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On behalf of the National Association of State Departments of Agriculture

Testimony on *“At Risk: American Jobs, Agriculture, Health and
Species—The Costs of Federal Regulatory Dysfunction”*

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Chairman Hastings, Chairman Lucas, Ranking Member Markey and Ranking Member Peterson, thank you for convening this hearing today on the Federal Endangered Species Act (ESA) consultation process for pesticides. I appreciate the opportunity to testify today and share a state agency perspective on this important topic.

I am testifying today on behalf of the Washington State Department of Agriculture as well as the National Association of State Departments of Agriculture (NASDA). NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the introduction and spread of plant and animal diseases, and fostering the economic vitality of our rural communities. Environmental protection and conservation are also among our chief responsibilities.

Forty-three of NASDA’s members are co-regulators with the Environmental Protection Agency (EPA) under the state primacy provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Our agencies are the lead state agencies responsible for administering, implementing and enforcing the laws regulating pesticide labeling, distribution, and use in our states. In addition to our pesticide regulatory responsibilities, state departments of agriculture use pesticides in their administration of invasive-species control programs such as the control of apple maggot in Washington State.

I am here today because the pesticide registration process faces serious challenges from litigation to compel compliance with ESA. While we all seek to protect threatened and endangered species, a litigation-driven process that fails to adequately incorporate the expertise of state agencies and other stakeholders and does not recognize the impacts on end users of pesticides, is not acceptable.

Over the past ten years, we in the Pacific Northwest have seen up close the implications of an ESA consultation process that is badly broken. In 2002, the U.S. Environmental Protection Agency (EPA) was sued by a coalition of environmental groups for failure to consult under the ESA on 54 pesticides used

for crop protection in the Pacific Northwest that could potentially affect threatened or endangered salmon.

Later that year, the U.S. District Court for the Western District of Washington found that EPA failed to consult with the National Marine Fisheries Service (NMFS) on the effects to salmon from 54 pesticides. The court ordered EPA to make “effects determinations” for all pesticides in question by August 1, 2003.

EPA’s initial assessment determined 37 of the 54 pesticides “may affect” listed salmonid species. These 37 pesticides were submitted to NMFS for formal consultation. However, NMFS failed to initiate consultation after receiving EPA’s effect determinations. As a result, in November 2007 the Northwest Coalition for Alternatives to Pesticides et. al. sued NMFS for failure to complete the consultation on the 37 pesticides. On August 1, 2008, NMFS and plaintiffs negotiated a stipulated agreement that requires them to complete the biological opinions by February 2012, which is nearly 10 years after the original court ruling against EPA.

In compliance with the 2008 court order, NMFS has authored the first four biological opinions that include sweeping new requirements for pesticide use. To reduce the chance for jeopardy to threatened and endangered salmon species occurring as a result of application of the pesticides of concern, NMFS specified mitigation measures known as Reasonable and Prudent Alternatives (RPAs) to protect listed salmon. These measures are expected to affect an extensive amount of agricultural land in California, Oregon, Idaho and Washington.

The RPAs outlined in the biological opinions for protecting salmon include drift and runoff buffers, application limitations when wind speed exceeds 10 mph, application prohibitions when soil moisture is at field capacity or a storm event is likely in 48 hours following the application, reporting of all incidents of fish mortality, and effectiveness monitoring. Of these requirements, three specific elements of the RPAs have generated substantial concern:

1. The definition of water bodies to which the RPAs apply

According to NMFS, “salmonid habitats are defined as freshwaters, estuarine habitats, and nearshore marine habitats including bays within the evolutionary significant unit ranges including migratory corridors. The freshwater habitats include intermittent streams and other temporally connected habitats to salmonid-bearing waters. Freshwater habitats also include all known types of off-channel habitats as well as drainages, ditches, and other manmade conveyances to salmonid habitats that lack salmonid exclusion devices.”

The definition presented by NMFS is overly broad and includes water bodies that are not salmon bearing. Washington state fish and wildlife experts have explicitly defined the extent of salmon habitat in Washington; using state specific data would allow NMFS to provide a RPA that focuses more on where the fish are and less on general assumptions.

2. The size of the buffers specified

The initial biological opinions rely heavily on buffers ranging from 100 to 1000 feet around waterbodies identified as salmon habitat. The impact these buffers will have on agricultural production across the state is significant. For example, in the Skagit Delta in Western Washington a 500-foot buffer would affect an estimated 48 percent of agricultural lands, while a 1000-foot buffer would affect an estimated 75 percent of agricultural lands. Notably, buffers were not calculated for all ditches and intermittent streams because their locations are not known with specificity. The actual agricultural acres affected are likely greater than estimated due to the presence of ditches and intermittent streams and because farmers typically do not partially treat a field and to do so is not generally an effective treatment for a pest. Similar statistics were calculated for the Wenatchee Valley in eastern Washington.

