



February 15, 2022

Jennifer Teerlink
 Pesticide Registration Branch
 California Department of Pesticide Regulation
 1001 I Street
 Sacramento, CA 95814

Re: Comments in Response to California Department of Pesticide Regulation’s Request for Comments on Pesticide-Treated Seeds Public Workshop

Dear Ms. Teerlink:

We write to submit the following comments on behalf of the Natural Resources Defense Council (NRDC), California Institute for Biodiversity, California Native Plant Society, Californians for Pesticide Reform, Center for Biological Diversity, Center for Food Safety, Environment California, Friends of the Earth, Pesticide Action Network, Pollinator Stewardship Council, the Xerces Society for Invertebrate Conservation, and our hundreds of thousands of California members and supporters (Commenters) in response to the California Department of Pesticide Regulation’s (DPR) request for public comment on the information presented at its November 15, 2021, public workshop regarding pesticide-treated seeds (the “November Workshop”).

We commend DPR for its earnest examination of the available information on pesticide-treated seed use in California, as well as its honest assessment and presentation of that information at the November Workshop. As outlined at that workshop, the true extent of the use of pesticide seed treatments in California is almost entirely unknown, although we now know it includes seeds treated with pesticide products not approved for use in California. Further, for many active ingredients, the use on seeds may far outstrip the uses regulated and tracked through DPR’s Pesticide Use Reporting (PUR) system.

Many of the Commenters petitioned DPR—in an initial September 23, 2020, petition and a December 22, 2020, request for reconsideration (collectively, the “Petition”)—to regulate and track the use of seeds treated with systemic pesticides as required by the California Food and Agriculture Code (FAC). The information presented at the November Workshop only further underscores the responsibility and the need for DPR to take the actions requested in the Petition. However, to date, DPR has denied the Petition and—despite apparent recognition of the intended pesticidal effect of certain pesticide-treated seeds beyond protection of the seeds themselves—has made no commitment to register, regulate, or track the use of any pesticide-treated seed anywhere in California.

DPR must do so now, at a minimum, for all seeds treated with systemic pesticides. These seeds clearly constitute “pesticides” under the FAC, and DPR must take the necessary regulatory steps to ensure their use does not harm California’s environment and its people. Whether that regulatory action takes the form of traditional registration and review as with other pesticide products or an alternative regulatory

program, DPR must provide for tracking of such seeds in the PUR system as well as any mitigation necessary to control their environmentally harmful effects—such as the many known destructive effects of neonicotinoid-treated seed use.

Commenters offer the following specific comments:

I. DPR Has a Duty to Regulate Seeds Treated with Systemic Pesticides

As outlined in the Petition, DPR has a duty to regulate, at a minimum, all seeds treated with neonicotinoid insecticides (neonics) and other systemic pesticides. We attach that Petition to these comments and briefly summarize its key argument here.

The FAC charges DPR with controlling the registration, sale, and use of pesticides in California in order to, among other things, “protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides.” FAC § 11501. To this end, DPR must regulate and control the use of agricultural chemicals that create hazards to domestic animals (including honeybees), the environment, or farmworker and public health as “restricted materials.” FAC §§ 14001, 14004.5. DPR must likewise regulate or prohibit the use of any “environmentally harmful materials.” FAC § 14102. With respect to neonics in particular, DPR must “adopt any control measures necessary to protect pollinator health.” FAC § 12838.

In California, “[a]ny substance, or mixture of substances which is intended to be used . . . for preventing, destroying, repelling, or mitigating any pest” is a “pesticide” subject to DPR’s regulatory authority. FAC § 12753(b). Under the FAC and DPR’s current policies, non-pesticidal products combined with pesticide active ingredients require registration as “pesticides” unless: (1) DPR individually evaluates and exempts them by rule, FAC § 12803; or (2) the active ingredient is applied “solely to protect the article/substance itself” and is not otherwise “intended to be used to control pests.”¹ DPR considers these articles/substances—known as “treated articles”—to fall outside the FAC’s definition of “pesticide” under the theory that they are not intended to prevent, destroy, repel, or mitigate a pest.

DPR has not individually evaluated or exempted pesticide-treated seeds by rule, while at the same time recognizing that seeds treated with systemic pesticides are intended to control pests beyond protection of merely the seed itself.

At the November Workshop, for example, DPR presented a slide from [Li et al. \(2018\)](#)² illustrating exactly how neonic-treated seeds’ intended pesticidal effects reach well beyond seed protection. Specifically, they are intended to absorb into plant tissues and bleed into soil, providing “localized *plant* protection” against “soil and above ground pests” that may attack the leaves, roots, and other features of the growing plant.³

¹ DPR, Letter to Pesticide Product Registrants and Stakeholders Regarding Registration Requirements for Products Made from Pesticide Impregnated Materials and Bearing Pesticide Claims, California Notice 2015-13 (Dec. 10, 2015), <https://bit.ly/3f1xpFc> (emphasis in original); see also DPR, Regarding the Exemption from California’s Regulatory Requirements, Pesticides that Are Exempt from Federal Requirements Pursuant to FIFRA Section 25(b)(2), Initial Statement of Reasons and Public Report, 3 (1999).

² Yang Li et al., *Adsorption-desorption and Degradation of Insecticides Clothianidin and Thiamethoxam in Agricultural Soils*, Chemosphere (Sep. 2018), <https://bit.ly/3r7u0hi>.

³ See the slide below presented at the November Workshop. Emphasis added.

Why are pesticide-treated seeds used?

- Localized plant protection.
- Protects against soil and aboveground pests
- Systemic active ingredients are able to absorb into the plant and distribute throughout its tissues.
- Majority of pesticide-treated seed environmental fate research conducted on neonicotinoids.



Li et al., 2018. Chemosphere.



A slide from DPR's November Workshop detailing the intended pesticidal impacts of neonic-treated seeds. As illustrated, these impacts extend well beyond protection of the seed itself.

Yet despite the agency's clear-eyed assessment of how such treated seeds are intended to work, DPR presumes, as a general policy, that all pesticide-treated seeds are exempt treated articles. At the November Workshop, DPR made numerous comments to this effect:

"Pesticide-treated seeds however do not fall under the state definition of a pesticide and therefore are exempt from PUR reporting." (Anson Main at 41:10)

"So at this time DPR considers all pesticide-treated seeds, they fall under 'not intended to be used as a pesticide.'" (Jennifer Teerlink at 1:08:38)

"[P]esticide treated seeds do not meet the state definition of a pesticide" (Jennifer Teerlink at 1:30:40)

[\(November Workshop Video\)](#).

DPR must commit to evaluating all pesticide-treated seeds on a case-by-case basis and regulating as "pesticides" all treated seeds with intended pesticidal effects that reach beyond protection of the seed itself. At a minimum, this will require some form of regulation for all seeds treated with systemic pesticides.

Lastly, commenters note concern regarding the nature of some of [DPR's questions](#) for this comment period—e.g., its request for "information on the relative environmental impact of pesticide-treated seeds versus other application methods." While this information is relevant to *how* pesticide-treated seeds should be regulated, it is not relevant to the question of *whether* DPR must regulate them. As noted, at least with respect to seeds treated with systemic pesticides, DPR's duty to regulate is clear and DPR must publicly acknowledge that fact.

II. DPR's Presentation at the November Workshop Illustrates a Considerable Regulatory Loophole that DPR Must Close

Regulation of pesticide-treated seeds is necessary to mitigate their likely considerable effects on California's environment. The Petition details these impacts with respect to neonicotinoid-treated seeds

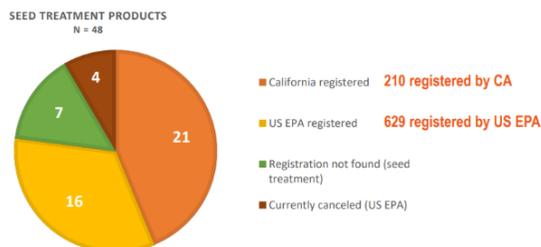
and outlines how DPR’s current policy would allow for seeds treated with pesticides that have not received DPR regulatory approval to be sown directly into California soil. Referencing an [NRDC-commissioned report](#) by pesticide risk-assessment expert Dr. Pierre Mineau, the Petition also illustrates how, on an annual basis, the total potential use of neonics on treated seeds may exceed all of the known uses of neonics tracked in the PUR system.

The information presented at the November Workshop confirms the Petition’s assessments. Initially, DPR discussed the results of an analysis it conducted using inspection data from the state Department of Food and Agriculture (CDFA) from the last 11 years. It revealed that over two-dozen pesticide products not approved for use in California—the majority of seed treatment products detected—appeared on seeds ready to be planted in California soil.

Registration Status: Seed treatment products

CDFA Seed Inspection Data: 2010 - 2021

- Majority of seed treatment products not registered in the state of California
- Some seed treatment products registered to be used in USA outside of California



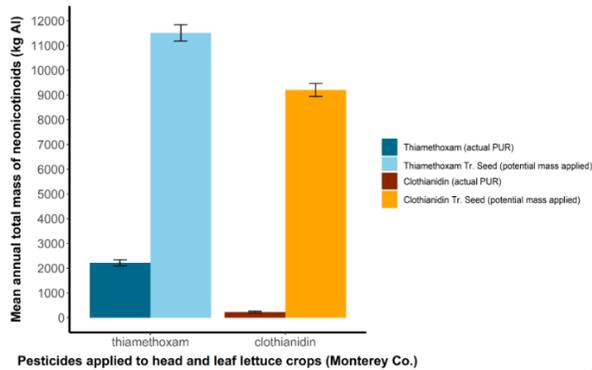
CDFA data showed over two dozen pesticide non-DPR-approved products on seeds slated to be planted in California.

DPR’s stated “concerns” with this data were that: “non-California registered seed treatment products are being planted in the state;” and (2) in some cases, these pesticides were not registered for seed treatment even by U.S. EPA. (Anson Main, [November Workshop Video](#) at 33:20). Further, because this information was gleaned from inspections that are not necessarily representative of treated seed use in the state as a whole, DPR remains mostly in the dark about actual treated seed use in California. The “data gaps” it notes include the California crops where seed treatment is used, the total “seed treatment mass” applied, “or even the acres treated.” (*Id.* at 37:13).

Other information presented by DPR shows that—while unknown—this use may be massive, far outstripping the known non-seed uses of many pesticides currently tracked in the PUR system. At the workshop, DPR presented the example of a case study it conducted on neonic-treated lettuce seeds, showing that the actual neonic use on lettuce seeds in California could be anywhere from five to thirty-five times higher than the known tracked and regulated use, depending on the active ingredient:

Reported use vs. potential mass from pesticide-treated seeds

Represents mean annual total mass (kg AI) from 2016 to 2019 on head and leaf lettuce hectares



The light blue and orange bars show that the amount of neonics used on lettuce seeds in California may dwarf those that DPR tracks.

These findings underscore the tremendous uncertainty DPR has regarding what, in all likelihood, may be the largest and most widespread uses of many pesticide active ingredients in the state of California.

While we understand DPR's attempt to close these information gaps through the voluntary submission of information to [the questions](#) posed in this comment period, these efforts will invariably fall short in actually closing them. Not all persons with information will comment, and, likely, much of the data DPR seeks—e.g., tracking information for how much “pesticide-treated seed is planted in California”—is simply not recorded anywhere. This underscores the importance of DPR performing the duties the FAC charges it with—tracking and regulation of the relevant pesticide-treated seeds.

DPR's other regulatory efforts with respect to neonics also highlight the importance of exercising regulatory control over the relevant treated seeds. Currently, DPR is in the process of proposing mitigation for agricultural neonic uses pursuant to its [reevaluation of neonicotinoids](#) and its efforts to comply with the FAC mandate that it “adopt any control measures necessary to protect pollinator health.” FAC § 12838. As the Petition notes, however, DPR has failed to evaluate the likely destructive effects of neonic-treated seeds on pollinator health. To the extent neonic-treated seed use approaches or exceeds all the known uses of neonics in the PUR system, failure to include mitigation affecting the use of neonic-treated seed will almost certainly ensure DPR also fails to adopt control measures to protect pollinator health.

The same is true for human health. In DPR's [review of imidacloprid in groundwater](#) under the Pesticide Contamination Prevention Act, DPR is charged with ensuring that lawful agricultural use of imidacloprid does not result in groundwater contamination that causes adverse human health effects. If DPR concludes that current levels of imidacloprid in California do pose adverse effects to the health of its residents, what will it do if most of the imidacloprid entering groundwater comes from pesticide-treated seeds? Without exercising direct regulatory control over the use of those seeds, how will it protect the health of Californians?

III. New Information Supports Regulation of Pesticide-Treated Seeds

While DPR already possesses sufficient information to, at minimum, regulate seeds treated with systemic pesticides as “pesticides” as demanded by the FAC, recent information also supports such action. The Petition contains an overall summary of treated seeds’ impacts on the environment, but DPR may find the following new research useful as it evaluates the impacts of treated seeds, especially as they relate to soil and water contamination.

Mounting evidence suggests that wild soil-nesting bees can be negatively impacted by soil pesticide contamination, including that stemming from insecticide-treated seeds. [Main et al. \(2021\)](#) found that neonic presence in field soil was associated with significantly lower richness of wild bees and the authors suggested that neonicotinoid seed treatments be curtailed on lands managed for wildlife conservation.⁴ As DPR continues to examine the impacts of neonics on pollinators, it is essential that seed treatments are considered as so many of California’s specialty crops depend on healthy populations of pollinators in and around agricultural fields.

A recent meta-review of the impact of pesticides on soil organisms, [Gunstone et al. \(2021\)](#), found that pesticides harm or kill soil invertebrates—which includes ground nesting bees—in 70.5% of cases analyzed. Neonicotinoids, specifically, negatively impacted soil taxa between 70% - 80% of the time. Because treated seeds deposit these pesticides directly into soil, they are of particular concern.

We also continue to be concerned about the impacts of pesticide-treated seed on water quality. Recent sampling has continued to find neonics and other systemic insecticides at levels exceeding EPA aquatic life benchmarks, especially in the Central Coast region, with an unknown contribution from seed treatment ([Sandstrom et al. 2022](#)).⁵ Research in the Midwest found that neonicotinoid concentrations, even below EPA aquatic life benchmarks, in wetlands surrounded by fields planted with treated seed were associated with declines in aquatic invertebrate biomass ([Scheper et al. 2020](#)).⁶ [Frame et al. \(2021\)](#) explored mass losses from neonicotinoid-treated seed in crop fields in Pennsylvania, finding at least 1.09% of seed-applied neonics were lost in runoff from fields annually.⁷ Though that may seem to be an inconsequential figure, the authors note that given the widespread planting of treated seed, “Even a 1.09% mass loss has the potential to cause major pollution over large areas.”⁸ Troubling levels of neonic contamination have been identified in watersheds dominated by crops planted with treated seed in the Midwest.⁹ While California’s crop environment is distinct from that of Pennsylvania and the Midwest, this work in concert with DPR’s own research in lettuce fields can improve understanding of how seed-applied pesticides move away from fields and into waterways. In assessing this risk, it is critical to consider that many California fields host multiple crop cycles in a given year. Without a strong

⁴ Main, A.R., E.B. Webb, K.W. Goyne, R. Abney, and D. Mengel. 2021. Impacts of Neonicotinoid Seed Treatments on the Wild Bee Community in Agricultural Field Margins. *Science of The Total Environment* 786:147299. <https://doi.org/10.1016/j.scitotenv.2021.147299>.

⁵ Sandstrom, M., L. Nowell, B. Mahler, and P. van Metre. 2022. New-generation pesticides are prevalent in California’s Central Coast streams. *Science of the Total Environment* 806:150683. <https://pubmed.ncbi.nlm.nih.gov/34627915/>.

⁶ Scheper, T., E. Webb, D. Tillitt, and T. LaGrange. 2020. Neonicotinoid Insecticide Concentrations in Agricultural Wetlands and Associations with Aquatic Invertebrate Communities. *Agriculture, Ecosystems & Environment* 287:106678. <https://doi.org/10.1016/j.agee.2019.106678>.

⁷ Frame, S.T., K.A. Pearsons, K.R. Elkin, L.S. Saporito, H.E. Preisendanz, H.D. Karsten, and J.F. Tooker. 2021. Assessing surface and subsurface transport of neonicotinoid insecticides from no-till crop fields. *Journal of Environmental Quality* 50:476-484. <https://doi.org/10.1002/jeq2.20185>.

⁸ *Id.*

⁹ Hladik, M.L., D.W. Kolpin, and K.M. Kuvila. 2014. Widespread occurrence of neonicotinoid insecticides in streams in a high corn and soy producing region, USA. *Environmental Pollution* 193:189-196. <https://pubmed.ncbi.nlm.nih.gov/25042208/>.

regulatory framework for treated seed, it will be impossible for DPR to monitor and mitigate any negative impacts of treated seed.

IV. Conclusion

In sum, DPR must ensure that all pesticide-treated seeds meeting the definition of “pesticide” under state law are regulated as such. At a minimum, this includes all seeds treated with systemic pesticides. In doing so, DPR may choose to register the relevant treated seeds as it does for other pesticide products, or it may craft an alternative regulatory program. Either way, DPR must ensure that any regulatory action includes tracking of the use of pesticides on such seeds in the PUR system and ensures sufficient mitigation and regulatory controls to protect California’s environment and its people.

Respectfully,

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ATTACHMENT



September 23, 2020
Via Email and Certified U.S. Mail
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**Rulemaking Petition to Regulate Crop Seeds Treated with Neonicotinoids
and Other Systemic Insecticides**

Dear Director Dolcini:

On behalf of the Natural Resources Defense Council, Californians for Pesticide Reform, Center for Biological Diversity, Friends of the Earth, Pesticide Action Network North America, the Xerces Society for Invertebrate Conservation, and our groups' tens of thousands of California members, we write pursuant to California Government Code § 11340.6 to request that the California Department of Pesticide Regulation (DPR) initiate rulemaking and other appropriate actions to regulate the use of neonicotinoid ("neonic")-treated crop seeds, as well as crop seeds coated with other systemic insecticides.

The use of neonic-treated seeds may represent one of the largest insecticide uses in the state of California—one that poses risks of serious harm to the state's environment and people. A recent estimate finds that neonic-treated seeds may deliver up to 512,000 pounds of neonics annually across 4,000,000 California acres, a total larger than all of the other recorded neonic uses combined. Scientific research links neonic-treated seed use to extensive and persistent soil and water pollution, losses of bees, birds, fish, mammals and other wildlife, and human health risks posed by chronic exposure to neonic-contaminated food and water. In California, DPR testing has found that neonics frequently appear in state waters at levels indicating likely ecosystem-wide damage.

Under DPR's current policy, these pesticide applications go wholly untracked and unregulated. DPR regards neonic-treated seeds and those coated with other systemic insecticides as falling outside the definition of "pesticide" under the California Food and Agricultural Code (FAC)—effectively exempting them from the state's pesticide laws.

This de facto exemption is unlawful and contrary to the letter and spirit of the FAC. Accordingly, we petition DPR to: (1) rescind its current policy and regulate and track all seeds coated with systemic insecticides sold or used in California as "pesticides;" (2) designate all neonic-treated seeds as "restricted materials" under the FAC and its implementing regulations; and (3) support development and promotion of regenerative agricultural practices that eliminate or reduce

chemical inputs, such as pesticide-treated seeds. Please note that while the discussion in Sections II-IV focuses on the use of neonics and neonic-treated seeds, the legal arguments in this Petition, and the proposed regulation in Section V apply to any seeds coated with systemic insecticides.

The basis for this Petition and our proposal are detailed below.

I. Interests of Petitioners

The Natural Resources Defense Council (NRDC) is a national non-profit environmental organization with offices in San Francisco and Santa Monica and nearly 400,000 California members and online activists. Since 1970, NRDC has worked to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. In California, NRDC has worked for decades to protect the state’s people, water, and wildlife from the threats posed by toxic pesticides. NRDC’s pollinator initiative seeks to safeguard keystone pollinating species—such as California’s more than 1,500 native bee species—from recent dramatic population losses driven in large part by widespread neonic use.

Californians for Pesticide Reform (CPR) is a statewide coalition of roughly 200 organizations founded in 1996 to fundamentally shift the way pesticides are used in California. CPR has built a diverse, multi-interest coalition to challenge the powerful political and economic forces opposing change. CPR approaches the need to reduce pesticide use as a critical environmental health and environmental justice issue, and we prioritize building leadership in communities living on the front lines of pesticide exposure. Much of our work focuses on holding state and local decision makers accountable for protecting human health and the environment.

The Center for Biological Diversity (the “Center”) is a national, non-profit conservation organization with offices throughout the United States and Mexico that works to secure a future for all species, great and small, hovering on the brink of extinction through science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive. The Center has more than 1.7 million members and online activists that support the work to protect the vast diversity of wild animals and plants and the health and welfare of human beings, which is deeply linked to nature. The Center’s Pesticides Reduction Campaign aims to secure programmatic changes in the pesticide registration process and stop toxic pesticides from getting into fish and wildlife habitats.

Friends of the Earth (FoE) is a national nonprofit environmental organization that was founded in 1969. With offices in the District of Columbia and Berkeley, California, and nearly 178,000 members and more than 1.7 million activists nationwide, FoE defends the environment and champions a healthy and just world. FoE U.S. is part of Friends of the Earth International, a global network representing more than two million activists in seventy-four countries. FoE’s campaigns focus on promoting clean energy and solutions to climate change; protecting marine ecosystems and the people who live and work near them; and ensuring our food system is healthy, just, and sustainable. As part of this work, FoE is working to protect bees and other critical pollinators that are in decline globally because of the widespread use of pesticides, habitat loss, changing climate, and disease, via research, public education, grassroots campaigns, and policy advocacy.

Pesticide Action Network North America (PANNA) is one of five regional centers worldwide, linking local and international consumer, labor, health, environment and agriculture groups into an international citizens' action network. Together, we challenge the global proliferation of pesticides, defend basic rights to health and environmental quality, and work to ensure the transition to a just and viable food system. With a base in California, PANNA has worked for over 35 years with our 22,000 members to protect workers, children, and rural communities from health hazards associated with the indiscriminate and unnecessary use of hazardous pesticides. A key strategy of this work is to support the widespread implementation of agroecological practices, including ecological pest management, that dramatically reduce the need for synthetic pesticides.

The Xerces Society for Invertebrate Conservation (“Xerces”) is an international scientific nonprofit organization that seeks to prevent the extinction of threatened invertebrates and protect the crucial ecosystem services they provide. Xerces is headquartered in Portland, OR, with offices in multiple states, including one in Sacramento, CA. Xerces has 15,000 active donors, including approximately 2,000 donors in California. Native pollinators are essential to many food crops grown in California, as well as to the native plants of California’s varied ecosystems. A diversity of native pollinators is paramount to maintaining the state’s agricultural and natural heritage. Protection of native pollinators is critical to all Californians and to Xerces members and supporters.

II. Neonic-Treated Seeds and Their Use and Impacts in California

A. Neonicotinoids Generally

Neonicotinoids, commonly referred to as “neonics,” are neurotoxic insecticides that permanently bind to and overstimulate nicotinic receptors in insect nerve cells, leading to collapse of the central nervous system.¹ Neonics kill insects by design, but even small, sublethal neonic exposures can ultimately cause individual or colony death by weakening critical functions—such as an insect’s immune system, navigational ability, stamina, memory, and fertility.²

Neonics pose broad ecological concerns due to their profound invertebrate toxicity, systemic properties, and immense popularity. Neonics have made U.S. agriculture up to forty-eight times more harmful to insects since their introduction,³ where they are most commonly applied as coatings on crop seeds.⁴ These “seed treatments” are designed to be absorbed through the root system of the growing crop plant, making its tissues—leaves, roots, fruit, pollen, nectar, etc.—toxic to insects. For a typical seed treatment, only 2-5% of the neonic active ingredient enters the

¹ See, e.g., National Pesticide Information Center, *Imidacloprid: Technical Fact Sheet* (visited Sep. 15, 2020), <https://bit.ly/2lQqh8W>.

² See Lennard Pisa et al., *An Update of the Worldwide Integrated Assessment (WIA) on Systemic Insecticides. Part 2: Impacts on Organisms and Ecosystems*, *Envtl. Sci. Pollution Research Int'l* (Nov. 9, 2017), <https://bit.ly/2HqqHwB> [hereinafter “Worldwide Assessment Part 2”]; Daniel Kenna et al., *Pesticide Exposure Affects Flight Dynamics and Reduces Flight Endurance in Bumblebees*, *Ecology and Evolution* (Apr. 29, 2019), <https://bit.ly/2Y2VIQo>.

³ Michael DiBartolomeis et al., *An Assessment of Acute Insecticide Toxicity Loading (AITL) of Chemical Pesticides Used on Agricultural Land in the United States*, *PLoS One* (Aug. 6, 2019), <https://bit.ly/2Yr4Xc7> [hereinafter “DiBartolomeis 2019”].

⁴ Margaret R. Douglas & John F. Tooker, *Large-Scale Deployment of Seed Treatments Has Driven Rapid Increase in Use of Neonicotinoid Insecticides and Preemptive Pest Management in U.S. Field Crops*, *Environ. Sci. Technol.* (Mar. 20, 2015), <https://bit.ly/2VWiTqk> [hereinafter “Douglas & Tooker 2015”].

target plant.⁵ The remainder stays in the soil, where it can persist—often for years—migrating easily in rain and irrigation water to contaminate new soil, plants, and water supplies. Indeed, all of the neonic active ingredients commonly used as seed treatments appear on California’s “Groundwater Protection List” for pesticides designated as having the potential to pollute ground water. *See* 3 Cal. Code Regs. (C.C.R.) § 6800 (listing clothianidin, imidacloprid, and thiamethoxam). Given all of these properties and their status as the most widely used insecticides in the world,⁶ neonics now broadly contaminate soil, water, and plant life across large areas of the country.⁷

A large body of scientific research connects this vast environmental contamination to tangible ecological harm. While neonics are perhaps best known as a leading cause of massive losses of honey bees and other insect pollinators,⁸ neonic contamination has also been linked to the devastation of fish populations and aquatic ecosystems,⁹ declines in bird and butterfly populations,¹⁰ and birth defects in white-tailed deer.¹¹ As discussed below, widespread neonic exposure is also increasingly raising human health concerns. *See infra* Section II, C.

B. Neonic-Treated Seed Use in California

Less is known about the use of neonic-treated seeds in California than anywhere else in the country, but it may be larger in size than all other recorded neonic uses in the state combined. Until 2015, the U.S. Geological Survey (USGS) compiled national neonic use estimates that included the use of neonic-treated seeds.¹² For California, however, USGS incorporated data from the state’s Pesticide Use Reporting database (PUR) only. While the PUR is often heralded as the “gold standard” for pesticide tracking in the United States, PUR data has never included neonic-treated seed use because DPR policy does not legally recognize neonic-treated seeds as

⁵ *See, e.g.,* Adam Alford & Christian Krupke, *Translocation of the Neonicotinoid Seed Treatment Clothianidin in Maize*, PLoS ONE 12(3) (Mar. 10, 2017), <https://bit.ly/2xZiEgS> [hereinafter “Alford & Krupke 2017”] (finding uptake of neonic active ingredient from corn seed treatments was < 2%); Robin Sur & Andreas Stork, *Uptake, Translocation and Metabolism of Imidacloprid in Plants*, Bulletin of Insectology (2003), <https://bit.ly/3iNOTJt> (finding uptake of imidacloprid from cotton, eggplant, potato, and rice seed treatments was <5%).

⁶ *See* Douglas & Tooker 2015.

⁷ *See, e.g.,* Michelle Hladik and Dana Kolpin, *First National-Scale Reconnaissance of Neonicotinoid Insecticides in Streams Across the USA*, Environmental Chemistry (Aug. 18, 2015), <https://bit.ly/31Mse6o> [hereinafter “Hladik 2015”]; *cf.* Thomas Wood & Dave Goulson, *The Environmental Risks of Neonicotinoid Pesticides: A Review of the Evidence Post 2013*, *Environ. Sci. Pollution Research Int’l*, (Jun. 7, 2017), <https://bit.ly/2Hpn8T5> [hereinafter “Wood & Goulson 2017”].

⁸ *See* Chiara Giorio, *An Update of the Worldwide Integrated Assessment (WIA) on Systemic Insecticides. Part 1: New Molecules, Metabolism, Fate, and Transport*, *Environ. Sci. Pollution Research Int’l* (Jul. 15, 2017), <https://bit.ly/2qVqciQ>; *Worldwide Assessment Part 2*; Wood & Goulson 2017; Daniel Cressey, *Largest-ever Study of Controversial Pesticides Finds Harm to Bees*, *Nature* (Jun. 29, 2017), <https://go.nature.com/2sgJjDk>; B.A. Woodcock et al., *Country-Specific Effects of Neonicotinoid Pesticides on Honey Bees and Wild Bees*, *Science* (Jun. 30, 2017), <https://bit.ly/2IFOAG0> (“These field results confirm that neonicotinoids negatively affect pollinator health under realistic agricultural conditions.”).

⁹ *See* Masumi Yamamuro et al., *Neonicotinoids Disrupt Aquatic Food Webs and Decrease Fishery Yields*, *Science* (Nov. 1, 2019), <https://bit.ly/34rKCSCG>; Francisco Sanchez-Bayo, *Contamination of the Aquatic Environment with Neonicotinoids and Its Implication for Ecosystems*, *Frontiers in Environmental Science* (Nov. 2, 2016), <https://bit.ly/2LifRHF>.

¹⁰ *See* Caspar A. Hallmann et al., *Declines in Insectivorous Birds Are Associated with High Neonicotinoid Concentrations*, *Nature* (Jul. 17, 2014), <https://go.nature.com/2KvIwah> [hereinafter “Hallmann 2014”]; Matthew L. Forister et al., *Increasing Neonicotinoid Use and the Declining Butterfly Fauna of Lowland California*, *The Royal Society Publishing: Biology Letters* (Aug. 1, 2016), <https://bit.ly/2o5P6i0> [hereinafter “Forister 2016”].

¹¹ Elise Hughes Berheim et al., *Effects of Neonicotinoid Insecticides on Physiology and Reproductive Characteristics of Captive Female and Fawn White-tailed Deer*, *Sci Rep.* (Mar. 14, 2019), <https://go.nature.com/2QI19Zf> [hereinafter “Berheim 2019”].

¹² Pierre Mineau, *Neonicotinoids in California: Their Use and Threats to the State’s Aquatic Ecosystems and Pollinators, with a Focus on Neonic-Treated Seeds*, (Sep. 2020), <https://on.nrdc.org/3cl5nEK> [hereinafter “Mineau 2020”], attached as Attachment A to this Petition.

“pesticides,” *see infra* Section III, B. Accordingly, no publicly available official estimate of the actual pesticidal load to California’s environment from neonic-treated seeds has ever been performed.

Nonetheless, California agricultural data indicate that load may be substantial. Use of neonics on crop seeds is believed to be near ubiquitous in corn (which covers 460,000 acres in California) and cotton (258,000 acres), and widespread in wheat (420,000 acres).¹³ While less is known about neonic-treated seed use on other crops, trends appear to suggest ever-increasing use.¹⁴ Further, in California, the retirement of older pesticide chemistries may also induce a shift to greater use of neonic-treated seeds. A recent estimate by Mineau (2020) of California’s total potential use (i.e., if neonic-treated seeds were used on all crops where such seeds are available) finds that neonic-treated seeds may cover as many as 4,000,000 acres, depositing 512,000 pounds of neonic active ingredients annually—well more than the 474,000 pounds of neonics applied by all other means as reported in the PUR.¹⁵

C. *Neonic-Treated Seeds Threaten California’s Environment and People*

At minimum, the state’s neonic-treated seed use likely covers hundreds of thousands (if not millions) of acres, with tens (if not hundreds) of thousands of pounds of neonic active ingredient sown into California soil every year. A large and growing body of evidence shows that even a realistic low-end estimate would result in considerable ecological harm.

Research links neonic-treated seed use with extensive environmental contamination. Studies of neonic-treated corn, canola, and wheat have documented neonic residues in planted fields as well as in surrounding soils, surface waters, and plant life—including in the pollen and nectar of adjacent wildflowers.¹⁶ During planting, clouds of abraded “seed dust” drifting across farm fields can prove fatal to bees and other pollinators and beneficial insects.¹⁷ After planting, rain and irrigation water carry neonic-laden runoff water through ecosystems.¹⁸ Substantial amounts of contaminated runoff have been documented leaving farm fields several months after planting and

¹³ *See id.* at Appendix 4; U.S. Dep’t of Agriculture (USDA), *2019 State Agricultural Overview: California* (accessed Jul. 9, 2020), <https://bit.ly/2ZdE5v1>.

¹⁴ *See* Douglas & Tooker 2015; Mineau 2020 at 1, 4, Appendix 4.

¹⁵ Mineau 2020 at 15.

¹⁶ *See, e.g.,* Cristina Botías et al., *Contamination of Wild Plants Near Neonicotinoid Seed-Treated Crops, and Implications for Non-Target Insects*, *Science of the Total Environment* (Oct. 1, 2016), <https://bit.ly/2EdJG9i> (“Our results suggest that neonicotinoid seed-dressings lead to widespread contamination of the foliage of field margin plants”); Bonmatin et al., *Environmental Fate and Exposure; Neonicotinoids and Fipronil* (Aug. 7, 2014), <https://bit.ly/35iN3HX> [hereinafter “Bonmatin 2014”] (summarizing evidence of neonics’ long persistence in soils and describing multiple neonic exposure routes); Schaafsma et al., *Neonicotinoid Insecticide Residues in Surface Water and Soil Associated with Commercial Maize (Corn) Fields in Southwestern Ontario*, *PLoS One* (Feb. 24, 2015), <https://bit.ly/32wMJqt> [hereinafter “Schaafsma 2015”]; Main et al., *Widespread Use and Frequent Detection of Neonicotinoid Insecticides in Wetlands of Canada’s Prairie Pothole Region*, *PLoS One* (Mar. 26, 2014), <https://bit.ly/2CLoom3>.

¹⁷ Travis A. Grout et al., *Neonicotinoid Insecticides in New York State: Economic Benefits and Risk to Pollinators*, Cornell University 210-211 (Jun. 2020), <https://bit.ly/2Ei7Z9Y> [hereinafter “Grout 2020”] (discussing risks and harms to pollinators from neonic-treated seed dust).

¹⁸ *See, e.g.,* Jesse Radolinski et al., *Plants Mediate Precipitation-Driven Transport of a Neonicotinoid Pesticide*, *Chemosphere* (May 2019), <https://bit.ly/2OmbfT4> (documenting “that neonicotinoids can be transported from seed coatings both above and through the soil profile, which may enable migration into surrounding ecosystems.”); Sara A. Whiting & Michael Lydy, *A Site-Specific Ecological Risk Assessment for Corn-Associated Insecticides* (Dec. 30, 2014), <https://bit.ly/3e1Hw7i> [hereinafter “Whiting & Lydy 2014”].

traveling considerable distances into wetlands and other water supplies.¹⁹ Because neonics can persist in soil and plants for years, neonics often accumulate in areas of repeated use and leave long-lasting legacy contamination.²⁰ Indeed, in areas where neonic-treated seeds are the predominant neonic use, neonic pollution is often described as “ubiquitous”—with the chemicals appearing in fields with no history of neonic use as well as local water supplies.²¹

Neonics’ potent invertebrate toxicity translates this pervasive contamination into substantial harm. Neonic-treated seeds have driven the dramatic increase in neonic use generally in the last several decades,²² which has made U.S. agriculture up to forty-eight times more harmful to insect life.²³ This increase has been linked with declines in insect populations—including California pollinators²⁴—which ripple through ecosystems. For example, in the Netherlands, researchers linked declining populations of insect-eating birds to the introduction of extremely low neonic levels in water (only 20 parts per *trillion*).²⁵ In Japan, researchers likewise connected the sudden and dramatic collapse of a fishery to the decimation of aquatic invertebrate populations from the introduction of neonics in nearby agriculture.²⁶ And here in the United States, research now links increases in neonic use in the mid-2000s with significant declines in grassland and insect-eating birds.²⁷

Neonic-treated seeds can also harm wildlife directly. Several studies link neonic-treated seed use with harms to pollinator populations and pollinator health,²⁸ and a recent Cornell University

¹⁹ Whiting & Lydy 2014; Sara Whiting et al., *A Multi-Year Field Study to Evaluate the Environmental Fate and Agronomic Effects of Insecticide Mixtures*, *Science of the Total Environment* (Nov. 1, 2014), <https://bit.ly/2ZNXp2p>; Jesse Miles et al., *Effects of Clothianidin on Aquatic Communities: Evaluating the Impacts of Lethal and Sublethal Exposure to Neonicotinoids*, *PLoS One* (Mar. 23, 2017) <https://bit.ly/3jsaciH>, with 2018 correction Miles et al., *PLoS ONE*, <https://bit.ly/2ZOSVZb>.

