- (3) Variabilities within the species, such as those demonstrated for the ABB, need to be acknowledged and mitigations adapted to those variations.

Feasibility of Proposed Mitigations

Most importantly, the need to have four mitigations proposed in the VSPP has not been established or justified. There is no information on how these broad mitigations increase species protection, and these mitigations go far beyond what may be necessary even if there is a potential for a harmful level of exposure (which also is not demonstrated).

EPA notes that, “The federal pilot is briefly discussed in this introduction because it informed the proposed mitigations for the Vulnerable Species Pilot” (p. 3). Furthermore, “EPA applied the lessons learned in the federal pilot collaboration as a starting point to developing the mitigations” (p. 5), but there is no further information on what the lessons learned are, and no report on the Federal Mitigation Pilot Project¹⁴ so that stakeholders can understand how one leads to the other. This project is not discussed at all in the VSPP technical support document, and only three of the species in the Federal

¹³ FWS Species Status Assessment Report for the American Burying Beetle - <https://ecos.fws.gov/ServCat/DownloadFile/165011>

¹⁴ EPA Federal Mitigation Pilot Project – <https://www.epa.gov/angered-species/implementing-epas-workplan-protect-angered-andthreatened-species-pesticides#projects>

Mitigation Pilot Project (Rayed Bean, Poweshiek skipperling, and Rusty patched bumble bee) are also in the VSPP.

It is also difficult to relate the basis for mitigations between the VSPP and the accompanying technical document. For example, on page 10 of the VSPP, EPA states, “EPA drafted an initial set of mitigations and then evaluated and revised them based on a representative set of pesticides that have been detected in monitoring data from locations relevant to many of the pilot species.” However, no references are given for monitoring data in the VSPP technical support document. In fact, references in both documents are listed as if they were cited in the text (“Author, Date”) but there are no such citations in the text of either document. In short, references are not specific to any point made or mitigation decided upon.

On page 5, EPA notes:

“there may be inconsistencies between the proposed mitigations described in this draft plan and the upcoming publications for other strategies. OPP may not be able to resolve all inconsistencies between the different efforts due to differences in timing and goals of these efforts as well as the evolving nature of EPA’s ESA strategies. However, OPP will more comprehensively harmonize the mitigation menu options and approaches across the various ongoing efforts, to the extent possible, as the Vulnerable Species Pilot evolves.”

There would be fewer inconsistencies if the VSPP was based on experience to date, referenced that experience in its Draft Technical Support, reported on the guidance that the Federal Mitigation Pilot Project provided, and incorporated knowledge gained from the first completed BiOps.

Recommendation:

- (1) The need for, impact of, and character of mitigations proposed in the VSPP needs to be understood so that there will be consistency across platforms within EPA as well as across agencies.
- (2) EPA needs to identify the species involved in the federal pilot(s), what mitigations were developed, and the spatial extent of these mitigations.
- (3) EPA has had applied experience in developing BEs and responding to Services BiOps, and those learnings should be used to construct and inform the VSPP.

Implementation Plan

EPA’s proposed implementation plan depends on voluntary, non-notification language additions to all pesticide labels except those for non-professional residential use. Instead of voluntary label language updates, the Agency should focus on the importance of assuring consistency among compliance measures and reliance on more carefully thought-out protective programs. EPA also suggested in the VSPP that Interim Ecological Mitigation would continue to be applied, and that inconsistencies in those and the Pilot mitigations would somehow be worked out. However, on page 45 of the Technical Support Draft, EPA notes:

“When these strategies overlap, EPA will generally use the spray drift and runoff/erosion mitigations from the Vulnerable Species Pilot instead of the IEM because the mitigations for the Vulnerable Species Pilot are considered more specific and protective for the vulnerable species in the pilot, and thus advance EPA’s ESA obligation the most. The IEM includes other measures

not covered by the Vulnerable Species Pilot (e.g., pollinator stewardship language, incident reporting language) that will be considered by EPA during registration and registration review decisions.”

This means broad protections proposed by the VSPP override more carefully thought-out protective programs which pesticide registrants have supported by research and education and pesticide users have invested in cultural or cropping changes to adopt.

Exemptions

Of great significance to the end-user is the discussion of Exemptions that begins on page 48 of the Technical Support Draft and is mentioned on page 23 (item 5) of the VSPP. However, the exemption statement appears to be limited to runoff and erosion and does not include provisions for drift and avoidance. Recently, EPA issued draft guidance¹⁵ to registrants on improved efficiencies for ESA assessments. In this draft guidance, EPA asked for data on drift-reducing adjuvants/additives. We encourage the Agency to extend the exemption opportunity to validated drift reduction technologies, which should include adjuvants/additives and precision application equipment. In the same spirit as the exemption opportunities for participating in a recognized conservation program, EPA should consider providing credit for existing practices, and label restrictions that reduce exposure to listed species and other non-target organisms.