Buffers this size applied to salmon habitat, as defined in the initial biological opinions, will effectively result in a prohibition of use for those pesticides within the Skagit Delta, Wenatchee Valley and similar areas.

3. One-year implementation timeline for the RPAs

The one-year timeline specified in the biological opinion may allow EPA time to implement the specified RPAs. However, one year is not adequate to allow for exploration of alternative pest control strategies for farmers. Minor crops may not have a viable replacement pesticide registered for use or an alternative pesticide may not work well with integrative pest management (IPM) programs that balance pest control with beneficial insect populations and use of specific pesticides. Another concern for minor crops is whether a Maximum Residue Level (MRL) has been established for replacement pesticides in export markets. If a MRL is not established for a replacement pesticide, international trading opportunities are severely limited.

Correspondence between NMFS and EPA indicates there is little agreement on the data and the underlying assumptions used to assess effects of pesticides on salmon in the consultation process. Due to conflicting statutory requirements and litigation-driven consultation, the working relationship between EPA and the Services can be described as fractured at best and, at its worst, openly antagonistic. As a result, there is little give and take between EPA and the Services as envisioned within the ESA consultation handbook for conducting ESA section 7 activities.

One area that needs to be resolved is the use of water quality monitoring data versus modeled exposure values. Washington has conducted targeted water monitoring which shows concentrations are below levels of concern for salmon. However, NMFS defers to modeled exposures for pesticides in salmon-bearing streams that show concentrations of concern. Assessment of the effects of listed species to pesticides must balance real-world exposure with conservative modeled values.

I am encouraged that EPA and the Services requested the National Research Council to convene a committee to review the scientific and technical issues that have arisen through the consultation process. However, I am concerned the review will take a minimum of 18 months and NMFS is still required by the courts to complete their biological opinions for salmon next year. Further, it is critical that as EPA and the Services resolve their differences on the technical issues and procedures, the biological opinions completed to date should be reassessed using the agreed upon procedures.

Transparency and accessibility is another area that has been lacking in the consultation process. Consultation for ESA compliance takes place between two federal agencies and, unlike the pesticide registration and review process, state agencies and other stakeholders have limited opportunity to participate in meaningful ways. Typically, the only opportunity to comment is when EPA makes a draft biological opinion available during a 30-day comment period. The biological opinions are highly complex technical documents that can be more than 1000 pages. This short review time is a function of the consultation schedule NMFS must follow that was negotiated through the courts.

The ESA requires the Services to implement RPAs that are economically and technologically feasible. Unfortunately, this requirement is applied to the action agency which in this case is EPA, not the end user. Therefore, no consideration has been given to the economic consequences for the RPAs to the farmer. This is especially of concern to states where minor crops are grown and the availability of alternative pesticides may be limited.

Progress is being made. In the most recent biological opinions, NMFS has incorporated quantifiable targets to define what constitutes jeopardy. This allows states and stakeholders to clearly understand what level of protection is needed to protect listed species. Also, NMFS Regional Administrator Will Stelle has organized several meetings to facilitate communication between NMFS, EPA, United States Department of Agriculture, states and stakeholders. Unfortunately, litigation on pesticide consultation for ESA continues. The Center for Biological Diversity filed suit against EPA for failure to consult on more than 300 pesticides and 214 species in January of this year. This lawsuit will affect pesticide registrations in all states except Alaska. Court-directed consultation between EPA, United States Fish and Wildlife Service and NMFS on such a scale is unsustainable given existing federal resources and processes. Moreover, specific court decisions to date have delivered unmanageable workloads for agencies and untenable timelines, but no workable solution to the problem of ESA consultation.

The current pesticide registration/consultation process limits the ESA's effectiveness at protecting listed species by delaying development and implementation of rational, effective measures for pesticide use. Because of numerous procedural barriers and minimal opportunity for states and stakeholders to engage decision-makers, the process also fails to provide reasonable registration of pesticides. Solutions to these challenges are available. For example, mediation of the strained relationship between the Services and EPA can establish a collaborative and transparent consultation process for pesticide registration. In addition, past and future biological opinions will benefit from incorporation of both current available data and assessment of the economic feasibility of proposed RPAs and Reasonable and Prudent Measures (RPMs). Similar benefits can be achieved through clear integration of consultation

into EPA's registration process. Integration can prevent future litigation based on the "failure to consult" premise and improve opportunity for public participation.

The facts are clear: the consultation process is poised to collapse under the weight of proposed litigation limiting effective species protection, and adversely impacting the nation's agricultural community. Ultimately, resolution will be achieved only when states, policy makers and interested parties join the call to improve the pesticide consultation process.