²⁰ Bonmatin 2014 (“the half-lives of neonicotinoids in soils can exceed 1,000 days”); Main et al., *Reduced Species Richness of Native Bees in Field Margins Associated with Neonicotinoid Concentrations in Non-Target Soils*, *Agriculture, Ecosystems & Environment* (Jan. 1, 2020) (detecting neonics in soils adjacent to both fields with historic neonic use and those without historic neonic use; higher soil concentrations were correlated with lower native bee species richness), <http://bit.ly/2OhMB6W> [hereinafter “Main 2020”]; Arthur Schaafsma et al., *Neonicotinoid Insecticide Residues in Surface Water and Soil Associated with Commercial Maize (Corn) Fields in Southwestern Ontario*, *Plos ONE* (Feb. 24, 2015), <https://bit.ly/2PArexx> (measuring pre-plant neonic levels as high as 7.5 µg/L in ditches outside a seeded field and 16.5 µg/L in puddles outside Ontario corn fields, indicating contamination from the previous use of seed treatments in the preceding growing season).

²¹ Main 2020; Kathryn Klarich et al., *Occurrence of Neonicotinoid Insecticides in Finished Drinking Water and Fate During Drinking Water Treatment*, *Environmental Science and Technology Letters* (Apr. 2017), <https://bit.ly/2PMRunk>; Tamanna Sultana et al., *Neonicotinoid Pesticides in Drinking Water in Agricultural Regions in Southern Ontario, Canada*, *Chemosphere* (Jul. 2018), <http://bit.ly/2JZawXI>.

²² Douglas & Tooker 2015.

²³ See DiBartolomeis 2019; Margaret Douglas et al., *County-level Analysis Reveals a Rapidly Shifting Landscape of Insecticide Hazard to Honey Bees (*Apis Mellifera*) on US Farmland*, *Scientific Reports* (Jan. 21, 2020), <https://go.nature.com/2SKhjHP>.

²⁴ See Forister 2016.

²⁵ Hallmann 2014.

²⁶ Masumi Yamamuro et al., *Neonicotinoids Disrupt Aquatic Food Webs and Decrease Fishery Yields*, *Science* (Nov. 1, 2019), <https://bit.ly/34rKCSG>.

²⁷ Yijia Li et al., *Neonicotinoids and Decline in Bird Biodiversity in the United States*, *Nature Sustainability* (Aug. 10, 2020), <https://go.nature.com/2Yb6cub>.

²⁸ See, e.g., Main 2020; N. Tsvetkov et al., *Chronic Exposure to Neonicotinoids Reduces Honey Bee Health Near Corn Crops*, *Science* (Jun. 30, 2017), <https://bit.ly/3hx9EH0>; Ben Woodcock et al., *Impacts of Neonicotinoid Use on Long-Term Population Changes in Wild Bees in England*, *Nature Communications* (Aug. 16, 2016), <https://go.nature.com/3hxAFKj>; Maj Rundlöf, *Seed Coating with a Neonicotinoid Insecticide Negatively Affects Wild Bees*, *Nature* (Apr. 22, 2015), <https://go.nature.com/2CYNo9Q>.

review of roughly a hundred exposure studies finds neonic-treated field crop seeds pose “substantial” risks to bees.²⁹

The direct impacts reach beyond the insect world. In the planting of field crops, piles of neonic-treated seeds are left out in the open or the seeds are planted shallowly enough for birds to eat.³⁰ Eating just one such seed is enough to kill some songbirds.³¹ And at nonlethal doses, neonic-treated seed ingestion can damage birds’ immune and reproductive systems, cause rapid weight loss, and impair navigation and migration ability—all reducing the likelihood of their surviving and reproducing in the wild.³²

Neonic-treated seeds can also harm mammals—either through direct ingestion or contamination of food and water sources. For example, neonic exposures have been linked with birth defects in white-tailed deer—including decreased body and organ weight, decreased jawbone length, and higher death rates for fawns.³³

In California, neonic-treated seeds pose substantial risks to bees and other insect pollinators and are likely major contributors to neonic residues appearing in state waters at levels expected to cause ecosystem-wide damage.³⁴ In recent DPR testing, the neonic imidacloprid appeared in more than 90% of Southern and Central California agricultural surface water samples, with all detections exceeding U.S. Environmental Protection Agency’s (U.S. EPA) chronic “benchmark” for harm to aquatic ecosystems.³⁵ Other state and federal testing also reveal this benchmark commonly exceeded by ten-to-one-hundred fold.³⁶ For example, in tributaries to the Salinas River in Monterey County, every sample over an eight-year period contained imidacloprid ten-fold above this ecological damage threshold.³⁷

²⁹ Grout 2020 at 237-38.

³⁰ Charlotte Roy et al., *Neonicotinoids on the Landscape: Evaluating Avian Exposure to Treated Seeds in Agricultural Landscapes*, Minnesota Department of Natural Resources & Wildlife Restoration, <https://bit.ly/337ENZK> (documenting exposed neonic-treated seed in 25 percent of 48 fields sampled, and observing that ring-necked pheasants, Canada geese, American crows, various species of sparrows, and blackbirds, as well as white-tailed deer, rodents, rabbits, and raccoons eating the seeds).

³¹ Pierre Mineau & Cynthia Palmer, *The Impact of the Nation’s Most Widely Used Insecticides on Birds*, American Bird Conservancy, 3 (Mar. 2013), <https://bit.ly/1jmQ7u0>.

³² Ana Lopez-Antia et al., *Imidacloprid-Treated Seed Ingestion Has Lethal Effect on Adult Partridges and Reduces Both Breeding Investment and Offspring Immunity*, Environmental Research (Jan. 2015), <https://bit.ly/2kwUdWS>; Margaret L. Eng et al., *A Neonicotinoid Insecticide Reduces Fueling and Delays Migration in Songbirds*, Science (Sep. 2019), <https://bit.ly/2kGS1MA>; Margaret L. Eng et al., *Imidacloprid and Chlorpyrifos Insecticides Impair Migratory Ability in a Seed-Eating Songbird*, Scientific Reports (Nov. 2017), <https://go.nature.com/2QEWHA6>.

³³ E. H. Berheim et al., *Effects of Neonicotinoid Insecticides on Physiology and Reproductive Characteristics of Captive Female and Fawn White-Tailed Deer*, Scientific Reports (Mar. 14, 2019), <https://go.nature.com/2Q1I9Zf>. Surprisingly, in the study, deer in the control group—i.e., those purposely not exposed to neonics—still contained detectable levels of neonics in their organs, demonstrating the ubiquity of neonic contamination real world.

³⁴ Mineau 2020 at 1, 16-26.

³⁵ See Xin Deng, *Surface Water Monitoring for Pesticides in Agricultural Areas in the Central Coast and Southern California, 2018*, DPR (May 28, 2019), <https://bit.ly/2n8Epeg> (finding imidacloprid in 94% of all samples); Robert Budd, *Urban monitoring in Southern California watersheds FY 2017-2018*, DPR (Mar. 1, 2019), <https://bit.ly/2nY9TUq> (finding imidacloprid in 92% of all samples); U.S. EPA, *Aquatic Life Benchmarks and Ecological Risk Assessments for Registered Pesticides*; Pierre Mineau, *Impacts of Neonics in New York Water* (2019), <https://on.nrdc.org/2lXsOOO> (finding neonics, on the basis of similar water testing results, were likely causing “ecosystem-wide damage” in New York).

³⁶ Mineau 2020 at 1, 21.

³⁷ *Id.* at 1, 23-24.

Concerningly, existing water testing data provide only a partial picture of neonic contamination. In contrast to sampling for imidacloprid, DPR’s testing for other neonic chemicals has been fragmentary. Yet the limited data available for clothianidin and thiamethoxam—two neonic chemicals mainly used as seed treatments—suggest that these chemicals are “major contaminants of agricultural areas of California,” likely even in greater amounts than imidacloprid in many regions.³⁸

This contamination in California may also have repercussions for the health of Californians. Research now indicates that neonic exposures may lead to elevated risk of developmental or neurological damage—particularly in infants and young children—including potential thyroid disruption and malformations of the developing heart and brain.³⁹ These studies are particularly worrying given the pervasiveness of exposure—monitoring by the U.S. Centers for Disease Control and Prevention indicates that *roughly half* of the U.S. general population is exposed to neonics on a regular basis.⁴⁰ Contaminated food and water are likely the most common exposure sources. Where neonics contaminate drinking water sources, conventional chlorination treatment does not remove them without additional filtration.⁴¹ Fruits, vegetables, and processed foods—including baby food—frequently contain neonics too,⁴² which, because they permeate treated foods, cannot be washed off.

Without data on the scope of neonic-treated seed use in California, it is difficult to quantify their full impact on California’s environment and its people. However, given current neonic-treated seed use patterns and their persistence, mobility, known environmental harms, and potential human health risks, their full impact is likely large, damaging, and widespread.

D. Most Neonic-Treated Seeds Fail to Provide Monetary Benefits

The vast majority of efficacy research on neonic-treated seeds has focused on corn and soybean production, showing that neonics provide little to no monetary benefits to farmers.⁴³ For example, a recent Cornell University review of hundreds of side-by-side North American field trials found that neonic-treated seeds produced “substantial” risks to pollinators, but “no overall

³⁸ *Id.* at 25.

³⁹ Comment Submitted by Gary D. Hammer, President, Endocrine Society to EPA Regarding Its Proposed Interim Decisions for Several Neonicotinoid Pesticides (May 6, 2020), <https://bit.ly/3cM0CU7>; Andria Cimino et al., *Effects of Neonicotinoid Pesticide Exposure on Human Health: A Systematic Review*, *Envtl. Health Perspectives* (Feb. 1, 2017), <https://bit.ly/2NVA1LR> [hereinafter “Cimino 2017”].

⁴⁰ Maria Ospina et al., *Exposure to Neonicotinoid Insecticides in the U.S. General Population: Data from the 2015–2016 National Health and Nutrition Examination Survey*, *Environmental Research* (Sep. 2019), <https://bit.ly/2YKLjmX>; see also Go Ichikawa et al., *LC-ESI/MS/MS Analysis of Neonicotinoids in Urine of Very Low Birth Weight Infants at Birth*, *PLoS One* (Jul. 1, 2019), <https://bit.ly/2nF2Dni> (finding neonics in the urine of newborn babies, indicating that neonics pass from pregnant mother to developing fetus).

⁴¹ See Kathryn L. Klarich et al., *Occurrence of Neonicotinoid Insecticides in Finished Drinking Water and Fate During Drinking Water Treatment*, *Envtl. Sci. and Tech. Letters* (Apr. 2017), <https://bit.ly/2PMRunk>.

⁴² See, e.g., Olga Naidenko, *Neonic Pesticides: Banned in Europe, Common on U.S. Produce, Lethal to Bees*, *Env’tl Working Group* (Jul. 26, 2018), <https://bit.ly/2EejbSx>; Friends of the Earth, *Toxic Secret: Pesticides Uncovered in Store Brand Cereal, Beans, Produce*, <http://bit.ly/2IIIE26V> (visited Oct. 17, 2019).

⁴³ See, e.g., Spyridon Mourtzinis et al., *Neonicotinoid Seed Treatments of Soybean Provide Negligible Benefits to US Farmers*, *Sci. Reports* (Sep. 9, 2019), <https://go.nature.com/2p5leCP>; Christian Krupke et al., *Planting of Neonicotinoid-Treated Maize Poses Risks for Honey Bees and Other Non-Target Organisms Over a Wide Area Without Consistent Crop Yield Benefit*, *J. of Applied Ecol.* (May 22, 2017), <https://bit.ly/36aMZtD>; Alford & Krupke 2017.

net income benefit” compared to untreated seeds.⁴⁴ An extensive field study in Canada published just weeks later confirmed similar results.⁴⁵

Despite their questionable value, the use of neonic-treated seeds is often near total in conventional field crops like corn and cotton.⁴⁶ This apparent market failure is, in part, explained by increased consolidation of seed and pesticide producers. For corn, farmers shopping for popular corn seed product lines generally have no choice but to buy neonic-treated seeds.⁴⁷ Further, those providing agronomic advice on the wisdom of treated seed use increasingly have ties to seed and chemical manufacturers.⁴⁸

These same market pressures exist in California. And given research showing neonic-treated seeds’ limited efficacy outside of the first few weeks after planting,⁴⁹ there is a concern that increasing neonic-treated seed use in California merely adds to other existing pesticide uses.

E. DPR’s Limited Consideration of Neonic-Treated Seeds

In California, DPR has largely overlooked the likely impacts of neonic-treated seeds on the state’s environment. In July 2018, DPR released a determination of neonics’ risks to bees, finding neonic-treated seeds present “low risk to honey bee colonies” because little of their active ingredient ends up in the pollen and nectar of the target crop.⁵⁰ That conclusion, however, ignores the reality that the neonic active ingredients migrate *elsewhere* through the environment—including soil, water, and the pollen and nectar of adjacent wildflowers, which may contain higher neonic levels than those of the target crops.⁵¹ Several Petitioners identified these concerns in an October 17, 2019, letter to DPR.⁵² However, DPR’s draft proposal to

⁴⁴ Grout 2020 at 236.

⁴⁵ Jocelyn L. Smith et al., *Quantifying Early-Season Pest Injury and Yield Protection of Insecticide Seed Treatments in Corn and Soybean Production in Ontario, Canada*, *Journal of Economic Entomology* (Jul. 11, 2020), <https://bit.ly/31BoMMB>.

⁴⁶ Mineau 2020 at Appendix 4.

⁴⁷ See John F. Tooker, *Why It’s Time to Curb Widespread Use of Neonicotinoid Pesticides*, *The Ecologist* (Jun. 27, 2018), <https://bit.ly/30mQV9P>.

⁴⁸ Major seed and chemical producers like Monsanto (now owned by Bayer) and Pioneer (now owned by Corteva Agriscience, formerly a unit of DowDuPont) have sales representatives, advisers, and licensed seed dealers located across the country. See, e.g., Monsanto US Ag Products, “Rep & Dealer Locator,” <https://bit.ly/2k1BIPD> (accessed Aug. 9, 2020). Pioneer, “Find Your Local Pioneer Team,” <https://bit.ly/2m20A56> (accessed Aug. 9, 2020).

⁴⁹ See, e.g., Alford & Krupke 2017 (two-year study of neonic residues in corn planting with neonic-treated seed finding “clothianidin concentrations followed an exponential decay pattern with initially high values followed by a rapid decrease within the first ~20 days post planting”).

⁵⁰ DPR, *California Neonicotinoid Risk Determination*, 8 (Jul. 2018), <https://bit.ly/33HaU6d> [hereinafter “Risk Determination”].

⁵¹ Cristina Botías et al. *Neonicotinoid Residues in Wildflowers, a Potential Route of Chronic Exposure for Bees*, *Env. Sci. Technol.* (Oct. 6, 2015), <https://bit.ly/3mhwTYm>.

⁵² Letter from NRDC, Center for Biological Diversity, Xerces, and FoE to DPR entitled “Concerns Regarding Reevaluation of Neonicotinoid Insecticides and Anticipated Rulemaking,” (Oct. 17, 2019), attached as Attachment B to this Petition.

mitigate risks to bees from neonic use, released July 24, 2020, does not address the use of or even mention neonic-treated seeds.⁵³

III. Current Legal Status of Neonic-Treated Seeds

Pesticides in California are governed by both federal and state law. Under federal law, U.S. EPA considers neonic-seeds to be pesticides. U.S. EPA has promulgated an exemption that it currently applies to neonic-treated seeds (though Petitioners believe U.S. EPA is wrong to do so). Under California law, no such exemption exists. Nonetheless, DPR currently considers neonic-treated seeds to fall outside the scope of California’s pesticide laws.

A. U.S. EPA Considers Neonic-Treated Seeds to Be Pesticides, But Exempts Them from Regulation

Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, all pesticides sold or distributed in the United States must first be registered with the U.S. EPA. FIFRA defines “pesticide” broadly as including “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u).

U.S. EPA may exempt a pesticide from FIFRA’s requirements if it determines that regulation of the pesticide is unnecessary “to carry out [FIFRA’s] purposes,” such as the prevention of unreasonable environmental harm. 7 U.S.C. § 136w(b). Pursuant to this authority, U.S. EPA has issued regulations exempting certain pesticide-treated articles, provided they meet two criteria: (1) the pesticide used to treat the article is registered by U.S. EPA; and (2) the “sole purpose” of the treatment is to protect the article itself. *See* 40 C.F.R. § 152.25(a).⁵⁴

U.S. EPA applies this “treated article” exemption to neonic-treated seeds. In a 2003 “harmonization document” released in conjunction with Canada’s Pesticide Management Regulatory Agency, U.S. EPA explained that pesticide-treated crop seeds—which include those treated with neonics—constitute “pesticides” under FIFRA.⁵⁵ Nonetheless, U.S. EPA currently exempts these seeds as “treated articles,” based on the presumption that “the pesticidal protection imparted to the treated seed does not extend beyond the seed itself.”⁵⁶ Accordingly, U.S. EPA does not register or otherwise directly regulate pesticide-treated seeds.

U.S. EPA’s exemption for neonic-treated seeds has been controversial because their pesticidal effects target growing crop plants and the surrounding soil—not simply the seeds themselves—and bleed well beyond field boundaries. *See infra* Section IV, B. Regardless, U.S. EPA effectively reaffirmed this exemption in its recent proposed interim registration review decisions

⁵³ *See generally*, DPR, *Draft Text of Proposed Regulations to Mitigate Risks to Pollinators from Neonicotinoid Exposures*, <https://bit.ly/2EB1WQ8> [hereinafter “Draft Neonic Regulations”] (visited Aug. 26, 2020).

⁵⁴ EPA, *Applicability of the Treated Articles Exemption to Antimicrobial Pesticides*, 2 (Mar. 6, 2000) (emphasis added), <https://bit.ly/2LzsY7X>.

⁵⁵ EPA, *Harmonization of Regulation of Pesticide Seed Treatment in Canada and the United States*, § 2.1 (Apr. 11, 2003), <https://bit.ly/2Au0tGI>, [hereinafter “EPA Harmonization Document”] (“For the purposes of FIFRA, pesticide-treated seeds are considered to be pesticides themselves because they are a mixture of substances that are intended to prevent, destroy, repel or mitigate a pest.”).

⁵⁶ *Id.* at § 2.1. Petitioners disagree with U.S. EPA’s conclusion that this exemption applies.

for all neonic active ingredients by not proposing a registration requirement or any other direct regulation of neonic-treated seeds.⁵⁷

B. DPR Maintains That Neonic-Treated Seeds Fall Wholly Outside Its Authority

The California Food and Agriculture Code (FAC) grants DPR regulatory authority over the sale or use of pesticides in California. *See generally* FAC Divs. 6-7. The FAC definition of “pesticide” mirrors that of FIFRA. *Compare* FAC § 12753 (defining “pesticide” as “[a]ny substance, or mixture of substances which is intended to be used for . . . preventing, destroying, repelling, or mitigating any pest”) *with* 7 U.S.C. § 136(u) (defining “pesticide” as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest”). As the definitions are materially identical, the FAC definition of “pesticide” encompasses neonic-treated seeds, just as the federal definition does.

DPR, however, maintains an interpretation of “pesticide” that excludes certain pesticide-treated articles, effectively reading the federal treated article exemption into California’s statutory definition. DPR has never formally promulgated this interpretation, and has explicitly declined to promulgate a “treated article” exemption paralleling the federal exemption.⁵⁸ In support of its statutory interpretation, DPR has identified language contained in its 1999 initial statement of reasons (“1999 ISOR”) for the rulemaking package for 3 C.C.R. § 6147, which contains the list of pesticides exempted from FAC pesticide regulation.⁵⁹ In email correspondence with petitioner NRDC, DPR confirmed that its reasoning for reading the statute as exempting certain pesticide-treated articles also applies to pesticide-treated seeds (such as neonic-treated seeds), and that the 1999 ISOR is DPR’s only written policy regarding the legal status of such seeds under the FAC’s pesticide provisions.⁶⁰

The 1999 ISOR asserts that, in DPR’s view, items like “[pesticide-]treated paint or wood” and other items “to which pesticides may be applied or added to provide preservation,” such as “textiles, plastics, paper, adhesives, and coatings,” are not “intended to be used to control pests” and therefore fall outside the FAC’s definition of “pesticide.” 1999 ISOR at 3. The document provides an important caveat to this reading of the statute:

[I]f the manufacturer of an article to which a pesticide has been added makes implied or explicit claims that the treated article itself can be used to prevent, repel,

⁵⁷ All proposed interim registration review decisions are available at: EPA, *Proposed Interim Registration Review Decision for Neonicotinoids*, <https://bit.ly/361DMp3> (visited May 15, 2020). In them, EPA identifies risks of concern for use of neonic-treated seeds, but is unable to provide effective mitigation because it preserves the treated article exemption. For example, EPA identifies risks regarding the way neonic-treated seed is commonly planted and disposed of. Yet, because it exercises no direct regulatory control over treated seed use, it provides no enforceable restrictions, opting instead for advisory seed bag labeling likely to be ignored by farmers. *See* Lucas Rhoads & Daniel Raichel, *Comments on the Proposed Interim Registration Review Decisions for the Neonicotinoid Insecticide Class*, NRDC, 30-34 (May 4, 2020), <https://on.nrdc.org/2TyHdyD>.

⁵⁸ DPR, *Regarding the Exemption from California’s Regulatory Requirements, Pesticides that Are Exempt from Federal Requirements Pursuant to FIFRA Section 25(b)(2), Initial Statement of Reasons and Public Report*, 3 (1999), attached as Attachment C to this Petition.

⁵⁹ Correspondence between Daniel Rubin, Chief Counsel, DPR, and Daniel Raichel, Staff Attorney, Natural Resources Defense Council between Mar. 16, 2020, and Mar. 30, 2020, attached as Attachment D to this Petition [hereinafter “DPR/NRDC 2020 Email Correspondence”]. The accompanying electronic attachment referenced in the email chain is the 1999 ISOR, provided here as Attachment C.

⁶⁰ *Id.*

or destroy pests, then the treated article is considered to be a “pesticide” and must be registered with DPR.

Id. The 1999 ISOR contains no explicit reference to pesticide-treated seeds or any other agricultural product. Further, no mention of pesticide-treated seeds or “treated articles” appears in the FAC or DPR’s implementing regulations. *See generally* 3 C.C.R. § 6147. Nonetheless, DPR’s lack of regulation of pesticide-treated seeds and DPR’s correspondence on the topic confirm that DPR maintains a policy of excluding pesticide-treated seeds from the statutory definition of “pesticide.”

C. *DPR’s Treatment of Pesticide-Treated Seeds Creates a Significant Gap in Its Regulation of Pesticides*

Neonics are one of the most popular pesticide classes in the world,⁶¹ and neonic-treated seeds may be the dominant use of neonics in California, as they are elsewhere in the United States. *See supra*, Section II, B. Accordingly, the practical effect of DPR’s policy regarding neonic-treated seeds is to excuse what may be one of the single largest pesticide uses in the state from all forms of tracking or regulation.

Neonics are not alone as seed treatments—fungicides, nematicides, other insecticides, and herbicides all also commonly appear as crop seed coatings, and often on the same seeds.⁶² As these treatments grow in popularity, DPR policy prevents the agency from addressing, or even understanding, their use and environmental impacts, both now and in the future. Indeed, under the agency’s current policy, DPR would be powerless to prevent any pesticide—no matter how dangerous—from being planted into California soil, provided it comes in on a seed treated in a different state.⁶³

DPR appears to believe that the FAC compels this result. However, as discussed below, DPR’s policy regarding neonic-treated seed finds no support in statute, contradicts DPR’s own reasoning in the 1999 ISOR, and is antithetical to DPR’s broad authority and duty to protect Californians and their environment from harmful pesticide use.

IV. **DPR Must Regulate Neonic-Treated Seeds as Pesticides**

The FAC requires that DPR regulate all pesticides sold and used in California, unless explicitly exempted by DPR regulation. Neonic-treated seeds fit squarely within the definition of “pesticide” under California law, and none of the limited exemptions from regulation apply.

⁶¹ Chris Bass et al., *The Global Status of Insect Resistance to Neonicotinoid Insecticides*, *Pesticide Biochemistry and Physiology* (Jun. 2015), <https://bit.ly/3gMxNcj> (combined, neonics had “a market share of more than 25% of total global insecticide sales” in 2014).

⁶² *See, e.g.*, Syngenta Crop Protection, Inc., Brochure for Cruiser Maxx Cereals Seed Treatments (2008), <https://www.syngenta-us.com/prodrender/imagehandler.ashx?ImID=29885B07-9834-4FE3-89A7-09DD98A0FCEE&fTy=0&et=8> (“By combining Cruiser insecticide with two fungicides in one convenient formulation, growers can protect against pest without mixing several products together.”).

⁶³ The University of California State Integrated Pest Management Program (UC IPM) recognizes this loophole and provides advice on how to exploit it. UC IPM, *How to Manage Pests: UC Pest Management Guidelines – Cucurbits* (visited Sep. 22, 2020), <https://bit.ly/3mLanHp> (“Farmore F1400 [a thiamethoxam seed treatment] is not labeled for use in California, but seed treated in and obtained from another state can be legally used in California even for a chemical not registered on cucurbits in California. Contact your retail seed dealer for information and availability.”).

DPR must therefore subject these seeds to the same registration and safety requirements as any other pesticide and ensure that their use does not create hazards to public health or the environment.

A. *DPR's Authority and Duty to Regulate Pesticide Use*

The FAC charges DPR with controlling the registration, sale, and use of pesticides in California in order “[t]o provide for [their] proper, safe, and efficient use” and “[t]o protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides.” FAC § 11501. It is unlawful to manufacture, sell, possess, or use any pesticide that has not first been registered with DPR. FAC §§ 12811, 12991-95. Further, as the state agency responsible for registration, DPR must ensure that registered pesticides are used in a manner that protects public health and the environment and that unregistered pesticide use does not occur. *See, e.g.*, FAC §§ 11501, 12995.

DPR may excuse a pesticide from the requirements of California’s pesticide laws only “by regulation,” only if the pesticide is exempt under FIFRA, and only after DPR: (1) “individually evaluates” the pesticide and concurs with U.S. EPA’s exemption decision; and (2) excludes from the exempting regulation any requirements necessary to protect the public health or the environment. FAC § 12803. Even afterwards, DPR retains the authority to regulate the exempted pesticide whether it is registered or not. *Id.*

Additionally, DPR must regulate and control the use of agricultural chemicals that create hazards to domestic animals (including honeybees), the environment, or farmworker and public health as “restricted materials.” FAC §§ 14001, 14004.5. DPR must likewise regulate or prohibit the use of any “environmentally harmful materials,” and in doing so “shall take whatever steps [DPR] deems necessary to protect the environment.” *Id.* § 14102. Further, DPR must “endeavor to eliminate from use in the state any pesticide that endangers the agricultural or nonagricultural environment, is not beneficial for the purposes for which it is sold, or is misrepresented.” FAC § 12824. Finally, with respect to neonic pesticides in particular, DPR must “adopt any control measures necessary to protect pollinator health.” FAC § 12838.

B. *Neonic-Treated Seeds Are Pesticides Under California Law*

Neonic-treated seeds constitute “pesticides” as defined by the FAC. Under FIFRA’s materially identical definition of “pesticide,” *compare* FAC § 12753(b), *with* 7 U.S.C. § 136(u), the U.S. EPA has concluded that “pesticide-treated seeds are considered to be pesticides themselves because they are a mixture of substances that are intended to prevent, destroy, repel or mitigate a pest.”⁶⁴ This analysis applies with full force to the FAC definition.

The FAC requires the registration of mixtures of neonics with otherwise non-pesticidal goods. *See* FAC §§ 12753(b) (defining pesticide as including any “mixture of substances which is intended . . . for preventing, destroying, repelling, or mitigating any pest”); 12993 (prohibiting manufacture, delivery, or sale of any “mixture of substances that is represented to be a

⁶⁴ EPA Harmonization Document at § 2.1.

pesticide”); 12995 (prohibiting use or possession of unregistered pesticides). DPR recognizes this through its registration of pesticide-impregnated products, including neonic-impregnated fertilizers.⁶⁵ Neonic-treated seeds fall into this category—whether the neonic active ingredient is applied to a seed or to another agricultural commodity, the pesticidal purpose is the same. The resulting mixture is, and must be regulated as, a “pesticide.”

DPR’s current policy and practice excludes neonic-treated seeds from FAC regulation as “treated articles” under the theory that such seeds are treated solely for the protection of the seeds themselves and “not intended to be used to control pests.” *See* 1999 ISOR.⁶⁶ This theory is false. DPR policy requires that exempt treated articles must be treated “solely to protect the article/substance itself” and not intended or advertised for a broader pesticidal purpose.⁶⁷ However, neonic coatings added to seeds are designed to be systemically absorbed into the later-emerging seedlings and crop plants to repel or kill pest insects. In other words, neonic-treated seeds are the intended vehicles for delivering pesticidal impacts extending beyond the seeds themselves. Further, they are advertised for this purpose.

For example, promotional materials for Gaucho® 600 Flowable—a neonic seed treatment product—state that it “provides unmatched protection against the worst insects, acting both on contact to protect the roots and systemically to protect the plant.”⁶⁸ This is the same manner the neonic active ingredient would be intended to work were it applied as a soil application from a DPR-registered product.⁶⁹ Similarly, Syngenta’s brochure for its neonic-containing Cruiser® line of neonic seed treatment products states that those products provide “convenient, seed-delivered protection” against pest insects, indicating the seeds are devices for delivering an intended pesticidal effect.⁷⁰ When seeds are coated in these pesticides, the resulting mixture is a pesticide intended to kill insects throughout the early life of the plant.

These advertisements illustrate that the fundamental nature of pesticide-treated seeds is vastly different than the examples of “treated articles” discussed in the 1999 ISOR—such as treated paint, wood, textiles, plastics, paper, adhesives, and coatings. Unlike a fencepost or a doormat, seeds are living items that grow into something else—specifically, agricultural plants that are

⁶⁵ *Id.*; *see also, e.g.*, DPR, Product Information Report for Signature Brand Fertilizer with 0.2% Merit (Reg. no. 432- 1349-AA- 34704), available at <https://bit.ly/2ZPCjow>.

⁶⁶ DPR/NRDC 2020 Email Correspondence.

⁶⁷ DPR, Letter to Pesticide Product Registrants and Stakeholders Regarding Registration Requirements for Products Made from Pesticide Impregnated Materials and Bearing Pesticide Claims, CA Notice California Notice 2015-13 (Dec. 10, 2015), <https://bit.ly/3f1xpFc> [hereinafter “DPR Impregnated Materials Guidance”] (emphasis in original); *see* 1999 ISOR at 3.

⁶⁸ Bayer Crop Science, *Gaucho 600 Seed Treatment*, (visited Jun. 3, 2020), <https://bit.ly/307hAbV> [hereinafter “Gaucho 600 Seed Treatment Website”].

⁶⁹ *See, e.g.*, Syngenta United States, *Platinum Insecticide*, (visited August 12, 2020), <https://bit.ly/2XYILVU> (“With a wide variety of soil application methods, Platinum® insecticide offers residual control of sucking and chewing insects in vegetables, potatoes and fruit. Its highly systemic activity results in rapid root uptake and long residual control.”); DPR, Product Information Report for Platinum Insecticide, (visited Aug. 12, 2020), <https://bit.ly/30RrEGk> (stating that registration is active and identifying sole active ingredient is the neonic thiamethoxam).

⁷⁰ Syngenta, *Cereals Seed Treatment Portfolio Brochure*, 7 (2012), available at <https://bit.ly/3mxHIFO>, [hereinafter “Syngenta Cruiser Brochure 2012”]. *See also* BASF United States, *Poncho® 600 Seed Treatment* (visited Sep. 15, 2020), <https://bit.ly/3c24Mrg> (“Poncho® 600 seed treatment provides broad-spectrum efficacy against a range of soil and plant pests”); BASF, *Poncho® Votivo®* (visited Sep. 16, 2020), <https://bit.ly/3hv7sPu> (stating the product “contains a systemic agent that is absorbed by roots immediately, so pests do not get the opportunity to strike”); Winfield United, Sale Sheet for Resonate® 480 ST (2017), <https://bit.ly/32yzEMY> (“The active ingredient imidacloprid gives long-lasting protection during critical early-season crop development”).

commonly targets of registered pesticide use. And while the purpose of treated paint or wood may be “to paint buildings or build a deck,” 1999 ISOR at 3, a key purpose of a neonic-treated seed is to deliver a pesticidal impact.⁷¹ Indeed, the 1999 ISOR and other DPR policy and guidance provide that pesticide-treated products advertised for their ability to prevent, repel, or destroy pests are “pesticides” and “must be registered with DPR.” 1999 ISOR at 3.⁷² Neonic-treated seeds are extensively promoted in this fashion—with treatment products and seeds often marketed and sold together as a single seed-and-pesticide package, advertising the seed as the intended delivery vehicle for the desired pesticidal impact.⁷³ Accordingly, neonic-treated seeds constitute “pesticides” under the FAC and must be duly registered.

Importantly, unlike treated fenceposts or doormats, neonic-treated seeds may constitute one of the largest insecticide uses in the state of California—with substantial and far reaching impacts for the state’s soil, water, and wildlife. *See supra* Section II, C. As a wealth of scientific research now demonstrates, neonic-treated seeds create pesticide residues that persist for years in the environment, travel well beyond farm field boundaries, and devastate bird, pollinator, and aquatic animal populations. *Id.* While the amount of neonic-treated seeds used in California is likely massive, the exact number is unknown because seeds remain wholly untracked and unregulated by DPR. *See supra* Section III, B. For DPR to continue to maintain this policy—that a pesticidal product, advertised for its pesticidal effect, and frequently used in California with widespread pesticidal impacts, is yet somehow beyond its regulatory authority over “pesticides”—is untenable. DPR must acknowledge that neonic-treated seeds are pesticides under California law.

C. California Law Requires that DPR Regulate Neonic-Treated Seeds

Because neonic-treated seeds constitute pesticides under California law, DPR must register and regulate them as it does other pesticides. The FAC provides that DPR may only exempt pesticides from state regulation in California by agency rule after careful, individualized consideration. However, DPR has never promulgated such a rule or engaged in any such consideration of whether to exempt neonic-treated seeds. Neonic-treated seeds are therefore not exempt and must be regulated as pesticides. In addition, the FAC requires DPR to regulate neonic-treated seeds to protect Californians and the state’s environment, including bees and other pollinators, from their known harms and hazards.

⁷¹ *See supra*, n. 70,

⁷² *See generally* DPR Impregnated Materials Guidance.