Page 19 of the VSPP, Pesticide Use Limitations (Mitigation Measures), describes another exemption opportunity that instructs the applicator, within a pesticide avoidance area, to “coordinate with the local FWS Ecological Services field offices to determine appropriate measures to ensure the proposed application is likely to have no more than minor effects on the species.” No additional details are provided to suggest to the applicator what information may be useful in this coordination, which must be completed 3 months prior to the application, with the regional FWS field office. As written, this exemption opportunity seems unattainable by most applicators and would likely overwhelm the regional FWS field offices should applicators attempt coordination without clear direction. In addition, pesticide users generally cannot anticipate when all applications need to be made due to the dynamic nature of pest threats. The 3-month timeframe proposed in the VSPP will effectively require growers/pesticide users who lack precognition to miss key applications to crops, infrastructure, and/or public health pests. It is also unclear whether regional FWS field offices would have the training, resources, or access to the data (ecotoxicology, environmental fate, usage, etc.) that would be needed to conduct such an assessment.

Recommendations:

- (1) Consultation between growers/applicators and regional FWS field office staff prior to pesticide applications in avoidance areas may represent an undue strain on resources. While CLA supports the concept of an exemption allowing pesticide application within avoidance/minimization areas based on interactions with local FWS experts, the proposed concept must be fully developed with input from end-user stakeholders and the regional FWS offices.

¹⁵ EPA’s Draft Guidance to Registrants on Activities to Improve the Efficiency of Endangered Species Act Considerations for New Active Ingredient Registrations and Registration Review - <https://www.regulations.gov/document/EPA-HQ-OPP-2023-0281-0002>

- (2) We recommend the Agency develop an exemption framework for growers/users employing validated drift reduction technologies, including, but not limited to, precision application equipment and use of drift-reducing adjuvants/additives. This exemption framework should also consider current label restrictions to minimize off-site movement.
- (3) We recommend the Agency develop a research exemption to enable continued research and development of new crop protection tools in areas identified for proposed pesticide avoidance or minimization. For example, Oregon State University's agricultural research farms lie within one of the proposed pesticide avoidance¹⁶ areas for the Taylor's Checkerspot butterfly.

Potential Future Expansion Plan

The VSPP will require significant refinement and explanation prior to expansion to other species. The preliminary discussion to Section 7 (p. 49) of the VSPP, regarding future consultation with the FWS, is a potential opportunity for further discussions on the concept, but not mechanisms, of the VSPP. In the brief discussion on programmatic consultation, EPA recognizes, as we all do, that EPA and the Services need to devote "fewer resources to developing and evaluating mitigations to support EPA's BEs and consultation for these [and other] listed species." However, the drafts presented do not consider impact or scope and are not reasonable for many pesticide users. Rather than use the elements of the VSPP as a basis for programmatic mitigation – which is what EPA seems to be proposing here – it should be considered a starting point for a discussion of what programmatic consultation could achieve.

Recommendations:

- (1) Include significant refinements and revisions, as well as meaningful user community input, by uses (commodity, fruit/vegetable, public health uses, etc.) prior to implementation or expansion of the VSPP.
- (2) Engage FWS in mutual planning for a programmatic approach to consultation as part of programmatic mitigation, offsets, and specific species to which these elements might apply.

III. Conclusion

CLA supports our members' technical concerns about the use of the best available science, transparency, validated methodology, and data quality standards in making decisions regarding the protection of endangered species. CLA echoes the concerns of our member companies and other key stakeholders that the VSPP represents an alarming and precautionary departure from EPA's established risk- and exposure-based environmental protection under both FIFRA and ESA. We also understand the concerns expressed by the user community and recognize the difficulty or inability to sustain farming operations or other livelihoods which rely on pesticide applications should the majority of the mitigations within the VSPP be implemented. We remind the Agency that the potential impact of these restrictions will go far beyond pesticide users and the local communities in which they operate. Pesticides are a vital tool in securing a safe and equitable food supply, public health programs, maintaining wildlife habitat and protecting critical infrastructures. The effective pesticide ban proposed by the VSPP will detrimentally affect each of these components of our society.

¹⁶ EPA's Vulnerable Species – Taylor's Checkerspot Butterfly - <https://storymaps.arcgis.com/stories/6151d8adf03e449196e8aaa46e1ab140>

The comments we present here focus on procedures and policy and how the VSPP should be rethought, improved, or heavily amended before any implementation or expansion is finalized. CLA appreciates the need for interim mitigation measures while consultation moves forward, but it is not likely that all runoff, spray drift, and avoidance practices described at this draft stage will be required universally for all pesticides when an individual product's risk and exposure are fully addressed. As drafted, the VSPP proposes temporary measures that will involve significant efforts and lost uses, on the grower, applicator, landowner, retailer, state enforcement agencies, and the registrant. Such direct and heavy impact on the user community, through an arbitrary departure from current FIFRA and ESA implementation policies, and without careful consideration of existing best management and conservation practices, resistance management, and the vagaries of pest outbreaks, could be devastating to the protection of crops, structures, human health and animal welfare in the areas proscribed around the listed species used in this pilot, and should not be extended to more species or areas without more specificity and dedicated user input.

CLA remains committed to support improvements to the ESA review for pesticide registration decisions. In that spirit, we have offered the enclosed comments and recommendations above on overall improvements to the ESA process and specific comments on the VSPP and supporting technical document. CLA recommends that the Agency resolve the outstanding questions, requests for clarity and refinement, inconsistencies between parallel programs and collect adequate stakeholder input on the resolutions.