⁷³ *See, e.g.*, Syngenta Cruiser Brochure 2012 at 7; Gaucho 600 Seed Treatment Website (advertising imidacloprid seed treatment is “[c]onvenient; applied to the seed by your seed supplier”); Bayer, *Seminis: Neonics Vegetable Seed Treatment Information* (visited Sep. 16, 2020), <https://bit.ly/3hIwaw0> (stating under header “Can I Purchase Neonic-Treated Vegetable Seed?” that “[o]ur neonics are sold as part of our FarMore® FI400 and FarMore® FI500 offerings and include Cruiser® 5FS and Cruiser®70WS.”). Ads are similar for non-neonic systemic insecticide products. For example, Corteva Agriscience’s advertisement for the chlorantraniliprole-based insecticide Lumivia® states that the product provides “effective protection against damage from insects that feed on corn seedlings during vulnerable early season development,” and that farmers should “[a]sk your corn seed provider for added protection from Lumivia® insecticide seed treatment.” Corteva Agriscience, *Lumivia® Insecticide Seed Treatment*, <https://bit.ly/33wAkly>.

i. Neonic-Treated Seeds Are Pesticides that DPR Has Not and Cannot Exempt from Regulation

The FAC allows DPR to exempt pesticides from state regulation only under certain specified circumstances. *See* FAC § 12803. Prior to 1998, the FAC provided DPR with no authority to exempt pesticides from state regulatory requirements, including pesticides exempted from FIFRA regulation by U.S. EPA. 1999 ISOR at 2. That year, the Legislature amended the FAC to allow DPR to exempt FIFRA-exempt pesticides, but only by regulation after careful review and consideration. *See id.*; FAC § 12803. Specifically, to do so, DPR must first: (1) individually evaluate the pesticide and concur with the decision of U.S. EPA; and (2) exclude from the exempting regulation any requirements necessary to protect the public health or the environment. *Id.*

Neonic-treated seeds are FIFRA-exempt pesticides, *see supra* Section III, A, but DPR has not exempted them from state regulation in accordance with the FAC. Pesticides that DPR has formally exempted from regulation are listed in 3 C.C.R. § 6147. The list includes several classes of pesticide products and individual pesticide chemicals, but none of these classes encompasses pesticide-coated seeds or neonics. *See generally* 3 C.C.R. § 6147. As DPR has confirmed, the 1999 ISOR is the agency’s only written opinion relevant to the legal status of pesticide-treated seeds.⁷⁴ However, the document was never promulgated as a regulation and contains no mention or other evidence of individualized consideration of pesticide-treated seeds. *See generally* 1999 ISOR.

Accordingly, at the most basic level, because FAC § 12803 provides the only circumstances under which pesticides may be exempted from FAC regulation, and neonic-treated seeds have not been so exempted, they must be subject to DPR registration and regulation. Further, the environmentally harmful nature of neonic-treated seeds, and the letter and spirit of the FAC, prevent DPR from adopting a broad regulatory exemption for neonic-treated seeds in the future.

The FAC demands that DPR perform its own analysis of any FIFRA exemption—requiring independent evaluation of U.S. EPA’s factual findings, as well as whether those facts support similar exemption under the FAC’s more stringent environmentally protective standards. *See* FAC § 12803(b) (mandating that DPR maintain any “specific requirements . . . necessary to protect the public health or the environment” for FAC-exempt pesticides, even where it concurs with a U.S. EPA exemption decision); *see id.* §§ 14001, 14004.5 (governing designation of restricted materials), 14102 (governing regulation of environmentally harmful materials). DPR’s current policy, which has the effect of passively endorsing U.S. EPA’s treated article exemption for neonic-treated seeds, constitutes an unlawful and uncritical adoption of U.S. EPA’s questionable factual record and an abdication of DPR’s duty to ensure pesticide use in California does not cause substantial environmental harm. Because neonic-treated seeds do cause that harm, *see supra* Section II, C, they do not qualify for exemption under California law, and DPR must regulate their use.

⁷⁴ DPR/NRDC 2020 Email Correspondence.

ii. DPR Has Additional Duties to Control Neonic-Treated Seeds Due to Their Environmentally Harmful Effects

The FAC seeks to “protect the environment from environmentally harmful pesticides.” FAC § 11501(b). To that end, it obligates DPR to act to prohibit or control the use of pesticides that pose substantial hazards to the natural world, particularly where those pesticides are of little or no utility to users. Because neonic-treated seeds pose these hazards in California, DPR must regulate their use.

In addition to the other regulatory requirements, DPR must control environmentally injurious pesticides as “restricted materials.” *See* FAC §§ 14001-14015. These pesticides may only be applied pursuant to a time-limited, DPR-issued permit governing the time, place, and manner of application in order to avoid environmental harm. *See* FAC §§ 14006.5, 14007; 3 C.C.R. § 6432. DPR must designate as a restricted material any pesticide that poses a hazard: (1) “to domestic animals, including honeybees;” (2) “to the environment from drift onto streams, lakes, and wildlife sanctuaries;” or (3) “related to persistent residues in the soil resulting ultimately in contamination of . . . waterways, estuaries or lakes, with consequent damage to fish, wild birds, and other wildlife.” FAC §§ 14001, 14004.5 (c)-(e), 14005.

The use of neonic-treated seeds produces these hazards—including harms to honey bees from abraded seed dust drift and otherwise, persistent residues in soil which run off to contaminate California water, and the decimation of invertebrate populations, whose losses ripple through ecosystems. *See supra* Section II, C; FAC § 14004.5 (c)-(e). While DPR has found that neonic-treated seeds pose “low risk to honey bee colonies,”⁷⁵ the conclusion relies on U.S. EPA assessments that systematically underestimate and ignore the substantial risks that neonic-treated seeds pose to bees, including direct harms from dust drift.⁷⁶

Neonic-treated seeds also pose other environmental dangers that meet the criteria for restricted material listing—particularly those related to water contamination and wildlife impacts. *See* 14004.5 (d), (e). Due to their exceptional potential to contaminate water, all neonic active ingredients commonly used as seed treatments appear on the state’s Groundwater Protection List, as well as in an overwhelming proportion of state surface water sampling. *See* 3 C.C.R. § 6800; *supra* Section II, C. Further, DPR is aware that much of this contamination may be linked with neonic-treated seed use. In 2017 comments on U.S. EPA’s aquatic risk assessment of the neonic imidacloprid, DPR highlighted research “linking seed treatments and [neonic] pesticide detections in surface water.”⁷⁷ Subsequent research has confirmed this link—resulting both from drift of neonic seed dust and neonics’ persistence and mobility in soils—as well as the considerable damage to fish, wild birds, and other wildlife caused by the resulting neonic water

⁷⁵ Risk Determination at 8, 21.

⁷⁶ Mineau 2020 at 1-2, 26-38.

⁷⁷ DPR, Comments Regarding U.S. Environmental Protection Agency Preliminary Aquatic Ecological Risk Assessment to Support the Registration Review of Imidacloprid (Jul. 5, 2017), <https://bit.ly/3042tzT> (citing Michelle Hladik et al, *Widespread Occurrence of Neonicotinoid Insecticides in Streams in a High Corn and Soybean Producing Region, USA*, Environmental Pollution (Jun. 27, 2014), <https://bit.ly/2CIND98>).

pollution. *See supra* Section II, C. In California, neonics appear in water at levels expected to cause ecosystem-wide damage.⁷⁸

As DPR must control the use of pesticides that meet any one criterion qualifying them as restricted materials, *see* FAC §§ (requiring to DPR “control and otherwise regulate the use of restricted materials” meeting criteria identified in Section 14004.5); 14004.5 (requiring creation of “a list of restricted materials based upon . . . *any* of the following criteria” (emphasis added)), and neonic-treated seeds meet several of these criteria, DPR must control the use of neonic-treated seeds.

The FAC further provides that DPR “shall prohibit or regulate the use of environmentally harmful materials,” and, in doing so, “take whatever steps [it] deems necessary to protect the environment.” FAC § 14102. As discussed, impacts from the use of neonic-treated seeds run the gamut of environmental injury—from extensive soil and water contamination to wildlife population losses to potential human health harm—and therefore easily meet this standard. *See supra* Section II, C. At minimum, DPR must regulate and track their use through registration in a manner that protects the environment. It must also identify and prohibit uses of neonic-treated seeds where environmental harm cannot be controlled through registration.

Relatedly, under the FAC, DPR “shall endeavor to eliminate from use in the state any pesticide that endangers the agricultural or nonagricultural environment, is not beneficial for the purposes for which it is sold, or is misrepresented.” FAC § 12824. Neonic-treated seeds meet these criteria. The unregulated use of neonic-treated seeds threatens California’s natural and agricultural environment, including through their adverse impacts the managed and wild bees crucial to the production of numerous state crops. *See supra* Section II, C. A wealth of recent scientific evidence also shows that—at least with respect to field crops like corn—neonic-treated seeds provide little to no benefit for farmers. *See supra* Section II, D. Lastly, to the extent that manufacturers of neonic-treated seeds advertise and sell those seeds in California for pesticidal purposes, but fail to register them as pesticides, those products are misrepresented because the advertising implies they are approved for pesticidal use in California. Accordingly, DPR must endeavor to eliminate environmentally threatening uses of neonic-treated seeds, particularly those whose harms clearly outweigh any purported benefits.

iii. The FAC Requires that DPR Regulate Neonic-Treated Seeds to Protect Pollinator Health

Finally, DPR must rescind its policy and regulate neonic-treated seeds in order to meet the FAC’s requirement that it “adopt any control measures necessary to protect pollinator health.” FAC § 12838. Independent scientific literature links neonic use with pollinator population losses and other harms to pollinator health and shows that neonic-treated field crop seeds pose substantial risks to bees, both in magnitude and frequency. *See supra* Section II, C. DPR’s recent neonic reevaluation, however, wholly excludes any formal determination of risk from neonic-treated seeds,⁷⁹ and DPR’s recent draft regulatory proposal to mitigate neonic risks to pollinators

⁷⁸ Mineau 2020 at 1, 16-26.

⁷⁹ Risk Determination at 21 (“Risk determinations were only conducted for foliar and soil applications.”).

contains no mitigation for or mention of neonic-treated seeds.⁸⁰ As any successful effort to adopt control measures needed to protect pollinator health will necessarily include those addressing the use of neonic-treated seeds, DPR must regulate the use of neonic-treated seeds to satisfy its statutory obligations to safeguard pollinators.

D. *DPR's Nonregulation of Neonic-Treated Seeds Is Unlawful*

DPR's policy that neonic-treated seeds fall outside the FAC's definition of "pesticide" and its decision to effectively and categorically exempt those seeds from regulation violate the California Administrative Procedure Act (APA) and the FAC. DPR has enacted a regulation exempting neonic-treated seeds from regulation under the FAC without going through the public notice-and-comment procedure that the APA requires. *See* Cal. Gov. Code §§ 11340.5(a), 11343(a), 11346-48. Moreover, DPR's policy is unlawful because it conflicts with the plain text of the FAC. Contrary to DPR's position, the definition of "pesticide" unambiguously covers neonic-treated seeds. *See supra* Section IV, B; FAC § 12753(b). Even if the statute were ambiguous, DPR's policy would still be unreasonable and unlawful, particularly given DPR's longstanding legal interpretation that any article advertised for its pesticidal effect "is considered to be a 'pesticide' and must be registered." 1999 ISOR at 3. Because DPR's current policy regarding neonic-treated seeds was enacted in violation of the APA and FAC, DPR lacks authority to maintain the policy and must rescind it.

V. **Proposed Regulation**

While the use of neonic-treated seeds poses clear and potentially broad-ranging hazards to California's environment, little is known about their actual use patterns in the state. Because both caution and better information must inform DPR's regulatory approach to neonic-treated seeds, we petition DPR to take the following regulatory actions:

- **Registration of All Systemic-Insecticide-Treated Seeds** – DPR must register and track all seeds treated with neonics or other systemic insecticides, denying registration for particular treated seed products or treated seed uses where warranted under the FAC. Because U.S. EPA does not regulate pesticide-treated seeds, DPR should determine the appropriate unit of sale requiring registration (e.g., the seed bag) and should—pursuant to its policy on pesticide impregnated materials—require separate registrations for any materials "containing different pesticide active ingredients [or] different percentages of active ingredients."⁸¹ Further, as with all pesticide registrations, DPR must impose any restrictions necessary to protect public health and California's environment, including prohibitions on particular treated seed products or uses for which environmental contamination cannot be controlled or for which benefits are marginal or outweighed by their harmful effects. Importantly, DPR must ensure tracking of the time, place, and amount of systemic-insecticide-treated seed use through the PUR system.

Because DPR's current policy is unlawful under the California APA, DPR must

⁸⁰ *See generally* Draft Neonic Regulations.

⁸¹ DPR Impregnated Materials Guidance at 2.

discontinue the policy and begin regulating treated seeds as pesticides immediately. It does not need to engage in a formal rulemaking prior to doing so.

- **Listing of Neonic-Treated Seeds as Restricted Materials** – DPR must add all neonic-treated seed products to the state “restricted materials” list, making them subject to all the relevant permitting requirements. As discussed, neonic-treated seeds meet the standard for restricted material listing under California law, obligating DPR to control their use. Restricted materials permitting requirements will provide DPR with needed flexibility over the time, place, and manner of the use of neonic-treated seeds, allowing the agency to maintain adequate control as it receives information as to the actual scale and magnitude of their impacts. DPR should also list seeds treated with other systemic insecticides as restricted materials where they meet the standard for listing under the FAC.
- **Promotion of Non-Chemical Pest Control Alternatives** – DPR should support research into regenerative agricultural practices that eliminate or reduce chemical inputs—such as cultivation practices, beneficial insects, rotation, and cover crops. DPR should also provide outreach and assistance to farmers and agricultural producers to implement these practices and alternatives where possible. We believe this work can complement existing work and programs—such as that of DPR and the Alternatives to Chlorpyrifos Work Group to identify alternatives to the organophosphate pesticide chlorpyrifos as well as DPR’s alliance grant program.

As noted, this regulatory proposal applies not only to the regulation of neonic-treated seeds, but to all seeds treated with systemic insecticides, whose fundamental nature raises the same legal and environmental concerns.

VI. Conclusion

For the foregoing reasons, DPR must end its unlawful policy regarding seeds treated with neonics and other systemic insecticides. We petition the agency to rescind this policy and adopt the regulatory proposal in Section V. In accordance with Cal. Gov. Code § 11340.7(a), we look forward to the agency’s response within 30 days.

Thank you for your time and attention to this Petition. If you have any questions, please do not hesitate to contact us.

Respectfully,



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ATTACHMENT A

Neonicotinoids in California

Their Use and Threats to the State's Aquatic Ecosystems and Pollinators, with a Focus on Neonic-Treated Seeds

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EXECUTIVE SUMMARY

Neonicotinoid insecticides (neonics) are the most widely used insecticides in the United States—and the largest proportion of that use comes from neonic-coated crop seeds. The U.S. Environmental Protection Agency (USEPA) and the California Department of Pesticide Regulation (CaDPR) do not regulate treated seeds as “pesticides,” allowing them to escape scrutiny and tracking requirements applicable to other pesticide uses. Increasingly, farmers, and even agronomists, are unaware of the extent to which seed treatment insecticides are being used. The lack of accurate information limits the ability to assess neonic-treated seeds’ full impacts on agricultural production and economics, pest resistance issues, and the environment.

This report explores the use and impacts of neonics in California with a focus on the possible consequences of ignoring seed treatment applications, particularly with regards to impacts on aquatic life and pollinators. The report finds that neonic-treated seeds have the potential to be the single largest use of neonics in California, making them, therefore, also one of the largest insecticide uses. It also finds that the possible detrimental impacts of neonic-treated seeds on California’s aquatic ecosystems and pollinators are wholly uncharacterized and greatly under-appreciated.

Neonic-treated seed use is not tracked in California’s Pesticide Use Reporting database (PUR). As a result, neonic-treated seed use has never been estimated in California as opposed to all other states where the data was tracked by the U.S. Geological Survey until the agency discontinued tracking seed treatments in 2014. Accordingly, to examine the possible impact of neonic-treated seeds on California’s environment—both now and in the future—this report estimates the total potential use of neonics on crop seeds in the State based on 2016-2017 crop data. In California, exact use patterns are uncertain, but national trends suggest use of neonic-treated seeds is widespread in field crops (such as corn, cotton, and wheat), and likely on the rise in others. The report concludes that:

- If seed treatments were fully used on crops where they are allowed, the amount of neonics applied as seed treatments would equal 512,000 pounds annually. This total exceeds the 410,000 pounds of neonics that are applied by other means and reported through the PUR.
- This potential use of neonic-treated seeds would cover roughly 76% of the total cropland area in California, approximately 4 million acres.

This potential neonic-treated seed use has implications for water quality and ecosystem health. In its modeling approach, USEPA greatly underestimates aquatic contamination from neonic-treated seeds; ample independent field evidence already shows that use of neonic-treated seeds results in neonic levels in water sufficient to cause injury to aquatic habitats. If the use of neonic-treated seeds in California were even a fraction of the total potential use estimated in this report, contamination of and harm to aquatic habitats would be expected.

Regardless of the source, neonics frequently appear in California water at levels where we would expect to see damaging ecosystem-wide impacts. These impacts include widespread losses of aquatic insects and crustacea accompanied by knock-on effects on consumer species such as fish, amphibians, birds, and some mammals such as bats. At agricultural sites monitored by CaDPR, concentrations of the neonic imidacloprid, where detected, always exceeded the USEPA concentration benchmark where ecological damage is expected. At many sites, the benchmark was exceeded by 10X or even 100X. At sites described in this report—for example, tributaries to the Salinas River in Monterey County—every single sample taken over an 8-year period detected imidacloprid 10X above the USEPA ecological damage threshold. This data alone indicate a very high probability that neonics are causing ecosystem-wide damage.

Clothianidin and thiamethoxam are neonic active ingredients commonly used as seed treatments, and water sampling for these chemicals in California has not been adequate. CaDPR does not include these chemicals within a comprehensive agricultural sampling program or track seed treatment products more generally, creating a serious data gap that deprives scientists and policy makers of key information about the likely significant and damaging impacts of neonic-treated seed use. Indeed, even despite minimal sampling, evidence suggests that clothianidin and thiamethoxam residues are likely higher than imidacloprid residues at many agricultural sites. Given that most aquatic systems within agricultural regions will be exposed to the three nitoguanidine products in combination, the combined concentrations of all neonic active ingredients must be considered in assessing injury to the aquatic environment.

USEPA and CaDPR fail to properly characterize the risk of neonic seed treatments to bees, especially wild bees. In particular, the final USEPA (2020) and CaDPR (2018) pollinator risk assessments: (1) underestimate risks to wild bee species and other pollinators by relying on honey bee colony health and survival as a proxy for pollinator health generally; (2) underestimate

nectar and pollen contamination levels following the use of neonic-treated seeds by assuming that the majority of crop species will have residue values at the low end of the measured spectrum; (3) ignore risks of dust from neonic-treated seeds at planting, despite ample evidence that this route of exposure is highly relevant; (4) ignore exposures of bees and other pollinators to neonic-contaminated water—including guttation fluid and puddles in or near fields sown with neonic-treated seeds—despite existing field estimates that show that these routes of exposure can completely dwarf the routes that have been formally assessed; (5) ignore risks from neonic uses on crops deemed unattractive to honey bees, despite evidence that neonic residues migrate into adjoining areas, including wildflowers bordering neonic-seeded fields that can contain neonic levels exceeding those in the field proper; (6) exclude available peer-reviewed literature in favor of industry studies; and (7) ignore the growing amount of field data which now links the use of neonic-treated seeds to pollinator failure on a landscape scale. The USEPA and CaDPR therefore fail to account for the likely considerable and damaging effect that neonic-treated seeds are having on California’s pollinator populations.

All of these impacts on aquatic systems and pollinators have to be weighed against what appear to be questionable benefits of many seed treatment products to California agriculture.

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1. INTRODUCTION

There has been a large increase, over the last few decades, in the use of insecticidal seed treatments. This has happened in parallel with the introduction of neonicotinoid insecticides or “neonics,” which have marked systemic activity. The U.S. Environmental Protection Agency (USEPA), California Department of Pesticide Registration (CaDPR), and other regulatory bodies such as the Canadian Pest Management Regulatory Agency (PMRA) do not directly regulate pesticide-treated seeds under their respective laws. This regulatory loophole or grey area has been of increasing concern to several researchers (Douglas et al. 2015, Hitaj et al. 2020), has already been the subject of articles in popular media (e.g., Allington 2020), and has resulted in a formal citizen’s petition from a coalition of farmers, beekeepers, and not-for-profit organizations to USEPA in 2017 (Jenkins 2017). Yet despite their dominance of insecticide markets, neonic seed treatments are, for the most part, untracked. Agronomists are generally unaware to what extent insecticide seed treatments are being used in the crops they work on, and even farmers themselves are often in the dark.

The main objective of this report is to consider the use of neonics, especially the three main nitroguanidine active ingredients: clothianidin, imidacloprid, and thiamethoxam, which represent the bulk of seed treatment uses. For at least two of these active ingredients (clothianidin and thiamethoxam), seed treatment use is the principal way in which they are released into the environment—at least nationally.

Because of its robust pesticide evaluation and registration system as well as arguably the best pesticide tracking system in the world (NRC 2015), the State of California occupies an enviable position in the realm of pesticide regulation and data collection. Yet, it appears that, even in their case, seed treatments are a major blind spot, as the state does not register or track the use of pesticide treated seeds.

Given California’s diverse and rich agriculture and its relatively robust data on pesticide use and impacts, the state provides a good test case for understanding how widely neonic seed treatments may be used and what the impact of those treatments and other neonic uses have on water quality and natural systems, with a particular focus on pollinating insects. Accordingly, this report proposes to: (1) construct a snapshot of California agriculture to estimate the amount of total neonic seed treatments could represent (Section 2); (2) review what is known about the current degree of neonic surface water contamination (Section 3) and; (3) review the possible consequences of these undocumented sources of neonics to pollinator species (Section 4).

2. WHAT IS THE POTENTIAL TOTAL NITROGUANIDINE NEONIC USE IN CALIFORNIA, AND WHAT PROPORTION COMES FROM SEED TREATMENTS?

2.1. The role of neonic-treated seeds in agriculture

The use of insecticidal seed treatments has dramatically increased in the last few decades, in parallel with the introduction of neonicotinoid insecticides (Hitaj et al. 2020). Neonics, especially those in the nitroguanidine group (including imidacloprid, clothianidin, and thiamethoxam),¹ are highly water soluble, systemic, persistent, and broadly toxic to a wide range of terrestrial and aquatic invertebrates. It has been estimated that, by 2008, neonics already constituted 80% of the insecticide seed treatment market (Jeschke et al. 2011), which itself accounts for an increasing proportion of all insecticides used in agriculture. Therefore, nationally at least, a large proportion of current insecticide use is in the form of neonic seed treatments.

As state governments increasingly restrict or prohibit the remaining uses of organophosphorus insecticides (e.g., chlorpyrifos), the use of insecticidal seed treatments is likely to increase further. This shift has been criticized as pesticide seed treatments are, by design, prophylactic—meaning that treatments on an unknown portion of seeds serve no purpose whatsoever. Indeed, research indicates that the benefits of treatment for some crops are slim to non-existent in many cases (MacFadyen et al. 2014, Budge et al. 2015, Douglas and Tooker 2015, 2016, Douglas et al. 2015, Krupke et al. 2017, Alford and Krupke 2017, Hokkanen et al. 2017, Labrie et al. 2020), or can easily be replaced by existing cultural or other methods (Veres et al. 2020). Agronomists and agricultural researchers increasingly recommend against the prophylactic use of the insecticides, especially in major field crops, but the practice persists, in part because pesticide manufacturers also control the seed market.

Despite their dominance of insecticide markets, neonic seed treatments are, for the most part, untracked and ignored.² Through 2014, the private polling company Kynetek was the only entity collecting information on seed treatment use in the United States. The company, however, stopped in 2015, in part because of the increasing difficulty of collecting the information (Hitaj et al. 2020). In particular, consolidation of the seed and pesticide manufacturers has led to the bundling of pesticides with seed stock, so that growers are increasingly unaware that they are using a neonic on their field (and therefore unable to accurately answer a survey) (Hitaj et al. 2020). Since 2015, the U.S. Department of Agriculture (USDA) has attempted to fill the information gap through their annual ARMS survey (Agricultural Resource Management Survey), but the effort has been fraught with methodological problems and the survey has been steadily losing effectiveness (Hitaj et al. 2020). Further, USEPA and state regulatory bodies exempt treated seeds from regulation as “pesticides” and do not require the collection of use data. Accordingly, the agencies responsible for the regulation of neonics—the most popular insecticides in the U.S.—fundamentally lack data regarding their primary use (USEPA 2020a, b). As we move further away in time from the last 2014 Kynetek survey, our understanding of the actual neonic use on crop seeds—and, thereby, actual insecticide use in agriculture more generally—becomes less and less clear.

The U.S. Geological Survey (USGS), through the National Water-Quality Assessment’s (NAWQA) “Pesticide National Synthesis Project,” purchases annual pesticide use surveys from the Kynetec company and makes a summarized version available to the public. These summaries show a sharp drop in estimated neonic use from 2014 (the last year Kynetec included seed treatments in its surveys) to 2015. This drop has been used to infer what proportion of total neonic use was the result of seed treatment use. In previous reports (Mineau 2019a, b), it was estimated that seed treatment use accounted for 58% of imidacloprid, 75% of thiamethoxam, and 92% of clothianidin nationwide. Hitaj et al. (2020) also proposed this one-time method to estimate seed treatment uses.

However, it is now apparent that these estimates are underestimates because pre-2015 USGS data for California—an important contributor to U.S. national agricultural production—did not include seed treatment uses. California is the only state where USGS used a source other than commercial polling—specifically, the CaDPR’s Pesticide Use Reporting (PUR) database, which does not track pesticide seed treatment use.

California is unique among U.S. states, indeed worldwide, in that it requires pesticide users (aside from consumers) to log any pesticide application in the PUR system—providing area treated, crop, product, and location. This has typically led

1 Dinotefuran is also a nitroguanidine neonic but is not registered for seed treatment use.

2 Although seed treatment products (i.e., the products used to treat the seeds) must still undergo registration.

agronomists and other researchers to believe that that PUR data provides a “good handle” on pesticide use in the state. The PUR data have been key to investigating relationships between various pesticides and health outcomes (NRC 2015). However, since the PUR does not track seed treatment use, this confidence might be misplaced.

California has a complex and diverse agricultural environment with a large number of possible uses for seed treatments. One objective of this report is to assess how much the absence of seed treatment uses from the PUR system might underestimate the use of neonic insecticides—in particular, imidacloprid, clothianidin, and thiamethoxam.³ Given the link between neonics—and seed treatment products specifically—to honey bee and other pollinator losses, as well as the increasing reports of broad aquatic contamination from neonic-treated seed use, the question of how much these treated seeds are being used is an important one. As pointed out by Hitaj et al. (2020), the lack of accurate information on pesticide use limits our ability to answer questions regarding agricultural production and economics, pest resistance issues, and the full nature of neonics’ environmental risks and harms.

2.2. Comparing the total potential neonic-treated seed use to PUR estimates of tracked neonic uses

In this section, I estimate the potential amount of nitroguanidine neonics that could be used in California if crops for which neonic seed treatments were permitted made full use of those treated seeds. Full deployment of seed treatments where allowed may seem like an extreme case at first blush, but for some major field crops, neonic seed treatment use has become near total, while others trend in that direction. Over the last decade, there has been an exponential increase in the use of neonics in seed treatments, and the list of crops for which neonic seed treatment products are not registered has greatly diminished. Estimates of the extent of seed treatment use, when available, is therefore likely to be rapidly outdated. The extent to which seed treatment use is covered in the agricultural online press (personal observation) suggests that—despite the agronomic concerns surrounding prophylactic insecticide use and numerous studies showing neonic-treated field crop seeds fail to produce monetary benefits for farmers—they are being aggressively marketed, especially as older pesticide chemistries are being retired (Figure 1).

Figure 1. Excerpt from “The Guide to Seed Treatment Stewardship,” an industry bulletin endorsed by the National Corn Growers Association, Crop Life America, the American Soybean Association, American Seed Trade Association, National Cotton Council of America, Agricultural Retailers Association, and National Association of Wheat Growers.

What are the benefits of neonicotinoid seed treatments?

Neonicotinoids are highly valued by growers who use them in integrated pest management (IPM) programs. They provide a unique mode of action, necessary to manage pests resistant to other insecticides. Neonicotinoids selectively control insect pests, while ensuring beneficial insects remain available to keep other potential insect pests in check.

A comprehensive economic analysis of more than 1,500 field studies conducted over 20 years by AgInforomatics finds neonicotinoid insecticides provided average yield increases ranging from 3.6 percent to 71.3 percent in eight major crops across North America. This research found the average yield benefit of using neonicotinoids far exceeds the cost of treatment and delivers a substantial economic return on investment to the farmer.

³ Another neonicotinoid chemical, acetamiprid, has a few seed treatment registrations also—primarily canola and mustard. Acetamiprid’s market share is unknown at this point, but considered to be small (USEPA 2020k).

2.2.1. Calculating the total potential neonic-treated seed use in California

2.2.1.1. Step 1: Building a snapshot of California agriculture

The first step in approximating the total possible annual neonic-treated seed use in California is to estimate the total planted acreage in California where neonic-treated seed could be used in a given year. To create this “snapshot” of California agriculture, the year 2016 was chosen as the model year, as, when this project started, it was the most recent year for which almost all county reports from the various agriculture commissioners were available, and for which USGS⁴ had completed its analysis of neonic applications through the PUR system.

Crop information was downloaded from all county reports for the year 2016. The procedures and assumptions made in order to standardize the data are detailed in Appendix 1.

In many counties, data for various vegetable crops were combined for the purpose of reporting harvested acreages. For many crops, we therefore turned to the 2017 USDA agricultural census, which provided county-specific acreages for many of the main vegetable crops. Our final “snapshot” therefore combined the 2016 and 2017 data.

USDA also developed field crop estimates for 2016. Because field crops (sometimes major ones) were frequently combined in the various state reports, USDA totals were useful to disaggregate the different field crop types. However, USDA data also combine counties and even agricultural districts together, preventing a clear geographical separation of the data. We therefore used a combination of state statistics and USDA estimates to arrive at totals for as many counties and individual field crops as possible. California totals from the various USDA-reported estimates were then used to compute the geographically undefined part of the field crop. These “residuals” are given in Table 1.

For some field crops, county accounting appears to be reasonable; not so for barley and oats where a large residual exists. In those cases, acreages were not available from county reports, usually because they were combined with other field crops. Those residual acreages were included in our estimates of potential seed treatment use but not assigned to any county or agricultural region.

All of the compiled acreages and USDA data refer to harvested acreages. For the purpose of calculating possible seed treatment use, seeded acreages are more relevant than harvested acreages. Where crop failure occurs or where the crop is used as a cover crop (e.g., oats), the planted area can greatly exceed the harvested area. Therefore, USDA field crop totals for California were used also to work out a ratio of seeded to harvested crops (Table 2). For all crops other than those listed in the table, it was assumed that the planted acreage was equal to the harvested acreage. This will underestimate plantings and, therefore, seed treatment use to some extent.

Table 1. Comparison of USDA-reported acreages for 2016 to the summed total acreages reported in 2016 county agricultural reports for several surveyed field crops.

Commodity	Residual acreage not included in county totals (acres)	Proportion this represents of the total acreage for that crop harvested in California
Barley	24,544	40.9%
Cotton	7,817	3.6%
Corn, grain	1,348	1.3%
Oats	6,563	59.7%
Rice	1,725	0.3%
Sunflower	2,404	5.2%

4 Data obtained from: <https://water.usgs.gov/nawqa/pnsp/usage/maps/>.

Table 2. Ratio of planted to harvested 2016 crop acres for California.^a

Crop	Area planted (acres)	Area harvested (acres)	Correction factor	Year	Release date of data
Barley	85,000	60,000	1.417	2016	Mar-18
Cotton	218,000	216,000	1.009	2016	May-18
Dry beans	50,000	49,000	1.020	2016	Apr-18
Corn, total	420,000	415,000	1.012	2016	Feb-18
Oats	110,000	11,000	10.000	2016	Mar-18
Rice	541,000	536,000	1.009	2016	Mar-18
Sunflower	46,600	46,000	1.013	2016	Feb-18
Wheat, total	480,000	217,000	2.212	2016	Mar-18
Safflower	62,000	61,500	1.008	2016	Feb-19
Sugar beet	25,300	25,200	1.004	2016	Feb-19
Potato	39,400	38,300	1.029	2016	Feb-19
Sweet potato	20,000	20,000	1.000	2016	Feb-19

a Data obtained from: https://www.nass.usda.gov/Statistics_by_State/California/Publications/County_Estimates/index.php; https://www.nass.usda.gov/Publications/Todays_Reports/reports/cropan19.pdf.

Crop statistics could not be found for a number of crops for which neonic seed treatments are registered for use in California (CaDPR 2018). This is in large part because county statistics amalgamated several crops when reporting acreages. These include: amaranth, arrowroot and leren, arugula, borage, buckwheat, canola and rapeseed, cardoon, cassava, crambe, endive, edible flowers (e.g., chrysanthemum), fennel, flax, ginger, ginseng, kohlrabi, lupins, pearl and proso millet, all mustards, purslane, sorrel, soybean, peanuts, teosinte, and turmeric. This will result in an underestimate of potential seed treatment uses.

2.2.1.2. Step 2: Obtaining label rates for registered seed treatments

The second step in approximating neonic-treated seed use is estimating what amount of neonic coating could appear on a given treated crop seed. To achieve this, all registered seed treatment labels were examined, and, for each registered crop, maximum rates of application were retained. It is standard practice in regulatory assessments to assume maximum labeled rates (e.g., CaDPR 2018).⁵

Depending on seed type and product, label rates vary a great deal as to how application rates are expressed—e.g., ounce of product per 100 lbs of seed or per a certain number of seeds (typically 80,000, or 100,000) or amount of active ingredient (usually in milligrams) per individual seed. For our purposes, all rates were converted to either pounds (lbs) of active ingredient (a.i.)/100 lbs of seed or milligrams (mg) of a.i./seed. Given known seed weights and a given seeding density, the amounts of a.i. applied per acre can then be calculated for any situation. To arrive at a rate in lbs a.i./100 lbs for liquid formulations, the specific gravity (in lbs a.i./gal) and the application rates were retained and used as shown in Equation 1.

Equation 1

$$\text{lbs a.i./100 lbs seed} = (\text{lbs a.i./gal}) / (128 \text{ fl oz/gal}) * (\text{fl oz/100 lbs seed})$$

⁵ The vast majority of seed treatment products registered by USEPA contain only one neonic active ingredient. A few registered products, however, contain more than one neonic—e.g., Sepresto 75 WS (EPA reg. no. 264-1081). For the purpose of rate calculations in this report, the most dominant neonic active ingredient on label was chosen.

For solid formulations, the percent proportion of active ingredient and rate in ounces were used as shown in Equation 2.

Equation 2

$$\text{lbs a.i./100 lbs seed} = (\% \text{ a.i.}) * (\text{oz}/100 \text{ lbs seed})$$

To arrive at an application rate (in mg) per seed, calculations were performed as per Equation 3.

Equation 3

$$\text{mg a.i./seed} = (\text{fl oz per specified number of seeds}) / (\text{specified number of seeds}) * (\text{lbs a.i./gal}) / (128 \text{ fl oz/gal}) * (453592 \text{ mg/lb})$$

Excluding any label with a prohibition of planting the treated seed in California, we documented 106 different extant EPA labels for seed treatments in various crops—1 acetamiprid label, 12 clothianidin labels, 57 imidacloprid labels and 36 thiamethoxam labels. We also referred to CaDPR (2018), which carried out a similar analysis of California seed treatment uses.

Maximum labeled application rates are provided in Table 3, expressed either as lbs a.i./100 lbs seed or mg a.i./seed for reasons detailed above. Although there tends to be a convergence of labels towards a given rate, it can sometime vary two-or-three-fold, presumably in response to different pests for which the product is registered. Higher rates are usually labeled, for “extended protection” or some such term. It is widely believed that application rates have increased over time (e.g., Douglas and Tooker 2015) and, therefore, the higher registered rate is likely often the most popular. This is also borne out by the fact that the higher rates tend to appear more often on labels.

Crop or crop group	Clothianidin		Imidacloprid		Thiamethoxam	
	lbs a.i./100 lbs seed	mg/seed	lbs a.i./100 lbs seed	mg/seed	lbs a.i./100 lbs seed	mg/seed
alfalfa						0.001
amaranth		0.050				1.20
arrowroot	0.010					
artichoke	0.010					
Asian vegetables	0.010		0.125		0.050	1.20
barley	0.070		0.094		0.052	
bean	0.010	0.750	0.125		0.050	
borage			1.00		0.040	
broccoli	0.070	2.12				0.100
Brussel sprout						0.100
buckwheat	0.070					
cabbage		2.12	1.00			0.100
canola	0.406		1.00		0.404	
cardoon						1.20
carrot	0.010	0.120				0.050
cassava	0.010					
celery						1.20
chard						1.20

Table 3. Maximum application rates applied to seed and allowed in California.

Crop or crop group	Clothianidin		Imidacloprid		Thiamethoxam	
	lbs a.i./ 100 lbs seed	mg/seed	lbs a.i./ 100 lbs seed	mg/seed	lbs a.i./ 100 lbs seed	mg/seed
chicory		0.050				1.20
corn	0.070	1.25	0.528	1.34	0.220	1.25
cotton		0.424	0.502			0.375
crambe					0.400	
cucumber						0.750
endive		0.050				1.20
edible flowers	0.010	0.050				1.20
fennel						1.20
flax			1.00		0.400	
ginger	0.010					
greens	0.406	0.050	1.00			1.20
herbs		0.050				1.20
kale						0.100
kohlrabi						0.100
leek		0.360				
lettuce		1.42				1.20
lentil			0.125		0.050	
lupin	0.010		0.125		0.050	
melon						0.750
millet	0.070		0.250			
mustard			1.00		0.400	
oats	0.070		0.094		0.051	
onion		0.320				0.200
peanuts			0.062		0.045	0.300
peas			0.125		0.050	
potato	0.0125		0.0125		0.006	
rhubarb						1.20
rice					0.141	
rye	0.070		0.094		0.051	
safflower			1.00	0.500	0.400	
sorghum	0.200		0.250		0.199	0.093
sorrel		0.050				1.20
soybean	0.050	0.130	0.125		0.075	0.151

Crop or crop group	Clothianidin		Imidacloprid		Thiamethoxam	
	lbs a.i./ 100 lbs seed	mg/seed	lbs a.i./ 100 lbs seed	mg/seed	lbs a.i./ 100 lbs seed	mg/seed
spinach		0.150	0.199			1.20
squash						0.750
sugar beet		0.720		0.893		
sunflower			1.00	0.500		0.25
sweet corn		0.500	0.250			1.25
sweet potato	0.0100					
taro	0.0100					
turmeric	0.0100					
wheat	0.070		0.094		0.052	

2.2.1.3. Step 3: Calculating allowable application rates per planted acre

From the approximate neonic treatment rate per seed (Table 3), we can calculate the neonic application rate per acre of seeded crop by looking at planting densities in use in California. These were obtained from a USEPA compilation (USEPA 2010). California estimates were used where given in the compilation—otherwise, states in the Pacific Northwest were used as much as possible. While seed treatment product labels sometimes carry an equivalent application rate per acre, we believe that rates calculated here are more realistic. Given that an increasing proportion of growers do not actually know whether or not their seeds were treated with neonics (Hitaj et al. 2020), it stands to reason that actual application rates per acre are driven by the planting density, as chosen by the grower based on prevailing agronomics and their experience with the crop—rather than seed treatment product labels.

In order to work out planting densities, the following measurements are needed: either the finished number of seeds to the acre (when available); or a combination of the pounds of seed to the acre and a measure of seed weight—usually expressed as the number of seeds per pound. Selected high and low estimates for seed weight and planting density compiled by USEPA (2010) are reproduced in Table 4. They reflect different varieties of different crops.

Crop or crop group	Seeds per acre (low)	Seeds per acre (high)	Lbs seed per acre (low)	Lbs seed per acre (high)	Seeds per lb (low)	Seeds per lb (high)
alfalfa	2,985,000	3,405,000	15.00	15.00	199,000	227,000
artichokes	2,722	2,722			3,400	3,400
Asian vegetables	142,362	142,362	0.44	0.44	325,400	325,400
asparagus	29,040	104,544	8.00	10.00		
barley	282,000	420,000	30.00	98.00	9,400	14,000
beans, dry	69,696	104,544	38.42	130.68	800	1,814
beans, fresh	139,392	418,176	58.08	435.60	960	2,400

Table 4. Seed weight and planting density extracted from USEPA (2010).^a

Crop or crop group	Seeds per acre (low)	Seeds per acre (high)	Lbs seed per acre (low)	Lbs seed per acre (high)	Seeds per lb (low)	Seeds per lb (high)
beets	52,272	2,090,880	2.17	86.63	24,136	24,136
broccoli	62,726	69,696	0.42	0.87	80,000	150,000
Brussels sprouts	20,908	27,878	0.11	0.44	64,000	192,000
cabbage	22,402	26,136	0.14	0.58	45,000	165,000
carrots	900,000	1,300,000	2.25	7.43	175,000	400,000
cauliflower	17,424	23,232	0.12	0.29	80,000	150,000
celery	34,848	69,696	0.03	0.07	1,000,000	1,152,000
cereal, mixed	1,300,000	1,500,000	60.00	156.00	8,000	18,000
chard	13,068	17,424				
chicory	29,040	52,272	0.08	0.14	377,320	377,320
cilantro	313,632	896,091				
corn, grain	26,400	40,250	13.20	29.57	1,361	2,000
corn, silage	26,400	40,250	13.20	29.57	1,361	2,000
cotton	30,000	85,000		18.89	4,500	
cucumbers	7,260	21,780	0.40	1.82	12,000	18,144
daikon	63,360	95,040				
eggplant	6,534	14,520				
escarole & endive	29,040	41,818				
garlic	156,816	241,255				
ginger root						
ginseng			90.00	100.00		
greens					167,000	144,000
hay, alfalfa	2,985,000	3,405,000	15.00		199,000	227,000
hay, cereal	780,000	1,088,640	60.00	90.00	13,000	18,144
herbs	435,600	726,000	1.47	4.84	150,000	296,500
horseradish						
kale	21,780	576,000	0.15	5.76	100,000	144,000
leek	43,560	87,120				
lettuce	157,000	157,000	0.31	0.39	400,000	500,000
melons	29,040	34,848	1.40	2.18	16,000	20,800
mint	34,848	78,408				
oats	780,000	1,088,640	60.00	90.00	13,000	18,144
okra	17,424	40,209				

Table 4. Seed weight and planting density extracted from USEPA (2010). ^a						
Crop or crop group	Seeds per acre (low)	Seeds per acre (high)	Lbs seed per acre (low)	Lbs seed per acre (high)	Seeds per lb (low)	Seeds per lb (high)
onions	522,720	784,080	4.02	7.84	100,000	130,000
parsley	435,600	726,000	1.47	4.84	150,000	296,500
peas	196,020	522,720	39.20	163.35	3,200	5,000
peppers	10,890	26,136	0.15	0.52	50,000	72,000
potatoes	10,500	23,100	2,100.00	2,700.00	5	11
pumpkins	871	7,260	0.14	4.54	1,600	6,400
radishes	1,045,440	1,045,440	20.91	32.67	32,000	50,000
rhubarb	3,630	7,260				
rice	1,742,400	2,439,360	77.00	118.00	15,600	28,100
rye	1,080,000	1,080,000	60.00	90.00	18,000	
safflower	408,240	408,240	30.00	35.00	13,608	
sorghum	45,000	100,000	0.66	9.09	11,000	68,040
spinach	360,000	408,240	9.00	25.00	40,000	45,360
squash	8,712	11,616	1.36	6.05	1,920	6,400
sugar beet	52,272	104,544	1.31	4.75	22,000	40,000
sunflower	6,000	27,000	3.00	4.00	2,000	9,000
sweet corn	15,682	59,739	3.48	33.19	1,800	4,500
sweet potatoes	11,880	18,341				
tomatoes	52,272	69,696	0.28	0.58	120,000	190,000
turnips	29,040	261,360				
vegetable seeds	52,272	69,696	0.28	0.58	120,000	190,000
watercress						
wheat	1,300,000	1,500,000	60.00	156.00	8,000	18,000
wild rice						

a Numbers in italics are calculated from the other entries in different columns of the table. Numbers in bold derive from sources other than the USEPA compilation.

Ranges obtained with calculated values tend to be wider than ranges given in the USEPA 2010 compendium. For example, the calculated minimum of the range of pounds of seeds per acre is calculated by dividing the maximum number of seeds per acre by the minimum number of seeds per pound, while the maximum pounds of seeds per acre is the minimum number of seeds per acre divided by the maximum number of seeds per pound. This is probably a realistic estimate of the degree of variation occurring in real life given different soil types and conditions as well as the myriad of cultivars for any given crop type; whereas USEPA (2010) generally references a single source of information from the state—if any.

Combining the information from Tables 3 and 4 allows us to compute a neonic application rate, equivalent to seeding an acre of any given crop. As mentioned earlier, maximum values are retained for the purpose of this assessment. These are presented in Table 5.

Table 5. Equivalent application rates per acre for neonics in various crops with acreages compiled for this report. See text for groupings and crop substitutions.

Crop or crop grouping	Clothianidin lbs of a.i. per acre	Imidacloprid lbs of a.i. per acre	Thiamethoxam lbs of a.i. per acre
alfalfa			0.008
artichokes	8.01E-05		
Asian vegetables		0.001	0.377
barley	0.069	0.092	0.051
beans, dry	0.173	0.163	0.065
beans, fresh	0.691	0.545	0.218
broccoli	0.326		0.015
Brussels sprouts			0.006
cabbage	0.122	0.006	0.006
carrots	0.344		0.143
cauliflower			0.005
celery			0.184
cereal, mixed	0.109	0.147	0.081
chard			0.046
chicory	0.006		0.138
corn, grain	0.111	0.156	0.111
corn, silage	0.111	0.156	0.111
cotton	0.079	0.095	0.070
cucumbers			0.036
escarole & endive	0.005		0.111
greens			1.080
hay, alfalfa			0.008
hay, cereal	0.063	0.085	0.046
herbs	0.080		1.921
kale			0.127
leek	0.069		
lettuce	0.491		0.415
melons			0.058
oats	0.063	0.085	0.046
onions	0.553		0.346
parsley	0.080		1.921
peas		0.204	0.082
potatoes	0.338	0.338	0.162

Table 5. Equivalent application rates per acre for neonics in various crops with acreages compiled for this report. See text for groupings and crop substitutions.

Crop or crop grouping	Clothianidin lbs of a.i. per acre	Imidacloprid lbs of a.i. per acre	Thiamethoxam lbs of a.i. per acre
pumpkins			0.012
rhubarb			0.019
rice			0.166
rye	0.063	0.085	0.046
safflower		0.450	0.140
sorghum	0.018	0.023	0.021
spinach	0.135	0.050	1.080
squash			0.019
sugar beet	0.166	0.206	0.161
sunflower		0.040	0.015
sweet corn	0.066	0.083	0.165
sweet potatoes	0.338		
vegetable seeds			0.019
wheat	0.109	0.147	0.081
wild rice			0.166

2.2.1.4. Step 4: Cross-referencing allowable application rates per acre with California agricultural snapshot data

Steps 1 to 3 detailed above now allow for the calculation of potential total neonic use if all seeded acreages of registered crops did in fact use a neonic seed treatment. Because rates vary among the three seed treatment active ingredients, several assumptions were made regarding the relative market share of each active ingredient by crop. Where information was available from USEPA sources (e.g., USEPA 2017, 2018, 2019a, c), this information was used to work out approximate market shares. Where no information existed (e.g., as for all vegetable crops), all registered active ingredients were assumed to be used in equal proportion. The initial approach had been to note the number of times specific crops were mentioned on labels and use this as an indication of relative market share (see Appendix 2). However, it was decided that this was not a reliable indicator and that the number of products labeled for any given crop had more to do with how different companies market their products—some preferring to have separate labels for different crops rather than one “super-label” that tabulates all possible crops and rates.

Crops for which no evidence of registered seed treatments could be found were excluded from the compilation. This included asparagus, beets, daikon, eggplant, garlic, horseradish, okra, all pepper types, radishes, tomatoes, turnip, and watercress.

A few other crop-specific assumptions were made as follows:

- To apportion market share of treatments in corn, we consulted the USGS published estimates of clothianidin, imidacloprid, and thiamethoxam on corn for 2014, the last year when seed treatments were included in USGS use estimates. For states bordering California (Arizona, Nevada, Oregon), the ratio of clothianidin to thiamethoxam use was roughly 2:1 with no imidacloprid showing. This is the proportion we used for California.
- For cotton, sugar beet, and wheat, the proportion of each neonic was assigned based on the country-wide information provided in the analysis by USEPA’s Biological and Economic Analysis Division or “BEAD” (USEPA 2017, 2018). The proportional market share of the three active ingredients in wheat was extended to other cereal crops.

- Clothianidin in sweet potatoes was assumed to be used at the same per acre rate as for potatoes, given the similarity between the respective rates on seeds.

Table 6 provides the possible total quantity of each neonic active ingredient that could be applied via treated seed use, assuming all seeds treated if allowed. County information was amalgamated by USDA agricultural region (see Figure 2).

Figure 2. Agricultural regions of California.



Table 6. The calculated potential use of neonics applied as seed treatments in 2016 by agricultural region of California.

Agricultural region	Clothianidin lbs of a.i.	Imidacloprid lbs of a.i.	Thiamethoxam lbs of a.i.	Total
Central coast	59,496	6,180	60,012	125,688
Northeast	899	5,849	4,693	11,441
Northern coast	40	357	221	619
Sacramento valley	7,386	30,261	24,551	62,198
San Joaquin valley	62,060	67,018	62,454	191,532
Sierra mountains	46	426	441	913
Siskiyou-Shasta	800	1,780	3,516	6,095
Southern California	34,321	12,815	47,590	94,726
Unspecified ^a	463	13,400	4,827	18,690
Total	165,511	138,086	208,305	511,902

^a See section 2.2.1. The “Unspecified” total is based on USDA-reported seeded acreages that cannot be assigned to specific counties based on county statistics.

2.2.2. Comparing the total potential neonic-treated seed use to PUR data for non-seed neonic uses

We can compare the totals from Table 6 with those compiled by USGS from the PUR system in California (Table 7, Appendix 3). As mentioned earlier, the latter exclude seed treatments. Neither total includes *consumer* uses of these active ingredients. Totals for the other neonics acetamiprid and dinotefuran are also included.

Agricultural region	Clothianidin	Imidacloprid	Thiamethoxam	Sub-total of the 3 principal nitroguanidine neonics	Acetamiprid	Dinotefuran	Grand total
Central coast	7,998	40,906	12,807	61,711	6,056	1,969	69,736
Northeast	0	139	6	145	0	0	145
Northern coast	0	516	8	524	2	0	526
Sacramento valley	554	19,444	590	20,588	8,451	372	29,411
San Joaquin valley	11,571	218,289	21,857	251,716	31,388	8,749	291,854
Sierra mountains	18	178	0	196	116	0	312
Siskiyou-Shasta	4	208	26	237	7	0	245
Southern California	1,977	66,787	6,445	75,210	4,242	2,323	81,775
Grand total	22,122	346,467	41,738	410,327	50,262	13,414	474,004

a PUR data compiled by USGS for 2016. Data obtained from: <https://water.usgs.gov/nawqa/pnsp/usage/>.

As these calculations indicate, full deployment of nitroguanidine neonic seed treatments on crops for which the practice is labeled exceeds the reported (PUR) use of the three active ingredients for 2016 (511,902 lbs a.i. vs. 410,327 lbs a.i.). Thus, not taking seed treatment insecticides into account may seriously underestimate actual pesticide inputs in California.

Appendix 3 explores the potential discrepancy in more detail on a county by county basis. Reported use for counties reporting 0 lbs of neonic use was changed to 1 lb in order to calculate a proportional increase over the reported use. Clearly, those counties with little to no PUR-reported neonic use, but with some crops allowing for seed treatment use showed the greatest increase. However, even heavy agricultural counties showed substantial potential discrepancies suggesting that the use of clothianidin and thiamethoxam, especially, may have been greatly underestimated. For example, the amount of thiamethoxam used in Monterey county on the Central Coast could be over 500% of reported applications in the PUR system. Likewise, San Joaquin County could have application levels 300% higher than reported.

2.3. Estimating the actual total neonic-treated seed use in California

There is no publicly available information on the actual use of neonic seed treatments in California. Even when reported nationally, estimates are now very dated and not geographically explicit, and therefore potentially meaningless. Where information on seed treatments has been tracked following registration (e.g., Douglas and Tooker 2015 for several field crops), it shows that the extent of seed treatment use has increased exponentially. Later registrations and crops with smaller national acreages have not benefitted from the same level of scrutiny. It is reasonable to expect that use patterns registered more

recently are still in their exponential growth phase. Also, it is anticipated that removal of the last uses of organophosphorus insecticides (e.g., chlorpyrifos—see Appendix 4) will lead to further increases in neonic use.

Attempts to obtain seed treatment use information from California crop specialists yielded no relevant information. Crop experts who were contacted and kindly responded did not know the use information, often recommending that I contact seed retailers⁶ or suggesting (mistakenly) that the information could be obtained from PUR data. That total absence of knowledge illustrates that, as predicted by Hitaj et al. (2020), failure to account for seed treatments does result in a loss of agricultural expertise.

Any information I was able to find is presented in Appendix 4.

3. AQUATIC CONTAMINATION FROM NITROGUANIDINE NEONICOTINOIDS IN CALIFORNIA

This section provides a review of the potential for neonic seed treatment applications to contaminate state surface waters as well as a short analysis of the neonic water sampling performed to date.

3.1. At what level do neonics cause ecological harm?

Before examining the water data in California, we must first examine at what levels neonics would be expected to cause harm to aquatic ecosystems, also known as aquatic “benchmarks.” An extensive review of the setting of aquatic benchmarks is provided in my earlier reports on surface water contamination in New York State (Mineau 2019a, b). I will quickly summarize the arguments here in the context of the California situation and explore recent developments. Relevant sections of these reports will be excerpted here.

In my previous reports (Mineau and Palmer 2013, Mineau 2019a, b), I showed how USEPA had erred in its initial benchmark setting exercises with imidacloprid and argued that they were now making the same error in setting their benchmarks for clothianidin and thiamethoxam. My main thesis was that, given the 790,000 fold difference in sensitivity to imidacloprid from the least to the most sensitive organism tested (with 36 species tested as of 2017), setting any benchmark based on the “most sensitive” species for the smaller clothianidin and thiamethoxam datasets had more to do with chance than with good science.

As of June 2020, USEPA had derived the benchmarks appearing in Table 8.

Active ingredient	Acute (µg/L)	Chronic (µg/L)
Imidacloprid	0.385	0.01
Thiamethoxam	17.5	0.74
Clothianidin	11	0.05

a Data obtained from: <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/aquatic-life-benchmarks-and-ecological-risk> (consulted June 2020).

Clearly, USEPA still believed then that clothianidin and thiamethoxam were safer to aquatic life despite ample evidence that this difference was an artifact of the larger dataset for imidacloprid. In 2018, Canada’s PMRA (2018a, b) had already proposed chronic benchmarks for clothianidin and thiamethoxam that were 33 and 28-fold lower than the proposed USEPA benchmarks respectively.

As early as 2013, we (Mineau and Palmer 2013) had proposed that the aquatic toxicity of thiamethoxam and clothianidin to aquatic insects and crustacea should be assumed to be similar to that of imidacloprid based on a comparison of toxicity

6 A current (Jan. 2019-June 2020) list of authorized dealers in California numbered more than 950.

tests performed on the same species with different neonics. The argument was strengthened and published in Morrissey et al. (2015), which provided that:

“In general, acute and chronic toxicity of the neonicotinoids varies greatly among aquatic arthropods. . . . Based on limited data, however, it appears that differences in relative toxicity among the various individual neonicotinoids are minor.”
(Morrissey et al. 2015)

Other authors have concluded as to the similar toxicity of nitroguanidine neonics (e.g., Hoyle and Code 2016) on the strength of newer data such as Cavallaro et al. (2017). These authors generated comparative data for the three nitroguanidine neonics on the same chironomid species. They found almost identical toxicities for imidacloprid and clothianidin—somewhat less for thiamethoxam.

The publication of more comparative data by Raby et al. (2018a, b) finally provided information sufficient to convince USEPA that differences between neonic active ingredients were indeed not as great as it had originally believed (USEPA 2020c). The upshot was that, for the more sensitive species tested, all nitroguanidine neonics should be considered to be of equivalent toxicity:

“When considering the toxicity data for the mayfly, all four chemicals are similar, with clothianidin, dinotefuran and thiamethoxam all having 95% confidence intervals that overlap with the confidence intervals of imidacloprid. For the midge, there are slight differences in toxicity among the chemicals, where both clothianidin and imidacloprid are similar (95% confidence bounds overlap) and dinotefuran and thiamethoxam are slightly less toxic (LC50 values are 2x and 5x higher than imidacloprid; confidence bounds do not overlap with those of imidacloprid or clothianidin).” (USEPA 2020c)

Similar results were obtained in the chronic toxicity tests with thiamethoxam being slightly less toxic than imidacloprid—but by a two-fold difference only. It should be noted that thiamethoxam breaks down to clothianidin, so the lesser toxicity of the former is not as relevant ecologically. No-effect concentrations for clothianidin and imidacloprid were within a factor of 4 and 2 for the most sensitive and second-most sensitive species respectively. Clothianidin was more toxic than imidacloprid to the most sensitive species (a mayfly) but less toxic than imidacloprid for the second-most toxic, a chironomid. Clearly, the differential toxicity ascribed to the different nitroguanidine products in previous USEPA aquatic risk assessments is not justified scientifically.

Early research by Starner and Goh (2012) in California had shown that flowing water in agricultural watersheds showed concentrations of imidacloprid that remained steady for periods exceeding three months at least. Similarly, Whiting et al. (2014) and Whiting and Lydy (2015) had shown that, runoff water from corn seed treated with clothianidin carried residues for the whole summer. Schaafsma et al.'s 2015 study indicated that residues could persist for a full year following a single application. Given the persistence of the nitroguanidine neonics in soils or waters protected from direct sunlight, and the fact that they are found to contaminate runoff water for months after application, it is clear that there is a very high potential for chronic toxicity, making the chronic toxicity benchmark the most relevant threshold for ecological harm. Several authors have commented on this (reviewed in Mineau 2019a, b). In addition, the cumulative toxicity potential of neonics has been well examined. In a recent expansion of their previous analyses, Sanchez-Bayo and Tennekes (2020) restated their argument that neonics show characteristics of irreversible cumulative toxicity in both aquatic and terrestrial invertebrates. Their sound analysis argues for the fact that any benchmark based on acute or even short-term toxicity data is irrelevant in a real-world exposure situation.

All of this argues for disregarding any acute benchmark in favor of a chronic one. In previous reports, I argued that the 0.01 µg/L chronic benchmark established by USEPA for imidacloprid should be applied to the other nitroguanidine seed treatment chemicals. That has now been conclusively shown to be an appropriate benchmark for residues of any of the nitroguanidine neonics in water, or, where more than one neonic chemical is present, the sum of all nitroguanidine neonic residues.

3.2. Predicted contamination from seed treatments relative to other application methods

Because neonic seed treatments may be one of the greatest (if not the greatest) use of neonics in California, it is critical to understand the extent of aquatic contamination one can expect from them. Two questions that arise are: (1) what is the expected proportion of contamination from each chemical active ingredient; and (2) what is the expected contamination from seed treatments relative to all other uses (soil, foliar, etc.).

On the first question, as discussed below, surface water testing for clothianidin and thiamethoxam—both of which are commonly used as seed treatments—is inadequate. However, we can glean some insight from the active ingredients’ surface water mobility indices (SWMIs)—a measure designed by Chen et al. (2002) for the mobility of a chemical in the environment, and therefore its propensity to contaminate surface waters. The index ranges from 0 (low mobility) to 1 (extreme mobility), and the SWMI value for each of the three main nitroguanidine neonic active ingredients is provided in Table 9.

Table 9. Surface Water Mobility Indices (SWMIs) for the main seed treatment neonics based on an algorithm designed by Chen et al. (2002).^a

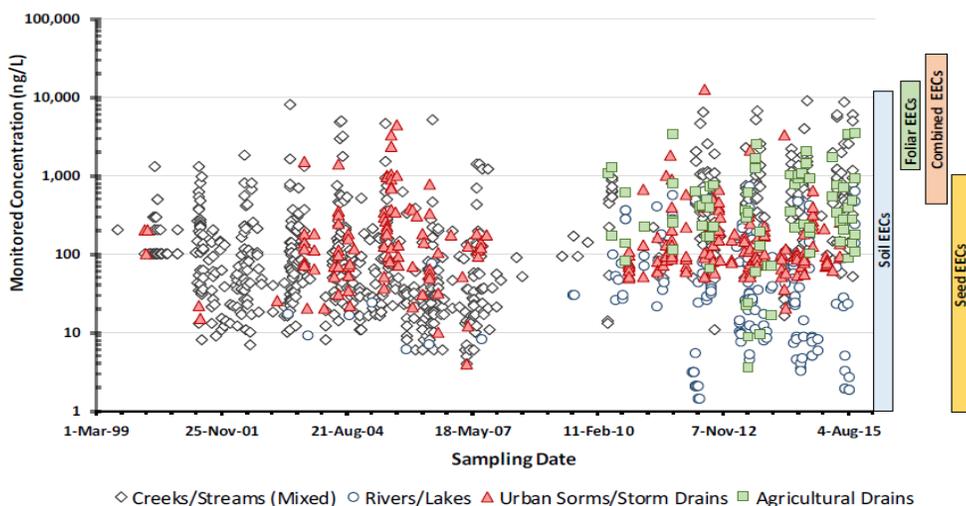
Neonic active ingredient	SWMI value
Clothianidin	0.66
Imidacloprid	0.56
Thiamethoxam	0.82

a Input data from Pesticide Properties Database obtained from: <https://sitem.herts.ac.uk/>.

As Table 9 shows, the physico-chemical properties of clothianidin and thiamethoxam make them more likely to contaminate surface waters than imidacloprid. Therefore, given similar use patterns, the predicted surface water contamination from clothianidin and thiamethoxam would be more extensive than for imidacloprid.

On the second question, we can first look to attempts by USEPA to assess the risks of neonic water contamination from seed treatments versus other sources in their recent re-evaluation of neonic impacts, which took place as part of a process known as “registration review.” In their initial review of imidacloprid residues in surface waters in the United States at large, USEPA (2016) used modeling to predict water concentrations from labeled uses. They argued that runoff concentrations from soil and seed treatment uses would be lower than from foliar applications, as shown in Figure 3. (Seed EECs).⁷

Figure 3. Detected imidacloprid concentrations in U.S. surface waters from routine monitoring efforts relative to the range of modeled concentrations for different use patterns of the pesticide (USEPA 2016).



⁷ EEC stands for “Expected Environmental Concentration,” an estimate generally obtained through models of runoff and/or drift.

Figure 2 shows a great deal of variability in the expected water concentration following the use of seed treatments. Part of this variation has to do with the labeled rate on seed as well as the depth of incorporation into the soil profile. The runoff models used by USEPA initially predicted no runoff when seeds are planted at more than 2 cm in depth (USEPA 2016).⁸ Given that recommended seeding depths for both corn and soybean are deeper than this 2 cm depth, the model findings were clearly at odds with the fact that aquatic contamination is very extensive in areas planted to corn and soybeans (Hladik et al. 2014). This contradiction was raised, but not resolved, in USEPA (2016).

USEPA (2020c) summarized the expected environmental concentrations (EECs) it anticipates from various seed treatment uses with the three main seed treatment neonics (Table 10). These are the water concentrations USEPA used to calculate risk quotients and assess the likely environmental damage from seed treatment uses in its recent re-evaluation. These estimates are meant to be conservative (i.e., worst case estimates) at this stage of the evaluation process. However, as seen below, they are clearly not.

Table 10. Estimated environmental water concentrations (EECs) in µg/L predicted by USEPA for neonic seed treatment uses (USEPA 2020c).

Crop	Peak (1 day) EEC µg/L			Chronic (21 day) EEC µg/L		
	Clothianidin	Imidacloprid	Thiamethoxam	Clothianidin	Imidacloprid	Thiamethoxam
Cotton	2.14	2.19	1.18	1.87	1.56	0.97
Corn	0.59	0.78	0.39	0.53	0.56	0.33
Soybean	1.77	3.33	0.46	1.53	2.21	0.40
Sugar beet	1.11	2.63	1.35	0.96	1.83	1.24
Wheat	2.27	2.56	1.08	1.99	1.81	0.86
Rice	71.7	NA	66.4	8.74	NA	35.5

Indeed, long before USEPA published these estimates, there was already evidence from published field studies that the agency had underestimated the potential for seed treatments to contaminate surface water. One possible reason for this is that their modeling ignores the issue of dust that is produced at seeding (USEPA 2016).

In the independent literature, Main et al. (2014) reported clothianidin values as high as 3.1 µg/L from sloughs (small ponds that occur frequently in “knob and kettle” landscapes) in canola-growing areas following the use of clothianidin seed treatments; and Schaafsma et al. (2015) reported levels as high as 16.2 µg/L in ditches outside another corn field seeded to clothianidin and 3.25 µg/L in puddles as far as 100 m from the fields. Whiting et al. (2014) and Whiting and Lydy (2015) documented clothianidin residues of 0.23 µg/L in runoff from a corn field, but this was at one-fifth of the allowable treatment rate;⁹ more importantly, residues persisted in runoff water a full 156 days after planting.

The situation is similar with thiamethoxam seed treatments. Main et al. (2014) found values up to 1.49 µg/L from sloughs around canola fields; and Schaafsma et al. (2015) measured levels as high as 7.5 µg/L in ditches outside a seeded field and 16.5 µg/L in puddles outside their Ontario corn fields. The latter two measurements were even more remarkable because they were measured pre-plant and therefore indicated contamination from the previous use of seed treatments in the preceding growing season. Higher levels were recorded in puddles within the field area.

More in line with USEPA (2020c) predictions, recent samples taken from a variety of waterbodies in crop and non-crop sites within an agricultural landscape in Indiana (Miles et al. 2017; with 2018 correction) found concentrations of clothianidin averaging 0.101 µg/L (all sites combined; with samples taken weekly for eight weeks). The highest concentrations of

⁸ These predictions, obtained through the PWC (Pesticide in Water Calculator), provide 2 cm as the default value beyond which no runoff is expected, although this input can be changed by the user. Data obtained from: <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/pesticide-water-calculator-version-150-and-152-user> (consulted June 2020).

⁹ It is common practice to scale contamination levels with application rate. In this case, this would result in a contamination level approximating 1.15 µg/L.

clothianidin (0.45-0.67 µg/L) were observed in small lentic woodland bodies of water well away from the seeded corn and soybean fields. One of these sites (PWA West) apparently received drainage from nearby fields; how the other got contaminated is unknown.¹⁰ Regardless, levels in these wetlands were higher than those reported in any of the ditch samples taken nearer the seeded fields, showing the difficulty in containing these extremely mobile insecticides within the treatment area.

On the whole, there is now ample model and field data evidence predicting what the expected neonic water contamination would be from seed treatment use. Regardless of whether current USEPA model estimates represent an accurate picture or a considerable underestimate—as the independent scientific literature would suggest—the anticipated neonic levels in water are all well within the range where we would expect considerable injurious impacts on aquatic habitats receiving runoff. Therefore, even if expected contamination levels from seed treatments are lower than from other application methods, the potential scale of use (as outlined in Section 2) is a clear concern with respect to the California environment.

3.3. Evidence of neonic contamination in California surface water data and likely environmental impacts

In California, CaDPR amalgamates all known water analyses into the state Surface Water Database or “SURF.”¹¹ The database includes CaDPR studies as well as the national USGS water sampling programs and others. CaDPR has been analyzing surface waters for pesticide residues since 1981.¹² Since 2000, the CaDPR program performing these analyses has been the Surface Water Protection Program (SWPP) (Goh et al. 2019).

Knowledge of extensive contamination of California surface waters by imidacloprid is not new. In 2012, Starner and Goh presented data from 2010-2011 demonstrating such contamination. Some of the sampling sites used in that report have continued to be monitored over time, and data from those sites are presented below.

Hoyle and Code (2016) queried SURF for the presence of neonics in samples collected between January 2010 and October 2015. For imidacloprid, this amounted to 790 samples taken from 132 sample sites. They found that 55% of the sites had at least one imidacloprid concentration above the level of detection with a mean detection level of 0.643 µg/L. Despite using the older EPA benchmark of 1.05 µg/L (105X higher than the currently accepted benchmark), they found that 14% of samples fell within the range expected to cause significant biological effects on receiving waters. Hoyle and Code (2016) further pointed out that, using the more protective European chronic benchmark of 0.067 µg/L (closer to the current USEPA and our proposed 0.01 µg/L benchmark), 89% of imidacloprid detections exceeded this benchmark.

Neonic use has dramatically increased since the 2010-2015 period when these water samples were taken. Hoyle and Code (2016) only examined imidacloprid data and, as they point out, it is difficult to separate the agricultural uses of imidacloprid from its domestic and landscaping uses, although high rates of detection in the Santa Maria, Salinas, and Imperial Valley areas did suggest agriculture is an important contributor.

Rather than repeating the Hoyle and Code (2016) analysis, I approached the data differently. Without an analysis of each of the sampling locations, their flow rates, why sites were chosen, and how samples were timed to correspond to agricultural activity and rainfall, the proportion of positive imidacloprid detections does not paint an accurate picture of whether they reflect agricultural or urban sources. New data collected by CaDPR, however, does address this to a certain extent (see below). Data on clothianidin and thiamethoxam—both of which are almost entirely associated with agriculture—are also now available.

The SURF database was queried in May 2020. It consisted of results tabulated to December 2019. Samples consisted of either filtered water samples or whole water samples, but this was not specified in all cases. Because of the high solubility of the three neonics of interest, I ignored this parameter, estimating minimal loss of analytes from filtering out the particulates.

As mentioned, CaDPR monitors both agricultural and urban sources of imidacloprid contamination. Studies are identified as such in the SURF database. I assumed that, if designated as such, the chosen sample locations indeed reflect ongoing

10 This is based on inspection of the PWA East & West sampling site photographs included in the publication and personal communication with two of the authors: C. Krupke and J.T. Hoverman.

11 Data obtained from: <https://www.cdpr.ca.gov/docs/emon/surfwtr/surfcont.htm> (consulted June 2020).

12 Data obtained from: <https://axial.acs.org/2019/07/30/surface-water-protection-program-for-pesticide-use-in-california/> (consulted June 2020).

agricultural or urban land use, although we cannot say whether samples were chosen to represent maximum likelihood of finding the analyte—e.g., presence of cropped fields or time of sampling relative to use patterns and precipitation, type of waterbody, etc. As reviewed in earlier analyses (Mineau 2019a, b) samples taken as part of regular water monitoring programs always underestimate the presence and levels of targeted pesticides.

Over the entire 2010-2018 period,¹³ CaDPR sampling for imidacloprid in sites labeled “agricultural” was comprised of 556 samples from 86 sampling sites (Table 11). Imidacloprid was detected at half of those sites, indicating some use in the watershed. All sampled sites had maximum detection levels that exceeded the 0.01 µg/L benchmark and a large proportion exceeded the benchmark by 10X or even 100X (Table 11). Indeed, over half of the sampled sites had maxima that exceeded the USEPA acute benchmark of 0.38 µg/L, a level which, as I argued earlier (see section 3.1), is clearly not protective enough in the case of a persistent compound with cumulative toxicity. The highest recorded maximum level was 41.1 µg/L. The next highest was obtained on the same site, suggesting the maximum reading was not in error. It came in at 9.86 µg/L.

The highest imidacloprid levels were recorded in Monterey County, followed by Santa Barbara, Imperial, and Napa—all intensive agricultural regions. In these counties, the imidacloprid data alone clearly indicates serious adverse impacts for aquatic life in receiving waters. Looking at positive detections over the years (Figure 4), there appears to be a trend for higher levels of detection over time. This could be the result of more targeted monitoring or reflective of the generally increasing amount of use of imidacloprid over that period.

CaDPR also sampled urban sites throughout the same period. A total of 578 samples were noted as being part of urban monitoring studies—roughly half from Orange County (Table 11). Although more of the sampled sites had positive detections, impacts from urban use may be less pronounced than for agricultural uses, as judged by the fewer number of sites registering maximum levels either 10X or 100X benchmark levels. Looking at positive detections over the years (Figure 5)—with the exclusion of one extreme value for 2018—does not reveal any convincing pattern, although there is a slight suggestion of a decline. Given that several of CaDPR’s studies mention “mitigation monitoring,” one can assume that there has been some effort at containing urban sources of imidacloprid. However, the generally lower levels seen in the urban samples may also be a result of higher flow rates and larger bodies of water being sampled. The ubiquitous presence of neonics in storm water retention ponds and canals has been of increasing concern on the part of municipal and regional governments (Murray 2015).

As was the case with the agricultural samples, one site had an extreme value (165 µg/L) recorded in 2018. The next highest detection (12.7 µg/L) was recorded at the same site some years earlier.

Table 11. CaDPR monitoring results for imidacloprid in studies indicated as agricultural or urban in nature.

Study type	All sites				Sites with positive detections		
	Number of samples taken	Number of sites sampled	Number of sites with positive detections	Maximum level (ppb)	Sites with maximum detections above benchmark	Sites with maximum detections 10X above benchmark	Sites with maximum detections 100X above benchmark
Agricultural	556	86	43 (50%)	41.1 (next highest: 9.86)	43 (100%)	33 (77%)	15 (35%)
Urban	578	57	43 (75%)	165 (next highest: 12.7)	43 (100%)	21 (49%)	3 (7%)

13 As of May 2020, no CaDPR agricultural monitoring samples were reported beyond 2018.

Figure 4. Plot of positive detections (in $\mu\text{g/L}$) by year for CaDPR's agricultural sampling for imidacloprid. The outlying value of 40.1 $\mu\text{g/L}$ from 2017 was omitted. The overall trend in the mean is depicted by the red line.

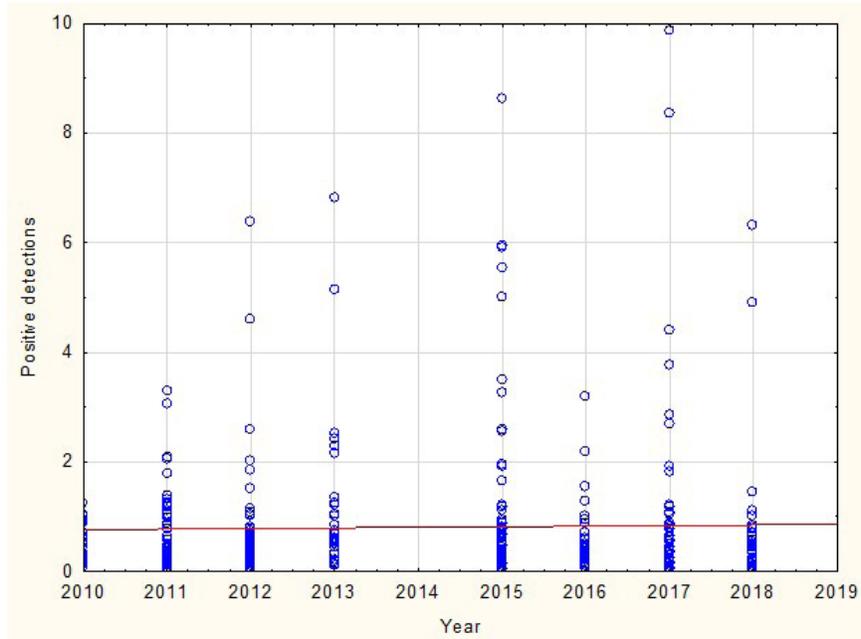
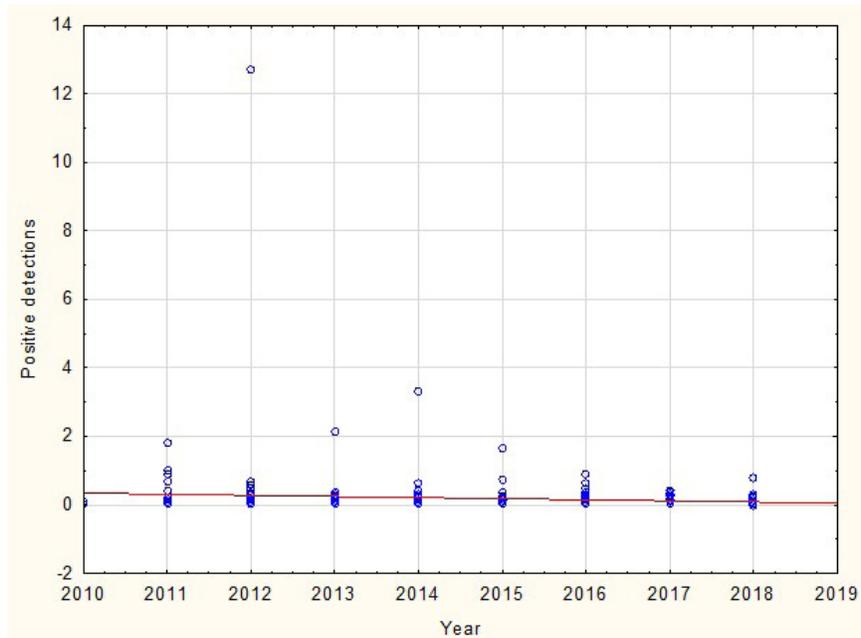


Figure 5. Plot of positive detections (in $\mu\text{g/L}$) by year for CaDPR's urban sampling for imidacloprid. The outlying value of 165 $\mu\text{g/L}$ from 2018 was omitted. The overall trend in the mean is depicted by the red line.

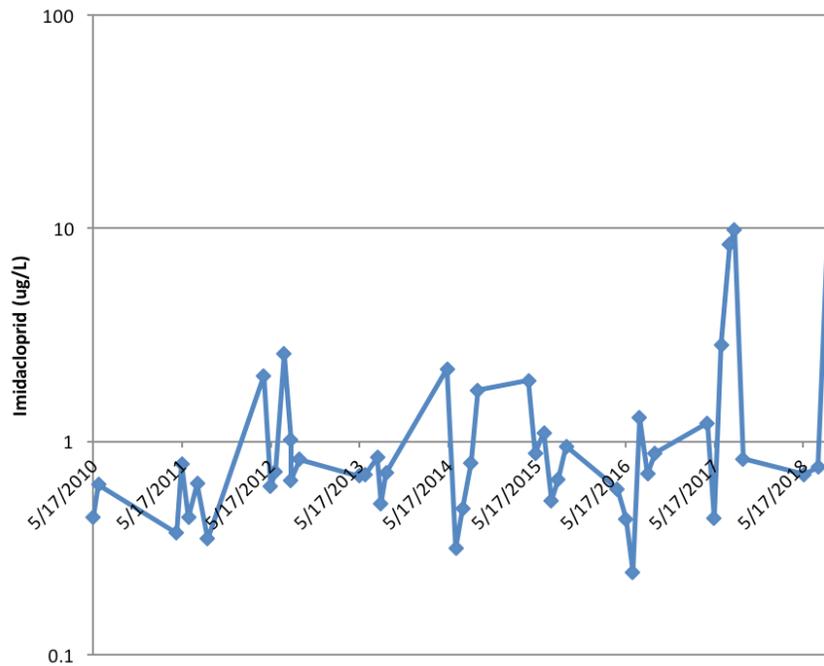


3.3.1. Continued monitoring of imidacloprid at sites from the Starner and Goh (2012) study

As mentioned above, the California data from agricultural sites reported by Starner and Goh (2012) offered good evidence that receiving surface waters were exposed to residues over the entire growing season, which argues in favor of using a chronic benchmark as the ecologically relevant one.

Monitoring continued at many of those sites right up to 2018. I chose to show data from two of the most intensively sampled sites—two tributaries of the Salinas River in Monterey County, Chualar Creek, (Figure 6) and Quail Creek (Figure 7).

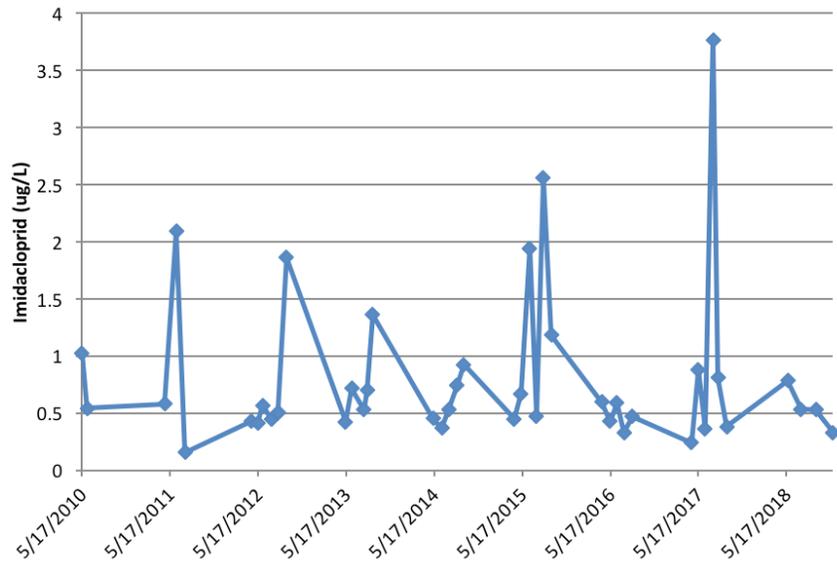
Figure 6. Imidacloprid residues at site 27-8 – Chualar Creek, a tributary to the Salinas River, Monterey County. The scale is shown on a log scale in order to accommodate the wide range in values.



In the case of Chualar Creek, every single water sample taken at that sampling site since 2010 has had a concentration of imidacloprid over 10X the benchmark level for damage to aquatic life (i.e., over 0.1 µg/L) and frequently over 100X that benchmark (i.e., over 1.0 µg/L). The final sample taken in 2018 was the highest at 41.1 µg/L.

Quail Creek shows a similar, although not quite as extreme, pattern. Over the 8 years of sampling, water concentrations measured between May and November seldom dipped below 0.5 µg/L or 50 times over the benchmark level for damage to aquatic life.

Figure 7. Imidacloprid residues at site 27-7 (Quail creek), a tributary to the Salinas River, Monterey County.



3.3.2. Clothianidin and thiamethoxam sampling

Sampling for clothianidin and thiamethoxam in California waters has not been adequate. Although some sampling for clothianidin and thiamethoxam began as early as 2011, it is clear that much of the sampling locations, especially in the earlier years, were not chosen with agriculture in mind, but as part of on-going USGS sampling of urban/industrial areas—e.g., Mallard Slough in Sacramento, or estuarine areas such as Grizzly Bay. Later, other groups became involved in sampling, such as the California State Water Resources Control Board’s Surface Water Ambient Monitoring Program or “SWAMP,” as well as other coalitions of different regional water boards. Fortunately, these sampling efforts include some of the same CaDPR agricultural long-term monitoring sites, as CaDPR by 2018 had still not incorporated clothianidin or thiamethoxam into its agricultural sampling programs. However, these samples were not taken during the more intensive summer season.

As a result, of the 85 sites monitored for imidacloprid by CaDPR, only 11 (13%) were examined for clothianidin or thiamethoxam residues, and this was only for the years 2017-2018.

Table 12 compares levels of imidacloprid with those of clothianidin and thiamethoxam for the 11 CaDPR agricultural monitoring sites. As mentioned, the comparison is rather inadequate because all of the clothianidin and thiamethoxam samples were taken in either September or December, whereas imidacloprid samples for the most part, were taken between April and September. As discussed in Mineau (2019a, b) the higher the frequency of sampling and the higher the number of samples, the greater the chance of detecting the higher residue concentrations. For example, the “maximum” value of 0.398 µg/L thiamethoxam obtained after only two winter samples at site 27-66 compared to the maximum 0.647 µg/L of imidacloprid following 47 spring and summer samples of imidacloprid strongly suggests that thiamethoxam would be shown to be a more significant contaminant at that site were the sampling adequate.

Table 12. Levels of three neonicotinoids compared at agricultural monitoring sites sampled by CaDPR. Samples taken from 2010-2018 for imidacloprid, and 2017-2018 for clothianidin and thiamethoxam.

County	Site	Clothianidin		Imidacloprid		Thiamethoxam	
		N ^a	Maximum recorded concentration (µg/L)	N	Maximum recorded concentration (µg/L)	N	Maximum recorded concentration (µg/L)
Monterey	27-12	2	0.060	36	1.12	2	0.482
Monterey	27-13	1	0	27	0.067	1	0.080
Monterey	27-2	1	0	1	0	1	0
Monterey	27-50	2	0	8	0.167	2	0.353
Monterey	27-58	1	0.251	5	0.118	1	1.44
Monterey	27-66	2	0	47	0.647	2	0.398
San Luis Obispo	40-13	2	0	26	1.44	2	0.069
San Luis Obispo	40-23	2	0	6	0	2	0.071
Santa Barbara	42-48	2	0	26	9.14	2	0.113
Santa Barbara	42-49	2	0	11	1.39	2	0.001
Santa Barbara	42-50	2	0.046	34	4.91	2	0.427
Santa Cruz	44-18	2	0	4	0.064	2	0.040

a N denotes the number of samples reported.

These data indicate that clothianidin and, especially, thiamethoxam are major contaminants of agricultural areas of California—which is perhaps predictable given their physico-chemical characteristics (Section 3.2) as well as the large reported and potentially larger unreported use (Section 2.3). Despite very fragmentary and inadequate sampling, maximum thiamethoxam water levels have already surpassed those of imidacloprid at some sites. Given that the potential clothianidin and thiamethoxam seed treatment use may far exceed their other uses in many counties of California (see Appendix 3), the failure to include these insecticides within a comprehensive agricultural sampling program or track seed treatment products more generally, has created a serious data gap—depriving scientists and policy makers of key information about the likely significant and damaging impacts of neonic-treated seed use.

Table 13 shows the total number of positive clothianidin and thiamethoxam detections regardless of sampling site. As discussed earlier, sampling intensity was much lower than for imidacloprid, so benchmark exceedances are not strictly comparable—especially since many sites are not in agricultural areas and clothianidin and thiamethoxam are predominantly used in agriculture.

Table 13. Positive detection of clothianidin and thiamethoxam in California (2011-2018).

	Clothianidin	Thiamethoxam
Number of sample sites with positive samples	23	47
Maximum level recorded (µg/L)	1.6	9.0
Sites with detections above 0.1 µg/L benchmark	20 (87%)	38 (81%)
Sites with detections 10X above 0.1 µg/L benchmark	13 (57%)	25 (53%)
Sites with detections 100X above 0.1 µg/L benchmark	4 (17%)	9 (19%)

The fact that each active ingredient, despite the inadequate sampling, frequently exceeds benchmark levels is worrisome. Given that most aquatic systems with agricultural regions will be exposed to these three nitroguanidines—along with the other neonics dinotefuran and acetamiprid—in combination, their combined concentrations must be considered when assessing injury to the aquatic environment. Clearly, not sampling comprehensively for neonics other than imidacloprid misses a critically important part of the picture.

4. POLLINATOR IMPACTS FROM NITROGUANIDINE NEONICOTINOID SEED TREATMENTS IN CALIFORNIA

4.1. Recent regulatory reviews of neonics and pollinators

USEPA and CaDPR collaborated on an extensive review and risk assessment of the three main nitroguanidine neonic insecticides (clothianidin, imidacloprid, and thiamethoxam) regarding their impacts on bees.¹⁴ The regulatory agencies, in conjunction with the registrants, developed protocols for honey bee colony studies to be carried out by the registrants. These studies formed the core of the assessments. Given the sheer amount of information available to these agencies, as well as the multitude of neonic use patterns, this evaluation was a complex one. CaDPR (CaDPR 2018, 2019) was first in publishing its version of the assessment, the review document and addendum coming in at almost 1200 pages. The USEPA final published version of the assessment (USEPA 2020d, e, f, g, h, i, j) came in at over 1100 pages, once the various appendices and attachments are factored in. A detailed review of either the USEPA or CaDPR versions of the pollinator assessment is beyond the scope of this report; but this report will highlight a few notable differences between the two assessments as well as some clear inadequacies and shortfalls, specifically with respect to the assessment of seed treatment uses. Simply put, the CaDPR and USEPA assessments both failed to adequately characterize the risk of neonic seed treatments to bees, especially wild bees. This is a serious issue because, while other methods of neonic application may indeed carry a higher risk on a per-application basis, the use of seed treatments can greatly extend the risk to pollinators spatially and involve crops not yet assessed for bee risk.

With the methods outlined in Chapter 2 and Appendix 1, this report can account for a little over 5 million acres of non-organic cropland in the State of California. As reviewed earlier, a number of minor crops—including several for which seed treatments are allowed—are not included in this total. Nevertheless, we can calculate that 76% of this crop area can potentially be sown with a neonic-treated seed. On a county by county basis (see Appendix 5), the proportion of crop area potentially seeded with neonics ranges from a low of 17% (Yuba County) to 100% (Imperial County). The sheer size of the potential treated area is such that it is critical to adequately assess the risk to pollinators posed by seed treatments.

4.2. What does the CaDPR assessment conclude with respect to neonic-treated seeds?

CaDPR (2018) essentially dismissed any risk from neonic-treated seeds on the basis of preliminary joint assessments carried out by itself and with USEPA. On the basis of these preliminary efforts, CaDPR concluded that residues in pollen and nectar resulting from seed treatment use were either below detection limits or at least below any effect levels. As detailed below, the USEPA assessment is much more nuanced and does, in fact, indicate a measurable risk to both individual pollinators and honey bee colonies, even before errors of omission and commission in that assessment are taken into account.

CaDPR (2018) does raise the issue of abraded seed coat dust (see extensive review below) but concludes that USEPA has addressed the issue with best management practices and that there are no records of such incidents occurring in California. To the author's knowledge, the issue of dust at seeding might indeed have been partially addressed, but it is a long way from being solved.

CaDPR only considers risk to honey bee colonies and therefore does not look at risk to individual pollinators in the field. The risk determinations are based on deriving no observable adverse effect concentrations (NOAEC) for pollen and

¹⁴ In fact, Canada's PMRA also contributed in this tripartite effort.

nectar residues in treated crops from registrant-supplied honey bee colony feeding studies (Table 14). In other words, the concentrations under which no effects were observable on honey bee colony health.

Table 14. NOAEC values in nectar and pollen used by CaDPR to assess the risk of residues in various crops (modified from Table 1; CaDPR 2018).

Active ingredient	NOAEC in nectar (ng/g)	NOAEC in pollen (ng/g)
Clothianidin	19	372
Imidacloprid	23	97.5
Thiamethoxam	30	372

One notable difference between the CaDPR and USEPA assessments is that CaDPR generates separate risk ratios for nectar and pollen consumption. The CaDPR assessment compares nectar and pollen residue levels in crop plants to the NOAEC levels generated in separate whole hive studies conducted with either spiked sugar solutions (surrogate for nectar) or spiked pollen patties. USEPA uses a “total dietary approach” and makes the assumption that honey bees will consume 20X more nectar than pollen; pollen residue concentrations are therefore divided by 20 to derive “nectar equivalent” residue values. As discussed below, neither approach is satisfactory for assessing the risk to wild bees.

By not considering risk at the individual bee level, CaDPR completely excludes appropriate consideration of any of the 1500+ Californian wild bee species, especially solitary bees, where the death of individuals is the appropriate endpoint against which potential exposure should be compared. In addition, there are many independent studies in the literature that show effects on bumble bee and mason bee colonies at lower exposure concentrations (see below). Curiously CaDPR offers that: “*Apis bees serve as a surrogate for other non-Apis species of bees (e.g., bumble bees) that may be exposed under agricultural conditions*” (CaDPR 2018). In actual fact, honeybees are not adequate surrogates and a honey bee-centric exposure scenario does not inform on the risk to wild bees as argued below. By considering only honey bee colony studies in its assessment, CaDPR explicitly excludes any consideration of solitary bee species.

In the rest of this chapter, we will look at the fuller evaluation of seed treatment uses in the USEPA assessment.

4.3. What does the USEPA assessment conclude with respect to neonic-treated seeds?

The USEPA assessment finds that, for imidacloprid, risk to individual bees falls below levels of concern for all crops except beans, canola, cotton, peanuts, peas, safflower, soybeans, and sunflower. The highest risks are for beans and peanuts, where honey bee colony-level risks of concern were identified. However, the strength of evidence supporting this risk finding was considered “weak.”

For clothianidin and thiamethoxam, the assessment concludes that the risk from seed treatments to honey bee colonies was low for all uses except clothianidin application to turmeric seed pieces, but the strength of evidence was considered to be weak there also. However, risk to individual bees was above the level of concern for canola, corn, legumes, sorghum, and soybean (for clothianidin) and beans, cucurbits, legumes, lentils, peanuts, peas, sorghum, soybeans, and sunflower (for thiamethoxam).

It is useful to recall that the earliest reported honey bee toxicity incidents with imidacloprid resulted from its use as a seed treatment in corn and sunflowers (Bonmatin 2005, Maxim and van der Sluijs 2013). As early as 1994, reports were coming in describing aberrant bee behavior, loss of foragers, and reductions in honey production, especially near sunflower crops. The first regulatory restrictions in France, in 2004, were for these seed treatment uses in response to a strong lobbying effort from the bee industry. Indeed, many honey bee mortality incidents reported to USEPA resulted from seed treatment uses.

It is therefore reasonable to ask whether the USEPA assessment is correct in dismissing most risks associated with seed treatment uses. The rest of this chapter explores this question, although some of the issues and problems with the assessment of seed treatments clearly have a bearing on the assessment of other neonic use patterns.

4.4. Deficiencies in USEPA's assessment of pollinator risk from neonic-treated seeds

4.4.1. The USEPA assessment fails to adequately consider risks to pollinators beyond honey bees

Honey bees (*Apis mellifera*) are important for the pollination of certain crops in California and, because of that economic imperative, the USEPA assessment like the California DPR assessment is very “*Apis*-centric.” Other species are mentioned in passing and a few bumble and mason bee studies are reviewed, but the emphasis of the assessment is on honey bees.

Like CaDPR, USEPA (2020d-j) concludes that honey bees can be used as an adequate surrogate for non-*Apis* bees—and this because of the circular logic that “... *the bee risk assessment framework used by the EPA indicates the honey bees are intended to be reasonable surrogates for other bee species* ...” (USEPA 2020e; section 6.2) (emphasis added). This “intention” notwithstanding, the USEPA assessment offers plenty of evidence to the contrary; some of this evidence will be highlighted below.

4.4.1.1. Wild bees may be more sensitive than honey bees

It is known that toxicity within and among bee species can vary greatly. For imidacloprid, USEPA (2020d) reports that within honey bees alone, the acute oral LD₅₀ values in tests they deemed acceptable ranged a full two orders of magnitude (100X). Taking the lower value (as was done in the assessment) may provide a certain amount of added safety, but it isn't clear whether this is sufficient to protect the many species of wild bees that will be exposed in California cropland. Indeed, several authors have looked at the relative sensitivity of bee species to a wide range of insecticides (providing more data than what is available for neonics only) and concluded that honey bees are not always the most sensitive for any given active ingredient.

The USEPA assessment also references studies that show that leafcutter bee larvae are more sensitive than honey bee larvae to clothianidin, that adults of the only stingless bee tested (*Nannotrigona perilampoides*) may be more sensitive than honey bees to thiamethoxam, and that bumble bees may be more sensitive to clothianidin and/or thiamethoxam through the oral route.

In their proposed methodology for pollinator assessment, the European pesticide regulators (EFSA 2013) proposed an extrapolation factor of 10X from the accepted honey bee LD₅₀ in order to cover other species. This was, in part, a result of a literature review comparing a handful of species only, so they expressed the view that this factor was preliminary and may be insufficient. A more recent analysis of paired toxicity data from the same studies (Arena and Sgolastra 2014) obtained a similar result: a safety factor of 10X applied to the honey bee toxicity endpoints was sufficiently protective of other bee species in 95% of cases. However, the full range of sensitivity ratios between the honey bee and one of the other 19 bee species with which it was paired ranged over 6 orders of magnitude. The differential weight of test bee species appears to be part of the reason for this vast difference, but other factors are also at play (Arena and Sgolastra 2014).

Accordingly, the assumption that the honey bee will be more sensitive than 1500+ wild bee species potentially exposed in the California cropland and adjacent non-crop areas is highly unrealistic. Moreover, a honey bee colony contains tens of thousands of bees; many more individuals can be lost or affected before the hive is compromised. This alone makes the conclusions of the USEPA assessment highly suspect given that the final risk estimate is based on honey bee colony-wide endpoints. For solitary bee species or bees with smaller colonies (e.g., bumble bees) the loss and/or debilitation of individual foraging adults becomes much more critical to population survival. Also, as seen below, the parameters of the USEPA assessment—e.g., the low pollen ingestion by individual honey bees—do not adequately represent other species.

As an aside, several studies reviewed in the USEPA assessment have provided contact LD₅₀ estimates that are lower than the ones finally adopted by USEPA. These studies were found to be acceptable but labeled “qualitative” because of the lack of access to the raw data. Given the very small difference obtained with different probit methodologies (i.e., how raw data are processed to arrive at an LD₅₀), this data exclusion seems excessive. Had the non-industry data been accepted, it would have reduced the contact LD₅₀ by over 3X. The estimates above also ignore that breakdown products of imidacloprid, especially (imidacloprid olefin), which appear to be more toxic than the parent material (e.g., Suchail et al. 2001).

Yet another serious limitation of the USEPA risk assessment is that it has failed to also consider that the presence of fungicides often included on the same seed treatment, as neonics can greatly enhance the toxicity of the latter. For example, Tsvetkov et al. (2017) showed that clothianidin and thiamethoxam both became twice as toxic in the presence of boscalid at relevant field concentrations.¹⁵

15 This was established by measuring levels in collected pollen.

4.4.1.2. Wild bees may be in different parts of the agricultural environment than honey bees

The USEPA assessment does concede the fact that many species of wild bees are attracted to crops that honey bees are not attracted to. In addition, many different matrices (both biotic and abiotic, such as foliage or mud) are potentially attractive to non-*Apis* bees. The USEPA assessment only looks at pollen and nectar as sources of exposure. Hopwood et al. (2016) estimates that 70% of North American bees are ground nesting. According to the same authors, most solitary bee species have a smaller foraging range and higher crop fidelity than honey bees. In the USEPA assessment, true cereal crops (for example) are deemed not to be attractive to honey bees and therefore to carry no risk. However, this ignores the possibility of arable weeds in flower in the crop, as well as movement of residues away from treated areas, either through dust drift or runoff. This off-site movement is reviewed in section 4.5 below. By excluding any consideration of crops deemed not to be attractive to honey bees, or crops harvested before flowering, USEPA seriously underestimates potential impacts to both honey bees, and wild bee species.

4.4.1.3. The USEPA risk assessment for individual honey bees is inadequate for wild bee species

To assess the risk to honey bees, the USEPA assessment uses the endpoints summarized in Table 15.

Table 15. Toxicity endpoints used in the USEPA assessment—said to be the lowest endpoints for which raw data were available to allow independent statistical verification—modified from Table 1-2 in USEPA (2020d) and 1.3 in USEPA (2020e).^a

Study type	Assessment endpoint	Clothianidin	Imidacloprid	Thiamethoxam
Adult acute contact	96-hour LD ₅₀ µg a.i./bee	0.0275	0.043	0.021
Adult acute oral	48-hour LD ₅₀ µg a.i./bee	0.0037	0.0039	0.0038
Adult chronic (10-day) oral	NOAEL/LOAEL (effect) µg a.i./bee/day	0.00036/0.00072 (12% mortality)	0.0011/0.0018 (food consumption)	0.0025/0.0049 (70% mortality)
Larval chronic repeat dosing (21-day)	NOAEL/LOAEL µg a.i./larva	N/A	0.0018/>0.0018	0.0037/0.0066
Colony feeding study (Spiked sucrose concentration)	NOAEC/LOAEC (ng/g)	19/36	23/47	44/82 ^b

a Values for clothianidin and thiamethoxam are expressed as clothianidin-equivalents (thiamethoxam values being corrected based on the ratio of their molecular weights).

b When assessing risk to honey bee colonies from thiamethoxam, USEPA uses the lower clothianidin values of 19 NOAEC and 36 LOAEC in acknowledgment of the fact that thiamethoxam is transformed to clothianidin in crop plants and in the environment.

For reasons mentioned above, it is appropriate to consider which endpoint should be used in the first tier of the risk assessment, which considers risk to individual foraging bees.¹⁶ In its “refined Tier 1 assessment” (i.e., assessment of risk to individual bees based on measured pollen and nectar residue levels) USEPA assessment computes risk estimates for both acute and chronic exposure scenarios. For a seed treatment use and given the duration of flowering in most crops, it could easily be argued that the chronic (10-day) toxicity test is much more relevant ecologically, especially in the case of bee species with a more limited range.

Because of the contamination of both nectar and pollen, the oral toxicity endpoints are arguably the most relevant for looking at potential effects from seed treatments, once the initial “dust deposition” (see below) has passed. The oral toxicity of all three active ingredients is shown to be virtually identical in the 48-hour adult oral test. Given the variability in test results seen for any given active ingredient (discussed above), this similarity is quite remarkable. However, the lack of a consistent ratio between the 48-hour values and the 10-day values among the different pesticides may have to do more with the vagaries of

16 It has been argued above that this endpoint should be 10X below that established for honey bees in order to cover all bee species, but we will leave this line of argumentation aside for now.

testing (test conditions, bee race and provenance, bee age, etc.) than with any real toxicological or pharmacological difference between the active ingredients. As reviewed by Sanchez-Bayo and Tennekes (2020), both clothianidin and thiamethoxam show a similar relationship between toxicity and exposure time in honey bees. Because of the negligible amount of metabolism, toxicity is effectively cumulative, so the clothianidin chronic results are exactly in line with what one would expect—the lethal dose per day over a 10-day period is approximately one-tenth the one-time lethal dose. Thus, EPA’s thiamethoxam chronic oral value (see Table 15 above), being almost the same as the one-time oral dose value, is the aberrant one and not credible.

Accepting for the time being that 0.00036 µg/bee is a more ecologically realistic endpoint for the toxicity of the nitroguanidine neonics, we can back-calculate the nectar concentration needed to deliver this dose to a foraging bee over a 10-day period. Deriving “acceptable” or “limit” concentration levels in nectar and pollen is a direct way of relating measured contamination levels resulting from the use of seed treatments to a harmful or fatal outcome and will be useful in considering measured nectar and pollen concentrations below. This is no different than the USEPA approach of providing “risk quotients,” a ratio of measured exposure to toxicity, but will allow us to unpack this ratio and look specifically at the assumptions the USEPA uses to derive expected nectar and pollen concentrations.

Using the consumption rate of 292 mg nectar per foraging bee/day provided by the USEPA assessment¹⁷ allows the calculation of a “limit” concentration considered safe to honey bees if the bee is going to forage on the treated crop for 10 days:

$$0.00036 \text{ ug a.i./bee} = \text{“limit” nectar concentration (ug a.i./mg nectar)} \times 292 \text{ mg nectar/bee}$$

$$\text{Limit nectar concentration (ug a.i./mg nectar)} = 0.00036 \text{ ug/bee} / 292 \text{ mg nectar/bee}$$

Therefore, this limit nectar concentration would be equal to 0.00000123 ug a.i./mg nectar or 1.23 ng a.i./g nectar. A review of expected nectar residue concentration levels in treated crops and surrounding habitat following the use of seed treatments (below) confirms the high lethal risk to individual foraging bees—whether *Apis* or non-*Apis*.

In addition, many papers have examined neonics’ sub-lethal effects on bee learning, reproduction, immune function etc. (see partial review in Hopwood et al. 2016). These sub-lethal endpoints are critical for assessing risk to wild bee species, whether solitary bees or even colonial ones given their smaller size and lack of “buffering,” which a honey bee colony with tens of thousands of individuals enjoys. The 1.23 ng a.i./g nectar value computed above only refers to lethal effects on half of the population and is therefore not fully protective.

4.4.1.3. The USEPA higher-tiered risk assessments for hive effects do not apply to other colonial wild bee species

The USEPA assessment proposes that drone honey bees represent a worst case with respect to pollen ingestion by bees and equates this value with consumption by nurse bees. This value is given as 3.6 mg/day.¹⁸ However, in their guidance document (EFSA 2013) European regulators point out that pollen ingestion ranges between 26.6 and 30.3 mg/bee/day for bumble bees; and 10.2 mg/bee/day for solitary bees—in other words, roughly 2.5 to 8 times more than USEPA’s “worst case.” Clearly, non-*Apis* bees may consume much more pollen than honey bees, making the USEPA assessment an almost certain underestimate if applied to wild colony-forming bees. Even for honey bees, other authors have used pollen ingestion values in their risk assessments that are much higher than that proposed in the USEPA assessment (e.g., 9.5 mg/bee/day in Stoner and Eitzer 2013).

If we were to use the midpoint value for bumble bee ingestion (28.45 mg/bee/day), and ignoring that bumble bees appear to be more sensitive than honey bees to clothianidin or thiamethoxam by the oral route, the calculation equivalent to the above for nectar returns a “limit” pollen value of 12.7 ng a.i./g pollen, clearly much lower than the 97.5 - 372 ng/g NOAEC pollen values derived from honey bee colony studies (Table 14).

The USEPA assessment does concede (2020d; section 6.3.2.2) that several studies in the open literature indicate risk to bumble bee colonies at concentrations of imidacloprid much lower than those known to affect honey bee hives. Indeed, at least four studies reviewed by USEPA documented significant colony effects at exposure levels of 10 ng/g, and one study documented

17 E.g., Table 4.12 in USEPA 2020d. Although we will accept EPA’s value for now, it should be noted that this value is not a worst-case scenario. According to the compilation of EFSA (2012, 2013), sugar requirements in a forager can be as high as 128 mg sugar/day. Given nectar concentrations that range between 15% and 30%, this means that nectar ingestion could be as high as 427-853 mg nectar/day. Note that the USEPA in their guidance (EPA/PMRA/CaDPR 2014) use the “least protective” value of 30% sugar concentration in nectar.

18 The USEPA assessment compares colony effects to a combined nectar/pollen exposure calculated as the sum of the nectar concentration plus the pollen concentration divided by 20 given their estimation that honey bees consume 20X more nectar than pollen.

effects at exposure levels as low as 0.7-1.4 ng/g. These exposure levels are much lower than the 19 - 23 ng/g colony effect levels derived for honey bees. Similarly, USEPA (2020e; pp. 97-98) reviewed studies documenting effects of clothianidin and thiamethoxam on bumble bee colonies, including Sandroock et al. (2014). That study found that syrup concentrations of 0.45 ng/g of clothianidin or 2.87 ng/g of thiamethoxam significantly decreased reproduction (50% decline) and modified sex ratio in the red mason bee (*Osmia bicornis*). Although the entire experiment ran for 35 days, the treated colonies started diverging from control approximately 6-7 days after the beginning of dosing—less than the 10-day period used in the chronic toxicity assessments. These effect levels are 7-42 times below the 19 ng/g concentration used by USEPA (2020e) (see Table 15).¹⁹

Despite the highly congruent nature of these findings, USEPA dismissed all these studies as unsuitable for “quantitative use in the risk assessment,” in large part because none of the authors analytically verified the concentration of their dosing solutions (USEPA 2020d; Table 5-13). This effectively ensured that only industry studies on honey bees were used in the final risk assessment. Although analytical confirmation of residues in the non-industry studies would have been desirable, it is difficult to believe that all of the researchers similarly erred and grossly miscalculated dosing levels. Verification of dosing levels is especially critical when there is the possibility that the active ingredient will degrade over time in the dosing solutions. Here, any degradation would mean that effect levels would effectively be *lower* than those reported. Given this, the number of colony studies and their congruent results, and that the effect levels are in line with chronic toxicity estimates from pollen ingestion as shown above, to have excluded the entire corpus of independent effect studies was not justified and resulted in USEPA almost certainly underestimating colony risk to bumble bees.

In addition, this exclusion of independent studies must be weighed against a possible bias in studies sponsored by pesticide registrants for the purposes of gaining regulatory approval of pesticides (e.g., Boone et al. 2014; Bero et al. 2016; Mie et al 2018; Sheppard et al 2020).

4.4.2. The USEPA assessment underestimates nectar and pollen contamination that results from the use of seed treatments

The USEPA assessment estimates the expected nectar and pollen neonic residues in certain crops planted with neonic-treated seed, but the scope of these estimates is limited and underestimates the likely real world residue levels.

In the USEPA assessment, residue values varied considerably between the few crops that were studied. Unfortunately, residue levels have not been established for the vast majority of crops where the products are registered. This is an unacceptable situation from a regulatory perspective. Submission of residue data should have been made a condition of registration.

Where information for a specific crop is lacking, USEPA recommends using the combined individual study data for all crops. For pollen, the sheer number of studies clearly gives a strong weighting to corn, which, incidentally, has the lowest pollen residue values of all crops studied to date. Soybean and cotton represent most of the data for nectar. Of the few crops studied, canola (oilseed rape) had the highest pollen and nectar residue values once normalized by application rate per seed (Table 15; Appendix 6), but these values are overshadowed by the other field crop data. A more precautionary (and I believe appropriate) approach to that proposed in the USEPA assessment would have been to take the crop with the higher pollen and nectar residues as a surrogate for those crops without residue information—or at least give equal weighting to the different crops studied rather than treating each study as an independent sample, which clearly they are not. Indeed, using canola as the surrogate for crops without residue information would still likely fail to capture the greatest risk. Given that only 4 crops have been studied (3 for pollen), it is likely that several crops for which neonics are registered will indeed show higher residues in nectar and pollen than the current maxima generated in canola.

In an earlier compilation, the European Food Safety Authority (EFSA 2013) had already arrived at higher values (Table 16), likely due to consideration of more oilseed rape studies as well as a few sunflower studies.²⁰ However, that compilation appeared to combine all values together without regard to individual study means or maximum values as done in the USEPA assessment and is therefore not as robust.

19 Although the NOAEC for thiamethoxam is 44 ng/g (Table 15), USEPA correctly uses the lower value of 19 ng/g for clothianidin because thiamethoxam breaks down to clothianidin within crop plants.

20 It is also clear that some studies showing higher corn pollen levels were omitted from the USEPA assessment. For example, Bonmatin (2005) recorded maximum corn pollen levels of 18 ng a.i./g with seed treated at 77% of the currently allowable treatment.

Table 16. Summary of expected pollen and nectar concentrations in crops planted with neonic-treated seeds. Data for the USEPA 2020 assessment is shown in Appendix 6.

Matrix	90 th percentile concentration (ng a.i./g) normalized to 0.1 mg a.i./seed				
	USEPA 2020 all crop study means	USEPA 2020 all crop study maxima	EFSA 2013 individual values	USEPA 2020 canola only mean	USEPA 2020 canola only maximum
Pollen	1.8	3.2	4.2	32.7	43.3
Nectar	4.5	7.6	7.7	8.0	11.3

USEPA’s overreliance on corn pollen values and soybean/cotton nectar values is clearly consequential and results in risks from seed treatments often being downplayed. Table 17 compares the USEPA-estimated pollen and nectar concentrations with those derived from the precautionary assumption that any given crop might be more “canola-like” than “corn-like” or “soybean-like.” The newly estimated pollen levels alone clearly place bumble bee individuals and colonies at extreme risk in a number of crops.²¹

As shown in Table 17, the precautionary approach of taking the crop with the higher pollen and nectar residues as a surrogate for those crops without residue information would show the risk to be more than an order of magnitude higher for pollen ingestion; about double for nectar ingestion.

Table 17. Comparison of average nectar and pollen concentration estimates between the USEPA assessment approach (i.e., taking the average of all studies heavily weighted to a few crops) versus an alternative approach that supposes crops will develop flower residues more in line with canola.

Crop	Concentration per seed (mg)	Active ingredient	USEPA predicted mean pollen concentration based on data for all crops heavily weighted to corn (ng/g)	Predicted mean pollen concentration if plant is more “canola-like” (ng/g)	USEPA predicted mean nectar concentration based on data for all crops heavily weighted to soybean and cotton (ng/g)	Predicted mean nectar concentration if plant is more “canola-like” (ng/g)
cucurbits	0.750	thiamethoxam	13.5	245	33.75	60
carrot	0.120	clothianidin	2.16	39.2	5.4	9.6
safflower	0.50	imidacloprid	9.0	163	22.5	40
sugar beet	0.720	clothianidin	12.96	235	32.4	57.6

a The mean value given is the 90th higher percentile of means obtained from each study. This is the value recommended to test against a chronic (10-day) exposure for foraging bees.

In the USEPA assessment, any risk quotient which showed a possible effect for any given crop led to a Tier 2 assessment where honey bee colony health and survival became the endpoint. This resulted in all risks to bees from seed treatments being dismissed or considered to be low, often being above an individual NOAEL, but below the defined colony LOAEL. While this method already likely underestimates risks to solitary bee species, it also is clearly questionable for colony forming species, given the weakness of USEPA’s underlying assumptions about potential exposure levels.

It should be noted also that the dismissal of risk can be at odds with the available evidence. For example, soybeans were said to represent no risk when applied as a foliar spray and carry the “weakest evidence of risk” as a seed treatment—yet USEPA acknowledges three possible or probable bee kill incidents reported in that crop (USEPA 2020d; Table 6-32).

21 Compare estimated pollen levels of 100 or 200+ ng/g in Table 17 with the 10-day limit lethal concentration of 12.7 ng/g calculated above or the many excluded bumblebee studies showing colony effects at 10 ng/g.

4.4.3. The USEPA assessment ignores critical exposure routes

The USEPA assessment fundamentally considers only two routes of exposure: Direct contact with insecticide droplets at the time of application (foliar application) as well as the consumption of nectar and pollen containing neonic residues in target crop plants. This greatly underestimates the actual neonic exposures bees and other pollinators are likely to face from many exposure routes under real world conditions.

Pollinator assessment schemes (e.g., EPA/PMRA/CaDPR 2014, EFSA 2013) have discussed the need to consider other routes of exposure such as neonic dust produced by the planting of neonic-treated seeds, plant guttation fluids, and surface water (including puddles potentially used as drinking water—particularly relevant in California’s predominantly arid and irrigation-dependent agricultural environment). Other possible routes include honey dew, soil (for ground-nesting bees) and leaves (leaf-cutting bees). Several of those routes of exposure have already been built into risk calculators for bees (e.g., Mineau 2014). Some of the literature review carried out in the context of this indicator is reproduced here.

4.4.4.1. Dust as a route of exposure

Dust production from the abraded seed treatments during planting is known to be an important source of neonic exposure. Many kills of honey bee colonies have been reported from this route of exposure in Europe as well as North America. However, the USEPA assessment only acknowledges, but does not include, this route of exposure in its calculation of risk.

Other researchers have attempted to quantify this risk. For example, Tapparo et al. (2012) conducted experiments where individual bees trying to reach a food source were captured after flying over a corn field during planting (the entire test running for 1h). These authors measured amounts of 0.078-1.240 µg/bee (N=5, mean=0.570 µg/bee) for clothianidin at 1.25 mg a.i./seed and 0.128-0.302 µg/bee (N=4, mean=0.189 µg/bee) for thiamethoxam at 1 mg a.i. /seed. The same authors reported maximum concentrations of 3.65 µg/bee (approximately 36.5 ppm) obtained in previous work with imidacloprid-treated seed. After a few hours and normal activities in the hive, residues had dropped by an order of magnitude; the bulk of the insecticide-laden dust on bee surfaces was thought to have been taken back to the hive but dislodged through normal hive activities. With potentially thousands of foragers returning to a hive, large quantities of insecticide can thus be transferred efficiently to the hive environment.

Krupke et al. (2012) analyzed samples of honey bees from kills associated with the planting of treated maize seed. Clothianidin levels in dead and dying bees were much lower than in the Tapparo et al. (2012) study, ranging from 0.0038 to 0.013 ppm. Bees die from a number of causes not associated with insecticide exposure; Tapparo et al. (2012) also mentioned that dead bees sampled in the hive after sowing showed no exposure or at least had residue levels that were below detection limits.

From a “residue per unit dose” point of view, it appears that seeding results in higher contamination of insects than an equivalent spray application (Mineau and Callaghan 2018), but due to the lower per acre rates of application for seed treatments, neonic concentrations available to pollinators are still lower than following a typical foliar application. The USEPA assessment relies on a single study by Koch and Weisser (1997) to estimate the amount of residues bees would accumulate while flying through a cloud of spray droplets. Yet, they ignore very similar data produced by Tapparo et al. (2012) and others for bees flying through dust generated at seeding.

Mitigation strategies for minimizing the impact of abraded seed dust are not fully implemented or fully effective. In North America, it is customary for farmers to use talc or graphite as lubricants in their seeding machinery (e.g., Krupke et al. 2012). Canada has banned the use of these seed lubricants on the grounds that they may cause more abrasion and loss of pesticide (Health Canada/OMAFRA 2014). Since 2014, any lubricant used in Canada is mandated to be a patented lubricant marketed by Bayer, which, according to the manufacturer, reduces the amount of clothianidin contamination at seeding (Bayer 2020). However, the use of a lubricant is not mandatory. Moreover, it has been shown that the efficacy of lubricants at reducing insecticide dust has probably been exaggerated (Schaafsma et al. 2017) because of deficiencies in the test protocols, namely the fact that soil dust in the incoming airstream greatly increases the abrasion of the pesticide from the seeds.

Another seed dust mitigation strategy consists of using deflectors which redirects the flow of air from the seeder towards the ground. This reduces, but does not eliminate, dust drift (see below). In a ground-breaking Canadian study (Tsvetkov et al. 2017) following Canada’s regulations mandating low-fluency agents, in-hive contamination levels were still sufficiently high to negatively impact colony health (see Section 3.3).

Dust produced at seeding has given rise to visible mortality. To date, seed treatment and soil uses (not foliar uses) comprise the bulk of imidacloprid bee-mortality incidents reported to USEPA (USEPA 2020f). Yet, both the USEPA and CaDPR

maintain that they are working with different stakeholders to identify best management practices (of the type already found to be inadequate in Canada) and to promote some sort of as-yet unidentified technological fix to the problem. Schaafsma et al. (2017) indicated that several corrective actions would be needed to adequately reduce abraded seed exhaust from air seeders; both intake and exhaust air supplies from air seeders need to be scrubbed and seed polymer coatings need to be improved. At this point in time, neither USEPA nor CaDPR appear inclined to adopt enforceable regulations to reduce seed dust, and the cost of technology-based solutions will likely discourage widespread adoption anytime in the near future. While beekeepers are now aware of this risk and move their honey bee hives to avoid seeding time, this does nothing to protect wild bees from the impact.

In Europe, risk assessments take dust production at seeding into account. As early as 2013, EFSA had proposed deposition rates associated with various types of application. EFSA also examined the efficacy of some of the “best management practices” likely to be proposed eventually by USEPA—e.g., deflectors that direct the dust towards the ground to reduce exposure to flying insects (see Table 18). For example, without deflectors, the amount of dust drift in field margins during corn seeding is deemed to be 17% of the applied field rate, very much of similar magnitude as drift documented from high drift foliar application scenarios, such as fruit tree spray applications. This estimate, however, is likely a worst-case scenario recommended for risk assessment purposes; the exact rate is highly variable and dependent on a multitude of factors starting with the seeding equipment (Xue et al. 2015). Regardless, dust production at seeding can be incorporated into an assessment of risks to bees—albeit with some assumptions as to realistically possible and enforceable improvements in seeding technology.

Table 18. Default deposition percentages for dust drift into field margins to be used for the different combinations of application technique and types of plants. From EFSA (2013; Appendix H).

Application type	Crop type	For purpose of measuring concentrations in nectar and pollen (% of application rate)	For purpose of contact exposure assessment (% of application rate)
Spray applications (spray drift)	Field crops	0.92	2.8
	Early fruit	9.7	29.2
	Late fruit	5.2	15.7
	Early grapevine	0.9	2.7
	Late grapevine	2.7	8
	Hops	6.4	19.3
Seed treatments (dust drift)	Maize with deflector	0.56	1.7
	Maize without deflector	5.6	17
	Oil seed rape with deflector	0.22	0.66
	Oil seed rape without deflector	2.2	6.6
	Cereals with deflector	0.33	0.99
	Cereals without deflector	3.3	9.9
	Sugar beets with deflector	0.001	0.003
	Sugar beets without deflector	0.01	0.03
Granule applications (dust drift)	All crops	3.2	9.6

There is a clear parallel between EPA, PMRA, and CaDPR’s collective failure to adequately assess the risk from seed treatment uses of neonics and their decision to exempt pesticide-treated seeds from tracking or regulation.

4.4.4.2. Surface water as a route of exposure

The USEPA assessment determined *a priori* that risk from surface water ingestion was a minor route of exposure for bees (e.g., Fig. 2-3 in EPA 2020d), and therefore excluded exposures to neonics from water contact or consumption in its calculation of risk. Yet, in the context of California's arid climate where irrigation is often critical to crops, irrigation water and puddles or other available surface waters are likely critical sources of water for many insect species, including non-*Apis* bees.

Water needs in bees are expected to be quite variable and thought to be dependent on temperature and local nectar yields. Most of the research on this subject has been carried out in the honey bee. A low availability of nectar means that water needs to be obtained from extraneous sources rather than from nectar alone (Kühnholtz and Seeley 1997). This suggests that extraneous water needs might be higher in intensively farmed landscapes with low nectar yields dominated by corn or other field crops. Regardless, water needs in spring and early summer are typically large, in part to dilute winter stores (Butler 1940). At one of their study sites, Kühnholtz and Seeley (1997) noted that the bees favored the muddy wet ground on the edge of a pond for water collecting. Mineau and Kegley (2014) reported on the observation that bees appeared to prefer wet muddy ground to a nearby pond. It has been known for a long time (e.g., Butler 1940) that bees are often attracted to "unsanitary" sources of water, such as rainwater gutters choked with organic debris, sewage effluents, or puddles on top of cow dung in preference to clean water supplies provided for their use. Butler (1940) was able to confirm that bees preferred some concentrations of sodium and ammonium chloride to distilled water. However, dilute organic solutions (leaf debris, manure, and urine) proved more popular still. In the context of an agricultural field, this raises interesting questions. For example, the attractiveness of water puddles may vary depending on the use of fertilizers (both natural or synthetic) and possibly even some pesticides (especially dissociated ionic compounds). Finally, Visscher et al. (1996) reviewed older evidence that water-collecting bees took heavier loads of water when the water was warm; any source of water in fields is likely to heat up faster than deeper bodies of water when exposed to the sun. These authors calculated that a water collecting bee is restricted to obtaining water within a 2.1 km radius of the hive based on energetics—compared to the 13.5 km that has been observed for nectar foragers.

Taken as a whole, these findings suggest that bees will seek out puddles in and around farm fields as a water source, particularly in the spring planting time. Considerable neonic levels have been detected in these kinds of puddles—likely due to the use of neonic-treated seeds. Samson-Robert et al. (2014) measured the concentration of pesticides in rain puddles at seeding (while planting was still in progress) and one month after seeding in corn. The puddles were large ones—described as 1.5-3 sq. m in size and between 4-6 cm in depth. No field spiking (adding a known quantity of pesticide to the samples to ensure no breakdown or loss in transit) was carried out, so reported values should be considered minimum values. Based on two years of sampling, all water samples taken from corn fields contained residues of either clothianidin or thiamethoxam; 83% of samples contained both. Several other pesticides were also detected, but, in samples taken one month after seeding, only clothianidin, thiamethoxam and the fungicide azoxystrobin were still found at levels exceeding the level of quantification (1 ppb). Levels were higher immediately after seeding, suggesting that dust production during seeding might be an important pathway by which puddles became contaminated. For clothianidin, mean and maximum concentrations were 4.6 and 56 ng/g; for thiamethoxam, 7.7 and 63 ng/g. These values are in the range of expected nectar residues documented above. Clearly any use of in-field water by bees will add substantially to their overall exposure.

EFSA (2013) in their pollinator guidance, recommended using a water consumption figure of 11.4 µL/day per foraging bee or 111 µL/day per larva, but did not provide further justification for those figures other than to mention they were at the high end of values obtained from the literature. The USEPA/PMRA/CaDPR guidance (2014) looked at two estimates of water consumption rates in honey bees. One of those estimates (450-1800 µL/day) was based on direct observations and calculations from water forager bees. References were supplied to show that between 30-60 µL were collected per foraging trip (e.g., see the work of Visscher et al. 1996) and that 30% of all water collected was consumed by the bee. However, because these estimates relate to water foragers and not to other worker bees, and because the estimates work out to a very high (5-20X) turnover of body water, USEPA favored another estimate, this one based on water flux in a similarly-sized species, the brown paper wasp. Indeed, their analysis concluded that, depending on conditions and food supply, bee food (i.e., nectar, honey) represents between 7—>100% of daily water needs. USEPA thus arrived at a maximum water consumption estimate of 47 µL/day, which the agency recommended for risk assessment purposes; yet, 8 years later, USEPA still does not factor water intake into its calculation of risk.

The possibility of exposure through water is made more complicated by the fact that pesticides can be absorbed from the bee's foregut; i.e., by water foragers bringing water back to the hive, rather than drinking it for their own water needs (Conner et al. 1978). Absorption was found to be highest at low sucrose concentrations—i.e., the situation in a water forager vs. the usual test situation in oral toxicity tests. It is known also that worker bees do collect water to cool the hive. This may not be equivalent to drinking exposure, but does undoubtedly lead to difficult-to-measure exposure.

4.4.4.3. Guttation water as a route of exposure

The USEPA assessment (e.g., Fig. 2-3 in EPA 2020d) also determined *a priori* that risk from consumption of neonic-contaminated guttation fluids (the excretion of excess water or nutrients through small openings on a plant’s leaves or stems) was minor, likewise excluding it from the risk calculation. However, research on the high concentration of neonics in the guttation fluid of treated crop plants indicates that these fluids, if consumed, would constitute a highly significant exposure route.

Several researchers have documented concentrations of various neonics in guttation water following their use as seed treatments in corn (Table 19). They reported that, on corn plants, experimenters were able to reliably and easily collect guttation droplets for at least three weeks after seeding under field conditions. Unlike what had been suggested in the literature, and assumed by regulatory authorities regarding this exposure route, they found that the phenomenon was not restricted to situations of high soil moisture and high humidity; moreover, droplets tended to pool in the leaf whorl of the developing plant. Only evaporation reduced the availability of droplets; however, the researchers proposed that concentrations could increase over time following repeated drying and droplet formation cycles.

Table 19. Measured concentrations of neonicotinoids and fipronil in guttation water from seed-treated corn.

Active ingredient	Rate of a.i. per seed (mg)	Concentration (mg/L) Mean (SE) or range (days 1-6 after germination)	Concentration (mg/L) reported maxima	Concentration normalized to 0.1 mg/seed (ng a.i./g)	Reference
imidacloprid	0.5 (field)	47 (9.96)	>200	9,400	Girolami et al. 2009
imidacloprid	0.5 (pots)	82.8 (14.07)		16,600	Girolami et al. 2009
imidacloprid	1.25	103-346 (leaf tip)	346	8,200-27,700	Tapparo et al. 2011
imidacloprid	1.25	8.2-120 (whorl)	120	660-9,600	Tapparo et al. 2011
clothianidin	1.25	23.3 (4.2)	>100	1,900	Girolami et al. 2009
clothianidin	1.25	76-102 (leaf tip)	102	6,100-8,200	Tapparo et al. 2011
clothianidin	1.25	7.3-47 (whorl)	47	580-3,800	Tapparo et al. 2011
clothianidin	1.25	7.5 - 8		600-640	Reetz et al. 2011
thiamethoxam	1	12 (3.3)	>100	1,200	Girolami et al. 2009
thiamethoxam	1	16-41 (leaf tip)	41	1,600-4,100	Tapparo et al. 2011
thiamethoxam	1	2.9-26	26	290-2,600	Tapparo et al. 2011

Comparison between these values and those predicted in nectar and pollen shows that the neonic concentrations in guttation droplets are typically two to three orders of magnitude higher. Accordingly, consumption of even a small amount of this water would dramatically change the risk picture for pollinators.

In its proposed problem formulation for pollinator risk assessments, USEPA (2012) downplays pollinator exposure risks from drinking neonic-contaminated water because: (1) some of those sources such as dew, puddles, or guttation droplets are not always present and ephemeral when present; and (2) the majority of foraging bees are expected to obtain most of their water needs through nectar. However, USEPA acknowledges that, if water was indeed to be obtained through puddles or guttation fluids, these routes of exposure would dwarf other routes of exposure such as direct sprays or dietary exposure through nectar or pollen. Regardless, USEPA/PMRA/CDPR (2014), in their final guidance document, opted not to include risks from exposure to neonics from drinking water, including guttation fluids.

In contrast, EFSA (2013) recommended that guttation water be included in the first tier of assessment, but that there also be an assessment of the likelihood of guttation droplet formation based on location conditions and calendar date.

I concur with EFSA (2013) and Blacquière et al. (2012) that prudence requires that drinking water routes of exposure be considered, at least until more information is obtained on their real world importance. This should be done not just for honey bees, but other bee species as well. The USEPA and CaDPR risk assessments are likely dramatically underestimating true risks to pollinators if potential neonic exposures from water sources, like guttation fluid, are excluded.

4.5. Risks and impacts to pollinators from neonic-treated seeds are not restricted to the crop area

Despite their recent analysis of risk for pollinators, both USEPA and CaDPR fail to accurately account for risks from neonic-treated seeds and, arguably, underestimate risks from neonics more generally. Failure to characterize the risk from seed treatments is a huge oversight given the potentially large area where treated seeds are planted, notwithstanding that higher risk may result from other application methods—notably, foliar and ground sprays.

Initially, the USEPA and CaDPR assessments incorrectly assume that neonic active ingredients on treated seeds remain restricted to the field area. As such, the assessment excludes crops that are not attractive to pollinators or that are harvested before flowering; in doing so, the assessments fail to consider the movement of residues off site—whether through dust, runoff, or windblown soil—into the pollen and nectar of adjacent wildflowers. This movement, however, is well documented. For example, Stewart et al. (2014) looked at seed treatments in corn, cotton, and soybean. They found evidence of contamination of wildflowers situated 20m on average from seeded fields. Residues were detected in a quarter of wildflower samples and, when detected, averaged 10 ng/g. This is about 10X the limit concentration calculated above as causing mortality in honey bees after 10 days of feeding. Rundlöf et al. (2015) similarly documented clothianidin in pollen and nectar in wild plants in the edges of oilseed rape sowed with a seed treatment containing clothianidin. Botias et al. (2016) documented significant contamination of wildflowers in field edges near oilseed rape fields, which had an average residue level of 14.8 ng/g of thiamethoxam, while the canola flowers in the treated field had an average residue level of 3.26 ng/g. Higher levels still were recorded on the foliage of wild plants in the margins; and, similarly, at greater levels than in crop foliage (Botias et al. 2016). Long and Krupke (2016) likewise found that pollen originating from a large number of non-crop plants in field borders was contaminated with a multitude of pesticides, not all from the adjoining crop. Finally, Bredeson and Lundgren (2019) found high residues in cover crops inter-seeded with corn; which is perhaps ironic given that the practice is intended in part to promote beneficial insect communities.

4.6. Harmful impacts from neonic-treated seeds have already been demonstrated

Importantly, the risks and harms posed by the use of neonic-treated seeds are not purely theoretical. Studies have shown adverse impacts at the levels of neonic contamination documented following seed treatment uses.

Tsetkov et al. (2017)—published in the prestigious journal “Science”—showed that bee food stores were heavily contaminated with clothianidin or thiamethoxam when hives were placed near corn fields having used those seed treatments. They then carried out a controlled exposure study that showed that measured levels of contamination were sufficient to negatively affect colony health. Indeed, their chosen levels of dosing (4.9 ng/g initially, declining to 2.0 ng/g of clothianidin on pollen patties) were below the measurements of actual hive exposures. These levels are also a fraction of the levels considered to be safe based on the industry studies used in the CaDPR and USEPA assessment (16 ng/g for a total nectar and pollen blended exposure; 372 ng/g for pollen alone). What also makes the Tsetkov et al. study particularly compelling is that the statistical analysis was performed under blind conditions, and that all of the raw data has been made available from a data depository site. Also, the study took place well after the mandated requirement for better fluency agents in Canada (Health Canada/OMAFRA 2004). It therefore highlights a situation that is already much more protective against neonic exposures to pollinators from abraded seed dust than the current status quo in the United States. In agreement with the work of Botias et al. (2015) and Long and Krupke (2016), the bulk of pollen stores were from non-crop plants. There is no indication that this study was considered in the 2020 USEPA assessment, despite its 2017 publication date. Several industry-submitted studies, however, with much higher effect levels, were considered.

Further, while it is typically difficult to tease out the effect of a specific stressor in ecological field studies, this has been done in several cases with neonic seed treatments.

Gilburn et al. (2015) noted a strong association between an increase in the area of oilseed rape (canola) treated with neonic seed treatments and significant decreases in population counts for 17 species of butterflies in the United Kingdom (UK). Like the analysis of Hallman et al. (2014) for insectivorous birds, Gilburn et al. were able to show that, prior to the introduction of neonics (1985-1998), butterfly numbers were actually increasing in those same areas making it less likely that butterfly numbers were simply reflective of intensive cropping.

Also in the UK, Woodcock et al. (2016) found that distribution data for 62 wild bee species showed an increase in the probability of local population extinction rates in areas of oilseed rape seeded with neonics. The most affected species were those foraging in the crop (it is useful at this point to recall that the USEPA assessment considers risk from canola to be low). Importantly, Woodcock et al. (2016) also showed that the use of foliar insecticides did not appear to have an effect on bee extinction probability, however, several best management practices implemented in English farming systems specifically to protect pollinators may have helped reduce the impact of sprays.

In California, Forister et al. (2016), working on four different long-term monitoring sites, were able to associate butterfly declines to neonic use measured on a county basis. The authors were able to remove the effects of other insecticides as well to isolate the effect of neonic use; however, their pesticide data came from the PUR which means that seed treatments were not included in their pesticide use estimates.

Rundlöf et al. 2015 found that oilseed rape seed treatments containing both clothianidin and the pyrethroid beta cyfluthrin affected both bumble bees (*Bombus terrestris*) and the solitary bee *Osmia bicornis* in field borders of Swedish farms. Because beta-cyfluthrin is not systemic and tightly bound to soil, the authors surmised that the impacts they were seeing were primarily from the clothianidin component.

A recent study (Main et al. 2020) looked at native bee diversity in and around corn or soybean in rotation treated with imidacloprid or clothianidin. Although they found less contamination of flowers in field edges than Botias et al. (2015), they measured lower diversity of wild bees associated with treated fields. Even their untreated fields showed the presence of neonicotinoid residues, although lower and not as frequent. The presence of a diverse wildflower community proved to be the most important factor controlling wild bee abundance—but not diversity.

An industry-funded study in Germany (Peters et al. 2016) failed to find an impact from the same clothianidin & beta-cyfluthrin product examined by Rundlöf et al. (2015), and reported levels of hive contamination were lower. Another industry-funded study (Sterk et al. 2016) similarly did not find any effects from this same seed treatment on bumble bees. Again, the authors commented on the fact that levels of contamination in their study were lower than in non-industry studies. This suggests that there were more alternative resources available for the bees in the German industry studies. Ultimately, it appears that whether or not bees have access to a large quantity of clean floral resources well away from neonic-treated fields or whether they are more restricted to feeding within immediate field borders greatly affects risk. The greater risk associated with floral resources in or near treated fields, however, appears driven by the use of neonic-treated seeds as well as foliar and soil applications.

4.7. Conclusions of the pollinator assessment

In summary, the CaDPR and USEPA assessments greatly underestimate the risks to pollinators from the use of nitroguanadine-neonic-treated seeds. In particular, the assessments: (1) underestimate risks to wild bee species and other pollinators by relying on honey bee colony survival as a proxy for overall pollinator health; (2) underestimate nectar and pollen contamination levels following the use of neonic-treated seeds by assuming that the majority of crop species will have residue values at the low end of the measured spectrum; (3) ignore risks of dust from neonic-treated seeds at planting, despite ample evidence that this route of exposure is highly relevant; (4) ignore exposures of bees and other pollinators to neonic contaminated water—including, guttation fluid and puddles in or near fields sown with neonic-treated seeds—despite existing field estimates that show that these routes of exposure can completely dwarf the routes that have been formally assessed; and (5) ignore risks from neonic uses on crops deemed unattractive to honey bees, despite evidence that neonic residues migrate into adjoining areas, including adjacent wildflowers that can exceed levels in the field proper; (6) exclude available peer-reviewed literature from quantitative risk assessment in favor of industry studies; and (7) ignore the growing amount of field data which now links the use of neonic-treated seeds to pollinator failure on a landscape scale. The USEPA and CaDPR therefore fail to appreciate and acknowledge the likely considerable and damaging effect that neonic-treated seeds are having on California's pollinator populations.

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APPENDIX 1. DATA STANDARDIZATION PROCEDURES TO BUILD AN ESTIMATE OF POTENTIAL NEONIC SEED TREATMENT USES IN CALIFORNIA FROM STATE AND USDA SOURCES

- Crop names were standardized and grouped to be consistent among counties.
- For the purpose of identifying areas where seed treatments might have been used, tree fruits, all vine and small fruits, and mushrooms were excluded.
- Areas in range or rangeland were excluded as we assumed no use of seed treatments in these areas.
- Areas in pasture, whether irrigated or not, were assumed to be in permanent pasture, which excluded any possible seed treatment use. This is a critical assumption as it represents a large area—almost 18 million acres according to 2016 county reports—but probably not an unreasonable one given that we can find no registered uses of neonicotinoids on pasture grasses. Seed treatments, however, are registered for cereals and alfalfa.
- Small areas reported as “mixed cereals” (barley, oats, rye, triticale, and wheat) were assumed to be “wheat” for calculation purposes. In fact, rates per seed of the different active ingredients are generally similar for all cereal species.
- Areas recorded as being in stubble post-harvest were counted as mixed cereal.
- Hay and haylage crop areas were separated into alfalfa and cereals (where seed treatments would be allowed) versus other types (grass crops including Sudan grass, ryegrass, timothy, clover, vetch, etc.) for which we have not found any registered seed treatment uses. Based on totals from the combined county statistics, harvested hay crops were divided almost equally between alfalfa, cereals, and other species. Therefore, for those counties where different types of hay crops were combined, we assigned 1/3 of the total acreage to each of these hay subtypes. For the purpose of calculations, cereal hay and haylage were considered to be “oats.”
- Acreages noted to be in “volunteer” hay were excluded, as no seeding was involved.
- Alfalfa seed and hay production were kept separate.
- Wheat and triticale crops were combined, as they were often combined in county reports.
- Sweet potato and yam crops were similarly combined.
- “Vegetable vine crops” were considered to be cucurbits—specifically, “cucumbers” for the purpose of calculations.
- All organic crop acreages were excluded from the tallies.
- Specialty Asian vegetables were usually combined in state statistics. For the purpose of calculating possible seed treatment uses, they were considered to be leafy greens—e.g., bok choy.
- For seed weight and rate calculations, the combined “herb” crop was assumed to be parsley.
- For seed weight and rate calculations, crop acreages reported as “greens” were assumed to be part spinach and part kale.
- “Vegetable seed production” in open fields is usually combined in statistics. Given the wide variety of possible crops and varieties, and for the purpose of calculating seed treatment rates, squash was used as the model crop.
- Asparagus are either direct seeded or started from crowns—in which case, seeds are also used, but in starting beds elsewhere. Both planting scenarios were combined.
- Roughly half of the artichoke crop is seeded annually; the other half of the crop consists of perennial plants (Smith et al. 2008). The reported artichoke areas were therefore divided in half when considering possible seed treatment use.
- It was assumed that only 10% of the California rice crop was available for seed treatment use, the bulk of the crop being water seeded (paddy rice). Neonic seed treatments are not registered for paddy seeding.

APPENDIX 2. TABULATION OF HOW OFTEN EACH CROP OR CROP GROUPING²² APPEARED AS AN APPROVED NEONIC SEED TREATMENT FOR POTENTIAL USE IN CALIFORNIA FROM 106 SEPARATE PESTICIDE LABELS DOWNLOADED IN MARCH 2020

Crop or crop grouping	Acetamiprid	Clothianidin	Imidacloprid	Thiamethoxam	All neonics
alfalfa				1	1
amaranth		3		1	4
arrowroot		2			2
artichoke		1			1
Asian vegetables		1	2	16	19
barley		8	45	7	60
bean		4	42	122	168
borage			13	2	15
broccoli		3		3	6
Brussel sprouts				1	1
buckwheat		6		1	7
cabbage		1	13	1	15
canola	2	6	43	6	57
cardoon				1	1
carrot		2	17	1	20
cassava		1			1
cauliflower				1	1
celery				1	1
chard				1	1
chicory		3		1	4
corn		15	41	9	65
cotton		1	25	4	30
crambe				2	2
cucumber				3	3
endive		3		1	4
fennel				1	1
flax			13	2	15
Edible flowers		10		1	11
ginger		1			1
greens		18	1	11	30
herbs		6		2	8

²² This is a more granular grouping of crops than the legal framework provided by USEPA and recognized by California (Appendix 4.40 CFR 180.41).

Crop or crop grouping	Acetamiprid	Clothianidin	Imidacloprid	Thiamethoxam	All neonics
kale				1	1
kohlrabi				1	1
leek		3			3
lentil			2	6	8
lettuce		13		4	17
lupin			8	8	16
melon				14	14
millet		8	10	2	20
mustard	1		18	4	23
oats		8	35	5	48
onion		6		1	7
pea			30	55	85
peanuts			1	3	4
potato	1	3	10	5	19
pumpkin				1	1
rhubarb				1	1
rice				2	2
rye		6	24	5	35
safflower			11	2	13
sorghum		2	25	2	29
sorrel		3		1	4
soybean		2	28	15	45
spinach		12		3	15
squash				13	13
sugar beet		4	24	1	29
sunflower			5	2	7
sweet corn		3	24	1	28
sweet potato		2			2
taro		1			1
turmeric		1			1
wheat		14	82	16	112
wild rice				1	1

For certain crop groups with many varieties separately mentioned on labels, a high number of tabulated listings may be partly artefactual. For example, the “bean” group includes adzuki bean, wax bean, kidney bean, etc., and the table shows how often “bean” is listed on a label. Similarly, issues may arise with the number of individual specialty crop species amalgamated into larger groups (e.g., greens, herbs, or Asian vegetables). Nevertheless, the tabulation shows the sheer number and diversity of approved seed treatment uses and the incredible penetration of neonics into the agricultural seed treatment business.

APPENDIX 3. COUNTY BY COUNTY COMPARISON OF POTENTIAL SEED TREATMENT USE OF NITROGUANIDINE NEONICS VERSUS THEIR REPORTED USE ACCORDING TO THE PUR SYSTEM

Agricultural region	County	Potential seed treatment use			PUR data			Proportional increase from seed treatments ^b
		CLO ^a lbs a.i.	IMI lbs a.i.	THI lbs a.i.	CLO lbs a.i.	IMI lbs a.i.	THI lbs a.i.	
Central coast	Alameda	12	103	58	0	461	13	1.37
	Contra Costa	846	789	773	69	1,284	48	2.72
	Lake	1	20	11	0	420	0	1.08
	Marin	88	86	98	0	0	0	273
	Monterey	54,146	1,606	53,185	6,538	18,975	10,287	4.04
	Napa	3	7	7	242	1,309	812	1.01
	San Benito	1,132	647	1,847	278	1,633	300	2.64
	San Luis Obispo	1,752	1,349	2,142	143	12,962	642	1.38
	San Mateo	68	76	73	0	73	55	2.70
	Santa Clara	205	188	276	416	572	340	1.50
	Santa Cruz	1,113	22	956	74	493	137	3.97
	Sonoma	129	1,288	584	239	2,723	172	1.64
Northeast	Lassen	138	2,624	1,481	0	0	0	4,240
	Modoc	755	3,177	3,157	0	139	6	50.0
	Plumas	5	48	55	0	0	0	109
Northern coast	Del Norte	3	56	30	0	0	0	90.1
	Humboldt	23	177	111	0	0	0	312
	Mendocino	14	124	80	0	516	8	1.42
Sacramento valley	Butte	102	810	1,935	89	1,060	1	3.48
	Colusa	418	3,892	4,097	5	1,170	2	8.14
	Glenn	1,347	2,625	3,087	2	1,467	0	5.81
	Sacramento	2,568	4,859	3,401	171	10,255	407	2.00
	Solano	805	5,907	2,685	163	1,248	30	7.52
	Sutter	1,093	2,923	3,800	60	749	0	10.7
	Tehama	159	1,458	615	7	101	0	21.8
	Yolo	888	7,724	4,245	32	3,116	150	4.90
Yuba	5	63	687	25	278	0	3.49	

Agricultural region	County	Potential seed treatment use			PUR data			Proportional increase from seed treatments ^b
		CLO ^a lbs a.i.	IMI lbs a.i.	THI lbs a.i.	CLO lbs a.i.	IMI lbs a.i.	THI lbs a.i.	
San Joaquin valley	Fresno	8,749	8,886	12,759	4,193	69,604	6,218	1.38
	Kern	10,229	7,950	8,318	2,140	50,131	2,855	1.48
	Kings	4,291	9,815	8,555	1,185	14,891	1,494	2.29
	Madera	1,449	1,506	1,289	549	17,359	512	1.23
	Merced	14,584	11,974	9,687	1,467	11,861	867	3.55
	San Joaquin	7,589	14,475	9,517	251	18,316	1,788	2.55
	Stanislaus	1,850	3,833	2,125	190	5,769	276	2.25
	Tulare	13,319	8,579	10,205	1,597	30,358	7,846	1.81
Sierra mountains	Amador	4	59	27	0	33	0	3.77
	Calaveras	5	14	22	0	9	0	5.58
	El Dorado	5	5	8	18	67	0	1.20
	Inyo	2	34	18	0	0	0	53.9
	Mariposa	1	12	6	0	0	0	19.4
	Mono	6	119	63	0	0	0	189
	Nevada	9	12	20	0	1	0	63.0
	Placer	14	152	261	0	69	0	7.20
	Sierra	1	20	17	0	0	0	40.0
	Tuolumne	0	0	0	0	0	0	1.00
Siskiyou-Shasta	Shasta	56	627	1,715	4	6	7	137
	Siskiyou	743	1,147	1,796	0	202	18	17.8
	Trinity	1	5	5	0	0	0	11.9
Southern California	Imperial	22,605	7,073	22,117	626	21,225	664	3.30
	Los Angeles	13	85	64	0	735	20	1.21
	Orange	23	0	16	0	213	55	1.15
	Riverside	1,800	4,263	4,187	17	9,586	6	2.07
	San Bernardino	129	530	746	0	643	77	2.95
	San Diego	88	115	216	0	2,717	182	1.14
	Santa Barbara	7,895	401	6,717	1,022	24,720	1,266	1.56
	Ventura	1,768	348	13,528	313	6,948	4,176	2.37
Unspecified		463	13,400	4,827				

a CLO= clothianidin; IMI= imidacloprid; THI=thiamethoxam.

b To avoid division by 0, reported PUR uses changed from 0 to 1 lb.

APPENDIX 4. WHAT WE KNOW ABOUT THE CURRENT USE OF NEONIC SEED TREATMENTS IN CALIFORNIA

Corn

Corn is known to extensively use neonic seed treatments. Douglas and Tooker (2015) estimated that, by 2011, between 79% and 100% of the corn acreage nationwide used neonic seed treatments and found evidence that the rate was still increasing. By now, most of the corn crop area is expected to be treated with either clothianidin or thiamethoxam. Indeed, it may be difficult for growers to find untreated seed to plant should they wish to do so. Lack of crop rotation remains the main impediment for moving away from prophylactic control of corn rootworm (Veres et al. 2020).

Cotton

The bulk of neonic use in cotton comes from seed treatments. The number of seed treatment applications slightly exceeded the number of base acres—1.04 to 1—when assessed (USEPA 2017). This suggests that all cotton acres receive a seed treatment, primarily thiamethoxam and imidacloprid.

Wheat and other cereal crops

USEPA (2018) estimated that 20% of winter wheat and 27% of spring wheat received a neonic seed treatment. However, these data date from the period 2010-2014 and likely are underestimates of current conditions.

Because aphids in small grain crops including cereals can vector diseases, extension recommendations often advise using neonic seed treatments for early season control of aphids (USEPA 2018). In comments sent to USEPA during the current review of neonicotinoid benefits, a representative of the National Barley growers association argued against possible restrictions of neonic use (USEPA 2019b). Similarly, the National Association of Wheat growers argued that seed treatments provided the most efficient treatment of early season pests (USEPA 2019b).

Sugar beets

As is the case with small grain crops, the possibility of vector-borne disease in sugar beets means that the use of seed treatments is often recommended (USEPA 2019b). Based on data collected between 2010 and 2014, USEPA (2018) estimated that 46% of the crop acreage nationally received a seed treatment.

Small grain and oilseed crops

USEPA (2019b) estimated that 44% of the sorghum crop received a neonic seed treatment. Once again, this was based on now-outdated information (2010-2014).

All three active ingredients are registered for oilseeds; a seed treatment is now considered the “standard” in canola as judged by the many articles looking into its use. No information could be obtained on sorghum, flax, safflower, and sunflower.

Vegetable crops

USEPA (2018) reviewed seed treatment uses of neonics in vegetable crops. Of most concern when considering seed treatments are crops that are direct seeded given that transplants are more likely to be grown under controlled conditions—e.g., in a greenhouse. Depending on how greenhouse effluents are collected and treated, greenhouse use may also pose contamination concerns, particularly for water contamination—but likely from a point source rather than diffuse sources.

In its benefits review of neonics, USEPA (2018) had this to say about vegetable crops:

“BEAD does not have data on the use of neonicotinoid seed treatments in vegetable crops and thus sought stakeholder feedback concerning usage. Per the American Seed Trade Association [ASTA], less than 15% of vegetable acreage is estimated to be planted with neonicotinoid seed treatments based on best professional judgement (ASTA pers. comm. 2018); ASTA did not provide estimates by individual crops. ASTA reported that clothianidin and thiamethoxam are preferred by growers over imidacloprid seed treatments.”

USEPA (2018) believed that there was a greater reliance on soil-applied insecticides (granules or drenches) than seed treatments because the former (presumably drenches) may better target above ground pests. However, they also acknowledged that several extension services recommend neonic-treated seeds. Further, it is likely that upcoming possible restrictions on the foliar use of neonics (e.g., in cucurbits) will result in a shift to more seed treatment uses.

I attempted to verify the 15% estimate by means of the differential 2014/2015 use reported from commercial surveys and made public by USGS. USGS reports the use of the main nitroguanidine neonics separately on “vegetable and fruit” crops. Excluding California (because seed treatment use was not estimated in either year), the total quantity of use dropped by 14% between 2014 and 2015. Assuming negligible use of seed treatments in fruit production, this drop may be ascribed to vegetable production and suggests that the ASTA 15% total use estimate appears to be reasonable. However, reliance on the USGS-reported differential for 2014/15 assumes that the Kynetec commercial surveys had a good handle on seed treatment uses in 2014. They stopped collecting the information in 2015, in part, because of the increased difficulty of acquiring reliable data from users (Hitaj et al. 2020).

It is clear also that seed treatment use will vary widely among the many vegetable crops. Whitefly and thrips are key targets of neonic seed treatments in vegetable production. Leafy vegetables and green onions are especially likely to be treated given that an economic threshold has not been established (USEPA 2018). Additionally, there is wide resistance to most other insecticide groups in those crops.

A study proposing to look at the fate of neonics applied as seed treatments to lettuce (USGS 2020) stated unambiguously that “*in California, lettuce is grown from neonicotinoid treated seeds.*” There appears to be no doubt in the mind of these researchers that use of seed treatments in that crop is the norm rather than a 15% possibility.

A recent development is the appearance of a new pest, the introduced bagrada bug (*Bagrada hilaris* - a species of stink bug). It is considered to be problematic for cole crops especially. The pest has now expanded from southern California to the entire state making the use of neonic seed treatments much more likely in broccoli, cauliflower, and cabbage. When its favored plants are not present, it attacks a wide range of other crop species (bell pepper, melon, papaya, tomato, and capers, corn, Sudan grass, sorghum, sunflowers, potato, cotton, and some legumes, including snap beans) (Reed et al. 2014).

Finally, USEPA (2018) proposes that neonic seed treatments may be more important in low-acreage vegetable crops for which other options have not been well developed. Keeping all of this in mind, it is clear that 15% should be considered a low estimate and that usage is probably increasing steadily in many vegetable crops.

Potatoes

It is unclear where potato “seeds” are treated—and if treated on farm, whether this is recorded in PUR data. In response to EPA request for comments, the National Potato Council and other state organizations stressed the importance of neonics as seed treatments in potato culture (USEPA 2019b). The first uses of neonicotinoids were in potato.

Rice

Most of the rice in California is water-seeded. Seed treatments are only registered for use in dry-seeded systems and are therefore of limited or no utility in California. Elsewhere, an estimated 45-75% of the rice is treated with a seed treatment (USEPA 2019c). This prohibition, interestingly, does not seem to apply to wild rice. Our understanding is that the crop is also seeded by air into paddies. This grass crop grows in wetlands. However, thiamethoxam is registered for use. It is unclear why it is registered if this crop is indeed wet seeded.

Forages

A key uncertainty in our assessment is the issue of neonic seed treatments for forages. Alfalfa and cereal forages, specifically, make up a large proportion (23.7%) of the total crop area on which crops could be planted with the use of seed treatments. This excludes 1/3 of the forage area planted to grasses and other species for which seed treatments are not registered, such as “pasture and hay,” for which USGS 2014 estimates reported no use of neonics.

For alfalfa (presumably grown for seed), the amounts reported by USGS (from PUR data) were identical in 2014 and 2015 suggesting no or minimal seed treatment use. Only thiamethoxam was reported as being used at all. The use of thiamethoxam on treated seed is likely to increase given that they were only introduced in time for 2013 plantings (AG Professional 2013), although neonic seed treatments were already registered for cereal use. According to AG professional (2013), the thiamethoxam component of the formulated seed treatment is able to “*help alfalfa crops develop stronger roots, use inputs more efficiently; emerge faster, and grow more evenly, even in the absence of insects*” (emphasis added).

It isn't known at this stage whether we will see the same exponential growth in alfalfa that was seen in corn, soy, and cereals. It also is not clear whether any of the cereal hay and haylage is grown with the use of the many available seed treatments.

APPENDIX 5. COUNTY BY COUNTY COMPARISON OF TOTAL CROPLAND CONSIDERED IN THIS REPORT COMPARED TO THE POTENTIAL AREA WITH NEONIC SEED TREATMENTS

Agricultural district	County	Sum of planted acreage	Sum of possible treated acreage	Proportion with possible seed treatment
Central coast	Total - all counties	511,155	462,742	91%
	Alameda	4,377	3,342	76%
	Contra costa	26,623	21,965	83%
	Lake	1,282	856	67%
	Marin	4,769	3,359	70%
	Monterey	344,009	337,438	98%
	Napa	475	311	65%
	San Benito	36,547	20,894	57%
	San Luis Obispo	39,405	38,138	97%
	San Mateo	2,735	2,218	81%
	Santa Clara	16,497	7,479	45%
	Santa Cruz	5,675	5,095	90%
Sonoma	28,762	21,648	75%	
Northeast	Total - all counties	165,643	130,587	79%
	Lassen	73,442	63,667	87%
	Modoc	85,566	61,288	72%
	Plumas	6,634	5,631	85%
Northern coast	Total - all counties	22,166	14,821	67%
	Del Norte	3,513	2,343	67%
	Humboldt	10,859	7,272	67%
	Mendocino	7,794	5,206	67%
Sacramento valley	Total - all counties	1,267,490	660,722	52%
	Butte	107,061	20,708	19%
	Colusa	223,016	76,999	35%
	Glenn	159,144	75,481	47%
	Sacramento	129,877	113,442	87%
	Solano	126,267	111,434	88%
	Sutter	189,108	68,073	36%
	Tehama	27,859	23,154	83%
	Yolo	262,330	164,350	63%
	Yuba	42,828	7,082	17%

Agricultural district	County	Sum of planted acreage	Sum of possible treated acreage	Proportion with possible seed treatment
San Joaquin valley	Total - all counties	2,465,333	1,968,959	80%
	Fresno	437,493	289,337	66%
	Kern	253,893	232,180	91%
	Kings	332,773	257,386	77%
	Madera	76,116	49,463	65%
	Merced	370,133	306,500	83%
	San Joaquin	341,058	310,159	91%
	Stanislaus	232,374	159,316	69%
	Tulare	421,494	364,620	87%
Sierra mountains	Total - all counties	35,071	16,628	47%
	Amador	3,108	1,869	60%
	Calaveras	888	584	66%
	El dorado	326	215	66%
	Inyo	2,087	1,391	67%
	Mariposa	726	484	67%
	Mono	7,378	4,919	67%
	Nevada	796	536	67%
	Placer	17,598	4,892	28%
	Sierra	2,164	1,739	80%
Siskiyou-Shasta	Total - all counties	104,697	85,684	82%
	Shasta	36,073	22,981	64%
	Siskiyou	68,295	62,486	91%
	Trinity	329	217	66%
Southern California	Total - all counties	531,425	509,531	96%
	Imperial	236,768	236,768	100%
	Los Angeles	5,748	4,023	70%
	Orange	201	184	92%
	Riverside	132,102	126,306	96%
	San Bernardino	21,642	20,167	93%
	San Diego	5,825	3,318	57%
	Santa Barbara	86,712	81,814	94%
	Ventura	42,427	36,951	87%
Unspecified	Unspecified	150,352	148,785	99%
California Total	Grand total	5,253,331	3,998,459	76%

APPENDIX 6. SUMMARY OF POLLEN AND NECTAR NEONIC RESIDUE LEVELS FOLLOWING SEED TREATMENT USE IN REGISTRANT STUDIES REVIEWED IN THE USEPA ASSESSMENT

Figure 20 from EPA 2020j (Attachment 4) summarizing industry data on mean pollen residues in three crops following the use of seed treatments. Residue levels are normalized to 0.1 mg a.i./seed. Open circles indicate that none of the samples had levels above detection. Crosses indicate that at least one sample was below the limit of detection.

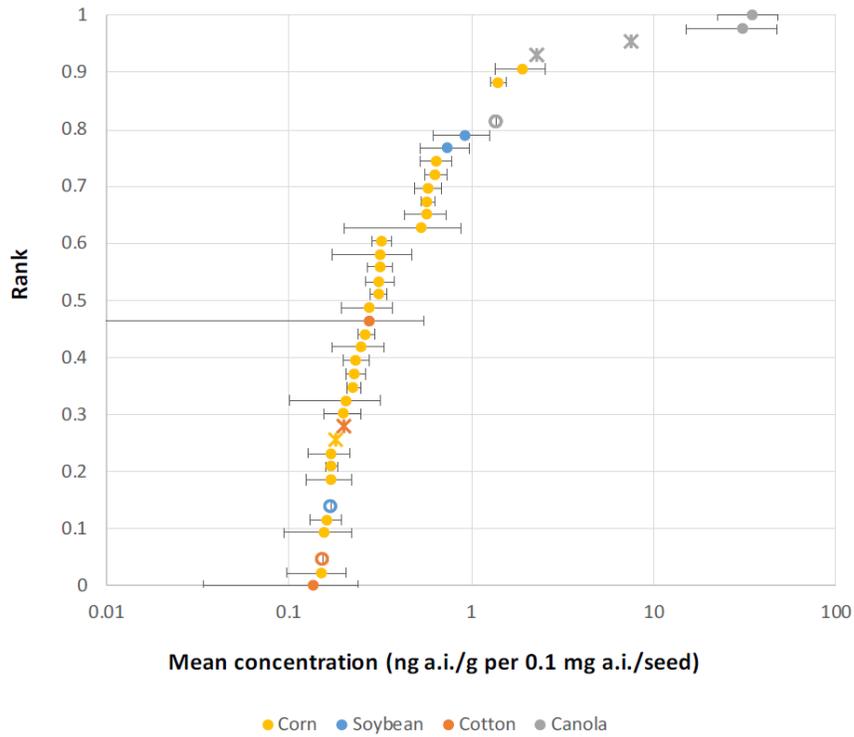
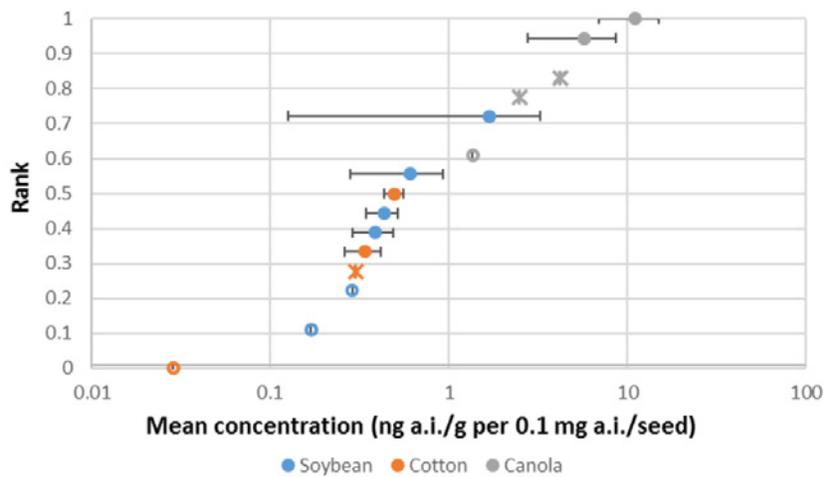


Figure 21 from EPA 2020j (Attachment 4) summarizing industry data on mean nectar residues in four crops following the use of seed treatments. Residue levels are normalized to 0.1 mg a.i./seed. Open circles indicate that none of the samples had levels above detection. Crosses indicate that at least one sample was below the limit of detection.



ATTACHMENT B



October 17, 2019

Val Dolcini, Director
California Department of Pesticide Regulation
1001 I Street, P.O. Box 4015
Sacramento, CA 95812-4015

Re: Cover Letter Regarding DPR Reevaluation of Neonicotinoid Insecticides

Dear Director Dolcini:

We write to send the attached letter requesting an in-person meeting—ideally, during the weeks of Oct. 28, Nov. 4, or Nov. 11—to discuss the Department of Pesticide Regulation’s (DPR) reevaluation of and rulemaking regarding neonicotinoids (“neonics”).

First, we would like to thank and congratulate DPR on its successful negotiation of an end to the sale or use of chlorpyrifos pesticides. It is a monumental achievement that will go far to protect all Californians and their environment from harmful pesticide exposure.

The recent ban on chlorpyrifos may also have unintended consequences, including driving the increased use of dangerous chemical replacements, such as neonics. This makes our request to meet with you and your staff even more urgent.

The attached letter expresses three major concerns with DPR’s July 2018 “California Neonicotinoid Risk Determination”—specifically, that it:

1. Identifies only honey bee colony risks for mitigation—suggesting DPR’s anticipated proposed rules will fail to protect all of California’s diverse pollinator populations as required by state law, Cal. Food & Agric. Code § 12838(b)(1);
2. Largely ignores risks from neonic-treated seeds and tree injections, two significant sources of neonic exposure for bees and other pollinators;
3. Fails to account for neonics’ full range of adverse impacts—including vast water and soil contamination, decimation of bird populations and aquatic ecosystems, and possible human health harms—which DPR must ultimately protect against.

DPR’s rulemaking on neonics is slated to be the first of its kind in the nation—and given California’s phenomenal diversity of agricultural production, we expect DPR’s anticipated rulemaking may influence national and international neonic policy. Accordingly, we would greatly appreciate the opportunity to discuss our concerns within the next month.

Respectfully,

Daniel Raichel
Staff Attorney,
Natural Resources Defense Council



October 17, 2019

Val Dolcini, Director
California Department of Pesticide Regulation
1001 I Street, P.O. Box 4015
Sacramento, CA 95812-4015

Re: Concerns Regarding DPR Reevaluation of Neonicotinoid Insecticides and Anticipated Rulemaking

Dear Director Dolcini:

On behalf of the Natural Resources Defense Council, Center for Biological Diversity, Friends of the Earth, and the Xerces Society, we would like to request an opportunity to discuss the Department of Pesticide Regulation's (DPR) reevaluation of and anticipated rulemaking regarding neonicotinoid insecticides ("neonics"). As detailed below, we have concerns that the scope of DPR's assessment fails to consider neonics' full range of impacts on California's environment and the health of its residents, impairing DPR's ability to comply with its statutory mandates under the California Food and Agriculture Code (the "Code").

Those mandates are both specific and general. Specifically, the Code requires that DPR "adopt any control measures necessary to protect pollinator health" with respect to neonics by July 1, 2020. Cal. Food & Agric. Code (FAC) § 12838(b)(1).¹ More generally, DPR must "endeavor to eliminate from use in the state any pesticide that endangers the agricultural or non-agricultural environment" and "prohibit or regulate the use of environmentally harmful materials" through its pesticide authority. FAC §§ 12824, 14102.

As described below, the narrow focus of DPR's July 2018 "California Neonicotinoid Risk Determination" (the "Risk Determination") indicates that DPR's expected proposal for mitigating the impacts of neonic use will fail to protect the health of California's pollinators as required by law. Further, a large and steadily growing body of scientific evidence and DPR's own water quality testing data indicate that current neonic use patterns are harming the state's environment on a broad scale, prompting an urgent need for additional regulatory protections.

These concerns are detailed below.

Background

Neonics are neurotoxic insecticides that permanently bind to and overstimulate nicotinic receptors in insect nerve cells, leading to collapse of the central nervous system.² While neonics kill insects by design, even small, sublethal neonic exposures in the real world can ultimately

¹ The Code requires DPR promulgate such regulations "within two years" of its completion of its "reevaluation of neonicotinoids." *Id.* DPR completed this reevaluation in July 2018. See DPR, *California Neonicotinoid Risk Determination*, (Jul. 2018), <https://bit.ly/2mwH6ph> [hereinafter "2018 Risk Determination"].

² See, e.g., National Pesticide Information Center, *Imidacloprid: Technical Fact Sheet* (visited Oct. 17, 2019), <https://bit.ly/2lQqh8W>.

cause individual or colony death by weakening critical functions—such as an insect’s immune system, navigational ability, stamina, memory, and fertility.³

While all insecticides harm individually exposed insects, neonics pose broader ecological concerns due to their profound invertebrate toxicity, systemic properties, and immense popularity. Since neonics’ introduction in the 1990s, U.S. agriculture has become forty-eight times more insect-toxic, with an estimated 92% of that increase attributable to neonics alone.⁴ Because of neonics’ “systemic” design—i.e., their ability to permeate and stay in a plant’s tissues—this toxic load (along with that from nonagricultural uses) persists and migrates considerable distances through the environment. As the most widely used insecticides in the U.S.,⁵ neonics now broadly contaminate soil, water, and non-target plants in large areas of the country’s urban, suburban, and rural landscapes.⁶

In the mid-2000s, annual losses of honey bee colonies jumped dramatically. Since that time, an outpouring of scientific research has linked neonic use not only to these continued and unprecedented losses,⁷ but also to the devastation of aquatic ecosystems,⁸ declines in bird and butterfly populations,⁹ and birth defects in white-tailed deer.¹⁰ Emerging research now also links neonic exposures to elevated risk of developmental or neurological damage in humans—particularly in infants and young children—including malformations of the developing heart and brain, memory loss, tremors, and autism spectrum disorder.¹¹ These studies are particularly worrying given the pervasiveness of human exposure to neonics—monitoring by the U.S. Centers for Disease Control and Prevention shows that *roughly half* of the U.S. general population is exposed to neonics on a regular basis.¹²

³ See Lennard Pisa et al., *An Update of the Worldwide Integrated Assessment (WIA) on Systemic Insecticides. Part 2: Impacts on Organisms and Ecosystems*, *Environ. Sci. Pollution Research Int’l* (Nov. 9, 2017), <https://bit.ly/2HqqHwB> [hereinafter “Worldwide Assessment Part 2”]; Daniel Kenna et al., *Pesticide Exposure Affects Flight Dynamics and Reduces Flight Endurance in Bumblebees*, *Ecology and Evolution* (Apr. 29, 2019), <https://bit.ly/2Y2V1Qo>.

⁴ Michael DiBartolomeis et al., *An Assessment of Acute Insecticide Toxicity Loading (AITL) of Chemical Pesticides Used on Agricultural Land in the United States*, *PLoS One* (Aug. 6, 2019), <https://bit.ly/2Yr4Xc7>.

⁵ See Margaret R. Douglas & John F. Tooker, *Large-Scale Deployment of Seed Treatments Has Driven Rapid Increase in Use of Neonicotinoid Insecticides and Preemptive Pest Management in U.S. Field Crops*, *Environ. Sci. Technol.* (Mar. 20, 2015), <https://bit.ly/2VWitqk> [hereinafter “Douglas & Tooker 2015”].

⁶ See, e.g., Michelle Hladik and Dana Kolpin, *First National-Scale Reconnaissance of Neonicotinoid Insecticides in Streams Across the USA*, *Environmental Chemistry* (Aug. 18, 2015), <https://bit.ly/31Mse6o> [hereinafter “Hladik 2015”]; cf. Thomas Wood & Dave Goulson, *The Environmental Risks of Neonicotinoid Pesticides: A Review of the Evidence Post 2013*, *Environ. Sci. Pollution Research Int’l*, (Jun. 7, 2017), <https://bit.ly/2Hpn8T5> [hereinafter “Wood & Goulson 2017”].

⁷ See Chiara Giorio, *An Update of the Worldwide Integrated Assessment (WIA) on Systemic Insecticides. Part 1: New Molecules, Metabolism, Fate, and Transport*, *Environ. Sci. Pollution Research Int’l* (Jul. 15, 2017), <https://bit.ly/2qVqciQ>; Worldwide Assessment Part 2; Wood & Goulson 2017; Daniel Cressey, *Largest-ever Study of Controversial Pesticides Finds Harm to Bees*, *Nature* (Jun. 29, 2017), <https://go.nature.com/2sgJjDk>; B.A. Woodcock et al., *Country-Specific Effects of Neonicotinoid Pesticides on Honey Bees and Wild Bees*, *Science* (Jun. 30, 2017), <https://bit.ly/2IFOAG0> (“These field results confirm that neonicotinoids negatively affect pollinator health under realistic agricultural conditions.”).

⁸ See Francisco Sanchez-Bayo, *Contamination of the Aquatic Environment with Neonicotinoids and Its Implication for Ecosystems*, *Frontiers in Environmental Science* (Nov. 2, 2016), <https://bit.ly/2LifRHf>.

⁹ See Caspar A. Hallmann et al., *Declines in Insectivorous Birds Are Associated with High Neonicotinoid Concentrations*, *Nature* (Jul. 17, 2014), <https://go.nature.com/2KvIwAh> [hereinafter “Hallmann 2014”]; Matthew L. Forister et al., *Increasing Neonicotinoid Use and the Declining Butterfly Fauna of Lowland California*, *The Royal Society Publishing: Biology Letters* (Aug. 1, 2016), <https://bit.ly/2o5P6i0> [hereinafter “Forister 2016”].

¹⁰ Elise Hughes Berheim et al., *Effects of Neonicotinoid Insecticides on Physiology and Reproductive Characteristics of Captive Female and Fawn White-tailed Deer*, *Sci Rep.* (Mar. 14, 2019), <https://go.nature.com/2Q119Zf> [hereinafter “Berheim 2019”].

¹¹ Andria Cimino et al., *Effects of Neonicotinoid Pesticide Exposure on Human Health: A Systematic Review*, *Environ. Health Perspectives* (Feb. 1, 2017), <https://bit.ly/2NVA1LR> [hereinafter “Cimino 2017”].

¹² Maria Ospina et al., *Exposure to Neonicotinoid Insecticides in the U.S. General Population: Data from the 2015–2016 National Health and Nutrition Examination Survey*, *Environmental Research* (Sep. 2019), <https://bit.ly/2YKLjmX>; see also Go Ichikawa et al., *LC-ESI/MS/MS Analysis of Neonicotinoids in Urine of Very Low Birth Weight Infants at Birth*, *PLoS One* (Jul. 1, 2019),

DPR's Neonic Reevaluation

In 2009, DPR initiated a reevaluation of four neonic active ingredients—clothianidin, dinotefuran, imidacloprid, and thiamethoxam—“to assess the magnitude of their residues in the pollen and nectar of agricultural crops and the corresponding levels of risk to honey bee colonies.”¹³ In 2014, the California legislature amended the Code to require DPR to “issue a determination with respect to its reevaluation of neonicotinoids” by July 1, 2018. FAC § 12838(a). DPR released the Risk Determination in response to this obligation.¹⁴

The Risk Determination represents DPR's “first ecologically-based risk assessment” for neonics—covering 282 California-registered pesticide products determined likely to contaminate plants serving as a foraging source for honey bees.¹⁵ Using a method developed in tandem with the U.S. Environmental Protection Agency (USEPA), the Risk Determination identifies agricultural neonic use patterns—broken out by crop and application method—that create “colony-level” honey bee risks, determined by the observed neonic levels in pollen and nectar for treated crops.¹⁶

The Risk Determination fails to address available scientific information regarding neonic impacts on non-pollinating species, other pollinating species—such as butterflies, birds, bats, and other insects—or even all bee species. Rather, it uses honey bees as a “surrogate for other non-*Apis* species of bees (e.g., bumble bees) that may be exposed under agricultural conditions.”¹⁷ Even here, “[r]isk determinations were only conducted for foliar and soil applications,” excluding seed treatment applications and tree injections.¹⁸ Risks from non-agricultural neonic uses were not evaluated.

Concerns Regarding the Scope of the Risk Determination and Expected Mitigation

The undersigned organizations will submit more detailed comments and information regarding the Risk Determination, DPR's anticipated rulemaking, and the department's responsibility to address neonics' environmental impacts in full. Presently, however, we identify three immediate, overarching concerns.

Mitigation Directed Solely at Protecting Honey Bee Colonies from Agricultural Neonic Exposures Will Fail to Protect Pollinator Health

The Risk Determination states that “[g]oing forward, DPR will consider mitigation measures for neonicotinoid applications to crops” to reduce colony-level risks to honey bees as identified in

<https://bit.ly/2nF2DNI> (finding neonics in the urine of newborn babies, indicating that neonics pass from pregnant mother to developing fetus).

¹³ 2018 Risk Determination at 2; see also DPR, *Notice of Decision to Initiate Reevaluation of Chemicals in the Nitroguanidine Insecticide Class of Neonicotinoids*, (Feb. 27, 2009), <https://bit.ly/2lnCwJX>.

¹⁴ 2018 Risk Determination at 1, 4 (“This risk determination document meets the requirements of FAC §12838 (a)”).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 11-12.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 21.

the document.¹⁹ Were DPR to propose mitigation limited in this way, it would be insufficient “to protect pollinator health” as required by law. *See* FAC § 12838(b)(1).

Honey bee colony health is a poor proxy for the health of most California bees. California is home to roughly 1,600 native bee species—all of which are pollinators, but almost none of which form colonies or make honey.²⁰ The vast majority of the state’s bees are solitary and do not enjoy the protections inherent in honey bee hives, where overall colony health is often insulated from an individual’s fatal exposures to pesticides.²¹ Likewise, endpoints considered in the Risk Determination “such as decreased colony strength and decreased stores of honey in honeycombs”²² do not apply to most native bees.

Other native pollinators—including butterflies, birds, and bats—are even more fundamentally dissimilar to honey bee colonies, yet these species also suffer from neonic exposures. For example, recent research links increasing neonic use rates in lowland California with decreases in butterfly populations, even controlling for climactic and land use changes.²³ And other new research suggests neonics play a leading role in the dramatic declines of North American bird populations in the last several generations.²⁴

Even regarding honey bees, DPR’s analysis in the Risk Determination—based solely on neonic levels in treated crops—fails to account for other important exposure sources likely to harm colony health. Notably, when applied in the field, neonics contaminate adjacent wildflowers and water supplies, both visited by honey bees.²⁵ Indeed, one recent study looking at canola fields in the UK found “the large majority (97%) of neonicotinoids brought back in pollen to honey bee hives in arable landscapes was from wildflowers, not crops.”²⁶ In the real world, honey bees and other native pollinators also live in urban and suburban areas where neonics are commonly used—meaning the Risk Determination flatly ignores exposure risks across large parts of the state.

The Risk Determination Ignores Two Important Sources of Neonic Exposure

On a related note, the Risk Determination ignores two critical sources of neonic exposure, both for bees and other wildlife: neonic seed treatments and tree injections.

¹⁹ 2018 Risk Determination at 2.

²⁰ UC Davis Arboretum and Public Garden, *Beyond the Honey Bee: Learn More about California Native Bees*, (Apr. 3, 2018), <https://bit.ly/2Unsusy>.

²¹ Andi M. Kopit & Theresa L. Pitts-Singer, *Routes of Pesticide Exposure in Solitary, Cavity-Nesting Bees*, *Environmental Entomology* (Apr. 4, 2018), <https://bit.ly/2nnXdWY>.

²² 2018 Risk Determination at 2.

²³ Forister 2016; *see also* Andre Gillburn et al., *Are Neonicotinoid Insecticides Driving Declines of Widespread Butterflies?*, *PeerJ* (Nov. 24, 2015), <https://bit.ly/1IGvH0y>.

²⁴ *See, e.g.*, Hallmann 2014; Margaret L. Eng et al., *A Neonicotinoid Insecticide Reduces Fueling and Delays Migration in Songbirds*, *Science* (Sep. 13, 2019), <https://bit.ly/2kGS1MA> [hereinafter “Eng 2019”]; Kenneth V. Rosenberg et al., *Decline of the North American Avifauna*, *Science* (Sep. 19, 2019), <https://bit.ly/2mndueu>.

²⁵ *See* Olivier Samson-Robert, *Neonicotinoid-Contaminated Puddles of Water Represent a Risk of Intoxication for Honey Bees*, *PLoS One* (Dec. 1, 2014), <https://bit.ly/2o4YQsJ>; Christina Botias et al., *Neonicotinoid Residues in Wildflowers, a Potential Route of Chronic Exposure for Bees*, *Environmental Science and Technology* (Oct. 6, 2015), <https://bit.ly/2mBmGfd> [hereinafter “Botias 2015”].

²⁶ Botias 2015.

The Risk Determination finds that neonic seed treatments present “low risk to honey bee colonies” because very little of that treatment ends up in the target plant’s pollen and nectar,²⁷ but this largely misses the point. Neonic seed treatments—which account for the largest use of neonics in agriculture²⁸—are famously inefficient. Typically, about 1% to 10% (and often no more than 2%) of the neonic treatment enters the target plant, leaving the remainder to contaminate soil, water, and nearby plants²⁹—all exposure sources for bees. Indeed, in at least some cases, *higher* neonic levels have been found in the pollen and nectar of adjacent wildflowers than in target crops receiving a seed treatment.³⁰

Tree injections, while less common, nonetheless pose significant risks to bees given their potency and persistence. Neonic injections can persist in trees for years,³¹ and the sole tree injection considered in the Risk Determination revealed “some of the highest residues noted in pollen and nectar from any application methods on any crops.”³² Yet, the Risk Determination appears to disregard these excessive levels because no neonic injection products for “agricultural crops” are registered in California.³³ To the extent non-agricultural neonic injection products are registered—such as for landscaping plants—DPR must examine their impacts on pollinators.

DPR Must Protect Against Neonics’ Full Range of Damaging Impacts on California’s Environment

While honey-bee health is critical to the health and well-being of California’s agricultural economy and people, the Code charges DPR with the responsibility to prohibit or regulate pesticide uses that endanger or harm the state’s “agricultural or nonagricultural environment.” FAC §§ 12824, 14102.

DPR’s own water testing provides strong evidence of such endangerment—with imidacloprid alone detected in more than 90% of Southern and Central California surface water samples and nearly 60% of Northern California urban surface water samples.³⁴ Notably, all detections exceed USEPA’s imidacloprid chronic “benchmark” for harm to aquatic invertebrates, indicating probable ecosystem-wide damage resulting from the diminishment of aquatic insect populations, which, in turn, starves insect-eating birds, fish, and amphibians.³⁵ In the Netherlands, for

²⁷ 2018 Risk Determination at 8.

²⁸ See Douglas and Tooker 2018.

²⁹ See Adam Alford & Christian H. Krupke, *Translocation of the Neonicotinoid Seed Treatment Clothianidin in Maize*, PLoS ONE (Oct. 11, 2017), <https://bit.ly/2xZtEgS>; Christian Krupke et al., *Assessing the Value and Pest Management Window Provided by Neonicotinoid Seed Treatments for Management of Soybean Aphid (Aphis Glycines Matsumura) in the Upper Midwestern United States*, Pest Management Science (Jul. 4, 2017), <https://bit.ly/30HJN5T>.

³⁰ Botias 2015.

³¹ See J.M. Bonmatin et al., *Environmental Fate and Exposure; Neonicotinoids and Fipronil*, Environmental Science and Pollution Research International (Aug. 7, 2014), <https://bit.ly/2OAwrCK>.

³² 2018 Risk Determination at 21.

³³ *Id.*

³⁴ See Xin Deng, *Surface Water Monitoring for Pesticides in Agricultural Areas in the Central Coast and Southern California, 2018*, DPR (May 28, 2019), <https://bit.ly/2n8Epeg> (finding imidacloprid in 94% of all samples); Robert Budd, *Urban monitoring in Southern California watersheds FY 2017-2018*, DPR (Mar. 1, 2019), <https://bit.ly/2nY9TUq> (finding imidacloprid in 92% of all samples); Michael Ensminger, *Ambient and Mitigation Monitoring in Urban Areas in Northern California FY 2017/2018*, DPR (Feb. 21, 2019), <https://bit.ly/33EWXCK> (finding imidacloprid in 58% of all samples).

³⁵ See Pierre Mineau, *Impacts of Neonics in New York Water* (2019), <https://on.nrdc.org/2IXsO0O> (finding neonics were likely causing “ecosystem-wide damage” in New York on the basis of similar water testing results); Francisco Sánchez-Bayo et al., *Contamination of the Aquatic Environment with Neonicotinoids and its Implication for Ecosystems*, Frontiers in Environmental Science Agroecology (Nov. 2, 2016), <https://bit.ly/2LifRHf>; Christy Morrissey, *Neonicotinoid Contamination of Global Surface Waters and Associated Risk to Aquatic Invertebrates: A Review*, Environment International (Jan. 2015), <https://bit.ly/2rwIeIT>.

example, researchers linked declining populations of insect-eating birds to the introduction of exceptionally low neonic levels in water (only 20 parts per *trillion*).³⁶ Similar results to those found by DPR prompted Canada’s national pesticide agency to propose banning outdoor uses of three major neonic chemicals.³⁷

An outpouring of scientific research shows how neonic exposures can also harm birds, bats, deer, and humans,³⁸ among others—which is particularly concerning because chronic neonic exposures are often hard to avoid. For much of California’s wildlife, finding habitat without neonic contaminated soil or water is virtually impossible. Similarly, California residents may be hard pressed to ensure that their food and water is neonic-free. Where neonics pollute drinking water supplies, conventional water treatment systems generally do not remove them.³⁹ And fruits, vegetables, and processed foods frequently contain neonics,⁴⁰ which, because they permeate treated foods, cannot be washed off.

Collectively, this research demonstrates that neonics cause—and are likely to continue causing—significant adverse impacts, requiring further DPR action. *See* 3 C.C.R. §§ 6220, 6221. Such action, however, need not and should not delay mitigation to protect California pollinators from neonic impacts.

Conclusion

Neonics’ meteoric rise in popularity has brought with it a host of new environmental and health concerns. While the Risk Determination marks a critically important first look at neonics’ risks to honey bee colony survival, DPR must look at those risks more fully—as well as the harms neonics pose to California’s other pollinators, environment, and people. As DPR must ultimately act to protect against these harms, we believe it is in the best interest of the agency and all Californians that it do so now.

We would appreciate the opportunity to discuss our concerns about the Risk Determination and the best next steps for DPR’s anticipated rulemaking. Thank you for your time and attention to this matter, and please let us know at your earliest convenience when you and your staff will be available to meet.

Respectfully,

Daniel Raichel
Staff Attorney
Natural Resources Defense Council

³⁶ Hallmann 2014.

³⁷ *See* CBC Radio, *Canada Bans Neonic Pesticides Implicated in Bee Declines* (Aug. 17, 2018), <https://bit.ly/2nPgU6S>.

³⁸ Eng 2019; Pierre Mineau & Carolyn Callaghan, *Neonicotinoid Insecticides and Bats: an Assessment of the Direct and Indirect Risks*, Canadian Wildlife Federation (2018), <https://bit.ly/2kSfs5K>; Berheim 2019; Cimino 2017.

³⁹ *See* Kathryn L. Klarich et al., *Occurrence of Neonicotinoid Insecticides in Finished Drinking Water and Fate During Drinking Water Treatment*, *Envtl. Sci. and Tech. Letters* (Apr. 2017), <https://bit.ly/2PMRunk>.

⁴⁰ *See, e.g.*, Olga Naidenko, *Neonic Pesticides: Banned in Europe, Common on U.S. Produce, Lethal to Bees*, *Env’tl Working Group* (Jul. 26, 2018), <https://bit.ly/2EejbSx>; Friends of the Earth, *Toxic Secret: Pesticides Uncovered in Store Brand Cereal, Beans, Produce*, <http://bit.ly/2IIE26V> (visited Oct. 17, 2019).

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Christine Hironaka, Deputy Cabinet Secretary, Office of Governor Newsom

Jonathan Bishop, Chief Deputy Director, CalEPA, State Water Resources Control Board

Jesse Cuevas, Chief Deputy Director, CalEPA, DPR

Karen Morrison, Assistant Director, CalEPA, DPR

Ann Prichard, Branch Chief, Pesticide Registration Branch, CalEPA, DPR

ATTACHMENT C

INITIAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Adopt section 6147

Regarding the Exemption from California's Regulatory Requirements,
Pesticides that are Exempt from Federal Requirements
Pursuant to FIFRA Section 25(b)(2)

PROBLEM, ADMINISTRATIVE REQUIREMENT, CONDITION, OR
CIRCUMSTANCE ADDRESSED

With certain limited exceptions, existing law requires every manufacturer of, importer of, or dealer in any pesticide to obtain a certificate of registration from the Department of Pesticide Regulation (DPR) before offering the pesticide for sale in the State of California. Food and Agricultural Code (FAC) section 12753 defines a "pesticide" as: (1) any spray adjuvant; and (2) any substance, or mixture of substances that is intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any pest, as defined in FAC section 12754.5, that may infest or be detrimental to vegetation, man, animals, or households, or be present in any agricultural or nonagricultural environment. In order to obtain DPR registration, manufacturers of such products must apply for registration and meet DPR's data requirements.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires that each pesticide (as defined federally) be registered with the U.S. Environmental Protection Agency (U.S. EPA) prior to distribution or sale of the product in the United States. FIFRA section 25(b) states that "[T]he Administrator may exempt from the requirements of this Act by regulation any pesticide which the Administrator determines either: (1) to be adequately regulated by another Federal agency; or (2) to be of a character which is unnecessary to be subject to this Act in order to carry out the purposes of the Act."

U.S. EPA has used FIFRA section 25(b) to exempt several pesticides or classes of pesticides from the provisions of FIFRA. U.S. EPA listed pesticides or classes of pesticides exempt from the provisions of FIFRA pursuant to FIFRA section 25(b) can be found in Title 40 Code of Federal Regulation (CFR) sections 152.20 and 152.25. Title 40 CFR section 152.20 lists two classes of pesticides that U.S. EPA has exempted from the requirements of FIFRA because they are "adequately regulated by another Federal agency." Title 40 CFR section 152.25 lists seven

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Page Two

classes of pesticides that U.S. EPA has determined to "be of a character not requiring regulation under FIFRA." The seven federally exempted classes of pesticides include: (1) treated articles or substances; (2) pheromones and pheromone traps; (3) preservatives for biological specimens; (4) vitamin hormone products; (5) foods; (6) natural cedar; and (7) minimum risk pesticides. Several of these classes of pesticides were exempted because U.S. EPA characterized them as "reduced risk" or naturally occurring compounds. For some of the exempted pesticides, U.S. EPA created constraints on how exempted products could be marketed and the types of inert ingredients that they could contain.

Prior to 1998, the FAC did not provide DPR with the authority to exempt pesticide products from state regulatory requirements. In the past, with the concurrence of DPR's legal counsel, the Director administratively exempted a limited number of federally exempted products from California's pesticide registration requirements. However, given the magnitude of U.S. EPA's 1996 expansion of the list of pesticide products exempt from federal regulatory requirements, the exemption of the same pesticide products from DPR's regulatory requirements by policy is untenable.

Effective January 1, 1998, Chapter 691 (Statutes of 1997) added section 12803 to the FAC. FAC section 12803 authorizes the Director, by regulation, to exempt from all or part of the requirements of FAC Division 7, pesticides exempted from federal requirements pursuant to FIFRA section 25(b). The exemption only applies to those pesticides that U.S. EPA determines to "be of a character unnecessary to be subject to FIFRA." The exemption does not apply to pesticides or classes of pesticides the U.S. EPA exempted from the requirements of FIFRA because they are "adequately regulated by another federal agency." In order for a substance to be exempt from DPR's regulatory requirements, the Director must individually evaluate each substance and concur with U.S. EPA's exemption decision. In addition, the Director must exclude from the exempting regulation those specific requirements of FAC Division 7 that "may otherwise be applicable and that are necessary to protect the public health or the environment." FAC section 12803 also states that "[N]otwithstanding any other provision of law, the Director shall retain authority to regulate any substance exempted pursuant to this section whether registered or not."

SPECIFIC PURPOSE AND FACTUAL BASIS

DPR proposes to adopt section 6147 to implement FAC section 12803.

Proposed section 6147(a) establishes that manufacturers of, importers of, and dealers in certain pesticide products or classes of pesticide products are exempt from the requirements of FAC Division 7. CCR section 6147(a) establishes that in order to be exempt, the pesticides must be exempt from federal pesticide regulatory requirements pursuant to FIFRA 25(b)(2). CCR section 6147(a)(1)-(5) lists five classes of pesticides that DPR proposes to exempt from the requirements of FAC Division 7, including the requirement to obtain a registration from DPR prior to sale in California. These are the same classes of pesticides exempted from the requirements of FIFRA under Title 40 CFR section 152.25, with two exceptions.

Title 40 CFR section 152.25(a) exempts "Treated articles or substances. An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use." DPR did not include a treated article exemption in proposed 6147(a)(5) because under current California law, treated paint or wood is not a pesticide when the paint or wood is not intended to be used to control pests, but rather is used to paint buildings or build a deck. Other articles to which pesticides may be applied or added to provide preservation include textiles, plastics, paper, adhesives, and coatings. It should be noted that if the manufacturer of an article to which a pesticide has been added makes implied or explicit claims that the treated article itself can be used to prevent, repel, or destroy pests, then the treated article is considered to be a "pesticide" and must be registered with DPR. An example of a treated article that is a pesticide would be a sponge to which a pesticide has been added and for which the sponge manufacturer makes implied or explicit claims that the treated sponge controls human pathogens, thereby providing protection for the sponge user. Since the issuance by U.S. EPA of a draft Pesticide Regulation Notice on treated articles in March 1998, the issue of treated articles and pesticidal claims has been the subject of much discussion. If based on the outcome of those discussions, DPR determines that a regulation change is needed, one will be proposed at that time.

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Title 40 CFR section 152.25(d) exempts vitamin hormone horticultural products consisting of mixtures of plant hormones, plant nutrients, inoculants, or soil amendments, under certain specified criteria. Proposed section 6147(a) does not include an exemption for vitamin hormone products because FAC section 12756 already exempts such products from DPR's pesticide regulatory requirements. FAC section 12756 defines the phrase "regulating plant growth" as used in the definition of a "pesticide" in FAC section 12753. FAC section 12756 states that "regulating plant growth" does not include nutrient mixtures or soil amendments commonly known as vitamin hormone horticultural products, provided the products are not intended for pest destruction.

Federally, spray adjuvants are not defined as pesticides. Therefore, such products do not need to be registered with the U.S. EPA prior to sale. However, spray adjuvants are defined under California statute as a pesticide and must be registered with DPR before they can be sold or used in California. Because spray adjuvants are not considered by U.S. EPA to be a pesticide, they cannot meet the exemption criteria of FAC 12803. As a result, the exemption provisions of proposed section 6147 do not apply to spray adjuvants.

Section 6147(a)(1)

Proposed section 6147(a)(1) exempts from the requirements of FAC Division 7, pheromones and identical or substantially similar compounds labeled for use only in pheromone traps (or labeled for use in a manner which the Director determines poses no greater risk of adverse effects on the environment than use in pheromone traps), and pheromone traps in which those compounds are the sole active ingredient. To be exempt such products must meet the criteria specified in Title 40 CFR section 152.25(b). Title 40 CFR section 152.25(b)(1)-(4) provides definitions for the terms "pheromone," "an identical or substantially similar compound," and "pheromone trap."

Title 40 CFR section 152.25(b)(1) defines "pheromone" to be a compound produced by an arthropod which, alone or in combination with other such compounds, modifies the behavior of other individuals of the same species. Title 40 CFR section 152.25(b)(2) defines a synthetically produced compound as "identical to a pheromone" only when their molecular structures are identical, or when the only differences between the molecular structures are between the stereochemical isomer ratios of the two compounds, except that a synthetic

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compound found to have toxicological properties significantly different from a pheromone is not identical.

Title 40 CFR section 152.25(b)(3) states that when a compound possesses many characteristics of a pheromone but does not meet the criteria in Title 40 CFR section 152.25(b)(2), it may, after review by U.S. EPA, be deemed a substantially similar compound. Title 40 CFR section 152.25(b)(4) defines a "pheromone trap" as a device containing a pheromone or an identical or substantially similar compound used for the sole purpose of attracting, and trapping or killing, target arthropods. Pheromone traps are intended to achieve pest control by removal of target organisms from their natural environment and do not result in increased levels of pheromones or identical or substantially similar compounds over a significant fraction of the treated area.

DPR concurs with U.S. EPA's determination that continued regulation is not warranted for pheromones intended solely for use in pheromone traps and pheromone traps with the pheromone already in the trap as described in Title 40 CFR section 152.25(b)(1)-(4). Therefore, DPR proposes to exempt the same products from the requirements of FAC Division 7. The toxicity of pheromones in general and the level of potential exposure to man or the environment from the exempted pheromone products is very low.

Section 6147(a)(2)

Proposed subsection (a)(2) exempts preservatives for biological specimens, including: (A) embalming fluids; (B) products used to preserve animal or animal organ specimens in mortuaries, laboratories, hospitals, museums and institutions of learning; and (C) products used to preserve the integrity of milk, urine, blood, or other body fluids for laboratory analysis. DPR concurs with U.S. EPA's determination that the level of potential exposure to man or the environment from the exempted preservatives is very low because of the way in which these products are used. In addition, these preservatives are used in specialized situations where the knowledge and experience of the users minimizes the possibility of harmful exposure to the pesticide.

Section 6147(a)(3)

Proposed subsection (a)(3) exempts from the requirements of FAC Division 7 products consisting of foods to attract pests and which contain no active ingredients. The phrase "contains no active ingredient" means that the product contains no chemical or biological toxicant. DPR concurs with U.S. EPA's assessment that since the product consists solely of food, there is no need to regulate its use as a attractant.

Section 6147(a)(4)

Proposed subsection (a)(4)(A) exempts natural cedar blocks, chips, shavings, balls, chests, drawer liners, paneling, and needles that meet all of the following criteria: (i) the product consists totally of cedarwood or natural cedar; (ii) the product is not treated, combined, or impregnated with any additional substances; and (iii) the product bears claims or directions for use solely to repel arthropods other than ticks or to retard mildew, and no additional claims are made in sale or distribution. The labeling must be limited to specific arthropods, or must exclude ticks if any general term such as "arthropods," "insects," "bugs," or any other broad inclusive term, is used. Proposed subsection (a)(4)(B) clarifies that the exemption does not apply to natural cedar products claimed to repel ticks, or to cedar oil, or formulated products which contain cedar oil, other cedar extracts, or ground cedar wood as part of a mixture.

Cedar products, both pesticidal and nonpesticidal, have been widely used for many years. These products include blocks, chests, drawer liners, chips, needles, or other forms of the natural wood or plant. Human or environmental exposure to pesticidal cedar products is no greater than to nonpesticidal cedar products. In fact, human exposure to nonpesticidal cedar products, such as children's toys, may be greater than to pesticidal cedar products, which are typically left in drawers and closets. DPR concurs with U.S. EPA's finding that the use of natural cedar products pose little or no risk to human health or the environment.

Section 6147(a)(5)

With CCR section 6147(a)(5), DPR proposes to divide the list of chemicals exempted from federal registration pursuant to 40 CFR section 152.25(g) into two groups. With subsection (a)(5)(A), DPR proposes to exempt from the requirements of FAC Division 7, products containing the following active

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ingredients either alone or in combination with other substances listed in subsections (a)(5)(A), (B), or (C):

- Castor oil (U.S.P. or equivalent)
- Cinnamon
- Citronella and Citronella oil
- Cloves
- Corn oil
- Cottonseed oil
- Dried Blood
- Garlic
- Geraniol
- Geranium oil
- Linseed oil
- Mint
- Peppermint
- Putrescent whole egg solids
- Rosemary
- Sesame (includes ground sesame plant) and sesame oil
- Sodium chloride (common salt)
- Soybean oil
- Thyme
- Zinc metal strips (consisting solely of zinc metal and impurities)

DPR determined that pesticide products containing the above active ingredients pose minimal hazard to the user. The substances are currently available in the channels of trade and available as foods, medicines, or hardware items.

With subsection (a)(5)(B), DPR proposes to exempt from the requirements of FAC Division 7, products containing the following active ingredients either alone or in combination with other substances listed in subsections (a)(5)(A), (B) or (C), provided the products meet certain additional criteria. To be exempt, each active ingredient in the product from list (5)(B) must constitute 8.5 percent or less of the formulated product, or the product label must carry as a minimum the signal word "CAUTION" with appropriate accompanying precautionary language and a requirement for the pesticide user to use appropriate protective eyewear and gloves:

- Cedar oil
- Cinnamon oil

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- Citric acid
- Clove oil
- Corn gluten meal
- Eugenol
- Garlic oil
- Lauryl sulfate
- Lemongrass oil
- Malic acid
- Mint oil
- Peppermint oil
- 2-Phenethyl propionate (2-Phenylethyl propionate)
- Potassium sorbate
- Rosemary oil
- Sodium lauryl sulfate
- Thyme oil
- White pepper

DPR determined that pesticide products containing the above active ingredients, and meeting the conditions specified in the regulation, pose minimal hazard to users. Exposure to products containing high concentrations of any of the active ingredients listed in subsection (a)(5)(B) poses a potential skin or eye irritation risk. DPR believes that the requirement that products containing more than 8.5 percent of any list (5)(B) active ingredient bear as a minimum the signal word "CAUTION" accompanied by a requirement that the pesticide user wear appropriate protective eyewear and gloves mitigates this potential risk. Like list (5)(A) chemicals, list (5)(B) chemicals are available in the channels of trade.

Proposed subsection (a)(5)(C) establishes that to be exempt products containing the substances listed under proposed subsection (a)(5)(A) and (B) may only include the inert ingredients listed in U.S. EPA's most current List 4A. U.S. EPA's list is updated periodically and is published in the Federal Register. The most current list may be obtained by writing to: Registration Support Branch (4A Inerts List) Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington D.C. 20460. U.S. EPA's List 4A includes approximately 160 substances such as, agar, beeswax, canary seed, cookies, dextrose, eggs, flour, gelatin, honey, lanolin, milk, nitrogen, oats, paraffin wax, raisins, sawdust, tallow, vanilla, whey, and yeast.

Proposed subsection (a)(5)(D) establishes additional conditions that each product must meet before it is exempt from the requirements of FAC Division 7. Each product must bear a label identifying the name and percentage (by weight) of each active ingredient and the name of each inert ingredient in the product. The product cannot bear claims either to control or mitigate microorganisms that pose a threat to human health including, but not limited to, disease transmitting bacteria or viruses, or claims to control insects or rodents carrying specific diseases including, but not limited to, ticks that carry Lyme disease. In addition, the product cannot bear any false and misleading labeling statements including those listed in Title 40 CFR 156.10(a)(5)(i) through (viii).

Title 40 CFR 156.10(a)(5) states that a pesticide is misbranded if its labeling is false or misleading in any particular including both pesticidal and nonpesticidal claims. Examples of statements or representations in the labeling which constitute misbranding include: (i) a false or misleading statement concerning the composition of the product; (ii) a false or misleading statement concerning the effectiveness of the product; (iii) a false or misleading statement about the value of the product for purposes other than as a pesticide; (iv) a false or misleading comparison with other pesticides; (v) any statement directly or indirectly implying that the pesticide is recommended or endorsed by any agency of the Federal Government; (vi) the name of a pesticide which contains two or more principal active ingredients if the name suggests one or more but not all such principal active ingredients even though the names of the other ingredients are stated elsewhere in the labeling; (vii) a true statement used in such a way as to give a false or misleading impression to the purchaser; and (viii) label disclaimers which negate or detract from labeling statements required under the Act and these regulations.

U.S. EPA's prohibition against false and misleading statements for exempted products does not include subdivisions (ix) and (x) of Title 40 CFR 156.10(a)(5). Title 40 CFR 156.10(a)(5)(ix) and (x) identify the following types of statements as misbranding: (ix) claims as to the safety of the pesticide or its ingredients, including statements such as "safe," "nonpoisonous," "noninjurious," "harmless" or "nontoxic to humans and pets" with or without such a qualifying phrase as "when used as directed"; and (x) non-numerical and/or comparative statements on the safety of the product, including but not limited to: (A) "contains all natural ingredients"; (B) "among the least toxic chemicals known;" (C) "pollution approved." Since the substances listed in proposed section 6147(a)(5) are being

exempted from DPR's regulatory requirements because they are considered to be relatively nontoxic, it follows that manufacturers should be allowed to make claims as to the safety of the product. DPR concurs with U.S. EPA's assessment that the types of statements listed in Title 40 CFR 156.10(a)(5)(ix) and (x) will not be considered misbranding for exempted products.

DPR concurs with U.S. EPA's determination that the above ingredients when used under the conditions specified in proposed subsection (a)(5), do not need to be subject to pesticide regulatory requirements. In determining whether to exempt a substance, DPR considered the following factors:

- (1) Whether the substance is available to the general public for nonpesticidal uses without any evidence of significant adverse effects to human or the environment.

DPR found that castor oil, cinnamon, citric acid, citronella, cloves, corn gluten meal, corn oil, cottonseed oil, garlic, geraniol (a component of citronella), geranium oil, lauryl sulfate, lemongrass oil, linseed oil, malic acid, mint, peppermint, rosemary, sesame, sodium chloride (common salt), sodium lauryl sulfate, soybean oil, thyme, white pepper, and zinc metal strips are available in the channels of trade.

- (2) If the substance is a common human food or a common constituent of food.

DPR found that cinnamon, citric acid, cloves, corn gluten meal, corn oil, garlic, malic acid, mint, peppermint, rosemary, sesame, sodium chloride (common salt), soybean oil, thyme, and white pepper are common foods or commonly found in foods. Potassium sorbate is a common food additive. The majority of the inert ingredients listed in U.S. EPA's List 4A are commonly consumed foods.

- (3) Whether the substance is listed in 21 CFR parts 182, 184, or 186 by the Food and Drug Administration (FDA) as Generally Recognized As Safe (GRAS).

Cinnamon, citric acid, citronella, eugenol, garlic, geraniol, geranium oil, lemongrass oil, malic acid, mint, peppermint, 2-phenethyl propionate, rosemary, sodium chloride (common salt), thyme, and white pepper are listed by FDA as GRAS.

- (4) Whether DPR is aware of any data indicating that the substance or a similar substance has the potential to cause significant adverse effects to humans or the environment.

DPR is unaware of any data either in its files or in published literature that indicates that any of the listed chemicals has the potential to cause significant adverse effects to humans or the environment.

Exempting these pesticides or classes of pesticides from the requirements of FAC Division 7 means that manufacturers, importers, and dealers of such products will no longer need to obtain a certificate of registration from DPR before selling the products for use in California. In addition, such products will no longer be subject to other requirements of FAC Division 7, such as the payment of mill assessment on sales of the products and restricted materials provisions. DPR concludes that the exemption of the products listed in proposed CCR section 6147 will not pose unreasonable risks to public health or the environment.

FAC section 12803(b) requires DPR to exclude from the exempting regulation those specific requirements that may otherwise be necessary to protect public health and the environment. DPR determined it could best do that by requiring the submission of reports of any adverse effects that result from the use of exempted products. Proposed section 6147(b) establishes that manufacturers, importers, and dealers of exempted products are required to report any factual or scientific evidence of any adverse effect or risk to human health or the environment to DPR within 60 days of learning of the information. DPR feels that a 60-day time period is a reasonable time frame for manufacturers, importers and dealers to collect and submit adverse effect information. Requiring adverse effects reporting allows DPR to obtain information on exempted products and, if necessary, reassess its decision to exempt such products from the requirements of FAC Division 7.

In compliance with Executive Order W144-97, DPR proposes to add subsection (c) to proposed section 6147. Subsection (c) requires DPR, in consultation with the Secretary for Environmental Protection, to review section 6147 within five years of its adoption to determine whether the regulation should be retained, revised, or repealed.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION

DPR has not identified any alternatives to the proposed regulatory action that would lessen any adverse impacts, including impacts on small businesses, and invites the submission of suggested alternatives.

EFFORTS TO AVOID UNNECESSARY DUPLICATION WITH FEDERAL REGULATIONS

The proposed regulation change makes DPR's handling of certain pesticides or classes of pesticides more consistent with current U.S. EPA handling of such products.

DOCUMENTS RELIED UPON

1. FAC section 12803 (SB 445, Statutes of 1997, Chapter 691).
2. FIFRA section 25(b) [7 U.S.C. sec. 136w(b)].
4. 40 CFR section 152.25.
5. 21 CFR Parts 182, 184, and 186.

ATTACHMENT D

Raichel, Dan

From: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>
Sent: Monday, March 30, 2020 6:49 PM
To: Raichel, Dan
Cc: Morrison, Karen@CDPR
Subject: RE: Pollinator Timeline and Treated Seed Policy

Hi Dan,

I can confirm that's the case. I suspect you've already see these, but there is a more general discussion of the treated articles exemption and 3 CCR 6147 at the links below:

<https://www.cdpr.ca.gov/docs/registration/manual/guidance.pdf> (page 9)

<https://www.cdpr.ca.gov/docs/registration/canot/ca00-6.pdf>

<https://www.cdpr.ca.gov/docs/registration/canot/2015/ca2015-13.pdf>

Best,
Daniel

From: Raichel, Dan <draichel@nrdc.org>
Sent: Monday, March 30, 2020 12:24 PM
To: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>
Cc: Morrison, Karen@CDPR <Karen.Morrison@cdpr.ca.gov>
Subject: RE: Pollinator Timeline and Treated Seed Policy

EXTERNAL:

Thanks, Daniel,

This is all very helpful. Just to clarify, is this is the only written policy DPR has on the status of the treated article exemption/pesticide-treated seeds? I think we can forgo the PRA request if you can confirm that's the case, but we do want to make sure we're capturing the whole picture, so we understand what DPR's current policy/interpretation is. Also happy to file the PRA request next week if it makes it easier to search on your end.

Thanks again,
Dan

From: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>
Sent: Friday, March 27, 2020 4:44 PM
To: Raichel, Dan <draichel@nrdc.org>
Cc: Morrison, Karen@CDPR <Karen.Morrison@cdpr.ca.gov>
Subject: RE: Pollinator Timeline and Treated Seed Policy

Hi Dan,

I believe this regulation was effective in 2000. So the ISOR would be from 1999.

Daniel

From: Raichel, Dan <draichel@nrdc.org>
Sent: Friday, March 27, 2020 2:42 PM
To: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>
Cc: Morrison, Karen@CDPR <Karen.Morrison@cdpr.ca.gov>
Subject: RE: Pollinator Timeline and Treated Seed Policy

EXTERNAL:

Thanks, Daniel,

Looking forward to reviewing. Quick question, what year is this from (didn't see it with a quick skim)?

Have a great weekend and hope you and yours are well too,
Dan

From: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>
Sent: Friday, March 27, 2020 4:22 PM
To: Raichel, Dan <draichel@nrdc.org>
Cc: Morrison, Karen@CDPR <Karen.Morrison@cdpr.ca.gov>
Subject: RE: Pollinator Timeline and Treated Seed Policy

Hi Dan,

Apologies for the delayed response and many thanks for your courtesy during this challenging time. In response to your inquiry regarding treated articles, I've attached the initial statement of reasons from DPR's 3 CCR 6147 rulemaking package. The relevant discussion is on page 3. Hope you and yours are well.

Best,
Daniel

From: Raichel, Dan <draichel@nrdc.org>
Sent: Monday, March 16, 2020 1:48 PM
To: Morrison, Karen@CDPR <Karen.Morrison@cdpr.ca.gov>
Cc: Rubin, Daniel@CDPR <Daniel.Rubin@cdpr.ca.gov>; Prichard, Ann@CDPR <Ann.Prichard@cdpr.ca.gov>; Darling, Russell@CDPR <Russell.Darling@cdpr.ca.gov>
Subject: Pollinator Timeline and Treated Seed Policy

EXTERNAL:

Hi All,

Hope everyone is well. We understand things are tumultuous right now, but wanted to write with two quick things:

- **Pollinator Mitigation Rollout Timeline** – We know the plan for listening sessions had been April, but assume things are likely delayed now. We just wanted to check on the status (or tentative status) and whether the listening sessions may be moving online.

- **DPR Treated Seed Policy** – In our last conversation, you mentioned you weren't sure whether DPR had a written policy/opinion for the position that pesticide treated seeds do not qualify as "pesticides" under the Food and Agriculture Code. This is an issue of importance to us, so we will be filing a Public Records Act request to clarify whether there is a written policy. We had planned on giving you all a heads up in any event, but we're happy to put off the formal request for a bit while the Department attends to more immediate matters.

Given the COVID-19 situation, please do not feel any pressure to respond to this email in the near term—we are happy to re-ping later. In the meantime, our best wishes and prayers go out to you and all of CalEPA while the agency attends to this crisis.

Be well,
Dan

DANIEL RAICHEL
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December 22, 2020

Via Email

Val Dolcini, Director
California Department of Pesticide Regulation
1001 I Street, P.O. Box 4015
Sacramento, CA 95812-4015
Val.Dolcini@cdpr.ca.gov

**Rulemaking Petition to Regulate Crop Seeds Treated with Neonicotinoids
and Other Systemic Insecticides—Request for Reconsideration**

Dear Director Dolcini:

On behalf of the Natural Resources Defense Council, Californians for Pesticide Reform, Center for Biological Diversity, Friends of the Earth, Pesticide Action Network North America, and the Xerces Society for Invertebrate Conservation (“Petitioners”), we write pursuant to California Government Code (CGC) § 11340.7 to request reconsideration of the California Department of Pesticide Regulation’s (DPR) October 23, 2020, decision (the “Decision”) denying our September 23, 2020, Rulemaking Petition to Regulate Crop Seeds Treated with Neonicotinoids and Other Systemic Insecticides (the “Petition”).

The Petition requests, among other things, that DPR repeal its current regulatory policy regarding crop seeds treated with neonicotinoids (“neonics”) and other systemic insecticides—which deposit hundreds of thousands of pounds of pesticide active ingredients into California soil each year and may account for the single largest use of neonic pesticides in the state. DPR’s policy excludes such seeds from the definition of “pesticide” under California’s pesticide laws, effectively exempting them from state registration or regulation.

The Decision acknowledges the existence of DPR’s exclusion policy, but denies Petitioners’ central demand to repeal that policy on the grounds that the requested repeal “do[es] not require rulemaking activity.” Decision at 2. This statement misconstrues Petitioners’ request. As the Petition explains, DPR’s current policy constitutes an unlawful regulation—enacted in violation of California rulemaking procedure and DPR’s enabling laws. The Petition’s request, therefore, constitutes a request for repeal of a regulation. *See* CGC § 11340.6.

DPR must respond to this request directly, *see* CGC § 11340.7, and Petitioners ask again that DPR do just that. We also ask that DPR reconsider and reverse its denial of our request that it designate pesticide-treated seeds as “restricted materials” and provide all other regulation

necessary to mitigate their environmentally harmful effects. For the reasons set forth in the Petition and below, DPR must grant our requests for reconsideration.¹

I. Background

A. Legal Standard

The California Government Code (CGC) provides that “any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5” of the California Administrative Procedure Act (APA). CGC § 11340.6. Within thirty days of receipt of such a petition, the state agency must grant or deny the petition, or grant or deny it in part, and “may grant any other relief or take any other action as it may determine to be warranted by the petition.” *Id.* § 11340.7(b). “Any interested person may request a reconsideration of any part or all of a decision” within sixty days. *Id.* § 11340.7(c). The agency must then respond to the request for reconsideration within thirty days, granting or denying, in whole or in part, the requested regulatory action and taking any other warranted action. *Id.* § 11340.7(a)-(c).

B. The Petition

On September 23, 2020, Petitioners filed the Petition with DPR pursuant to CGC § 11340.6. The Petition requests that DPR:

- (1) Repeal its policy classifying crop seeds treated with neonicotinoid pesticides (“neonics”) and other systemic insecticides as “treated articles”—thereby excluding them from the definition of “pesticide” under the California Food and Agricultural Code (FAC)—and register and regulate such seeds as “pesticides.” *See generally* Petition. As the Petition describes, DPR’s current policy (the “Exclusion”) constitutes “a regulation exempting neonic-treated seeds from regulation under the FAC without going through the public notice-and-comment procedure that the APA requires,” *Id.* at 19;
- (2) List seeds treated with neonics and other systemic insecticides as “restricted materials” pursuant to FAC §§ 14001-14015, *and* take any other regulatory action necessary to protect against the environmentally harmful effects of such seeds pursuant to its duties under FAC §§ 12824, 12838, and 14102, Petition at 17-20; *and*
- (3) Take regulatory action to support research and provide outreach and assistance regarding regenerative agricultural practices that eliminate or reduce chemical inputs—such as cultivation practices, beneficial insects, rotation, and cover crops, *Id.* at 20.

The Petition also details how the Exclusion violates the APA and the plain text of the FAC, describing why DPR lacks authority to maintain its unlawful regulatory policy. *Id.* at 19.

¹ This request for reconsideration is timely. *See* Decision (issued Oct. 23, 2020); CGC § 11340.7(c).

C. DPR's Decision

DPR denied the Petition on October 23, 2020.² In its decision letter (the “Decision”), DPR states that Petitioners’ first and third requests “do not require rulemaking activity,” and therefore require no response. Decision at 2. Accordingly, the Decision states that DPR would “not address” these requests. *Id.*

The Decision expressly denies Petitioners’ second request. In support of the denial, DPR begins by restating its Exclusion policy:

DPR must register a pesticide product before the product can be sold or offered for sale in California. (Food & Agr. Code, § 12993.) To the extent that neonicotinoid-treated seeds are treated with neonicotinoids to protect the seed itself, **DPR does not consider them to be “pesticides”** under Food and Agricultural Code section 12753, as they are not “intended to be used” to control any pests. Because DPR does not regulate these products as “pesticides,” they are not registered.

Id. at 2 (emphasis added). DPR reasons that because neonic-treated seeds are not “pesticides,” it cannot regulate them as “restricted materials,” thus making the Petition’s request “outside DPR’s jurisdiction unless and until DPR first regulates the product as a ‘pesticide.’” *Id.* DPR further states that, even assuming that neonic-treated seeds met the definition of “pesticide” and were registered, DPR lacks sufficient information to designate them as restricted materials. *Id.* at 2-3.

D. DPR's Separate Response Letter

In a response letter separate from the Decision (the “Response”), DPR informed Petitioners that the Petition “raises significant issues of concern to DPR” and that DPR will initiate “marketplace surveillance” as to “how, where, and for what purposes [neonic-treated seeds] are being used” and “look into obtaining better data and studies on how these products are currently being used in California.”³ Petitioners appreciate DPR’s efforts to examine the extent and types of usage of treated seeds in California and how those seeds are marketed and sold. However, as explained below, DPR already possesses sufficient information to decide the question of whether treated seeds qualify as pesticides.

II. Request for Reconsideration

A. DPR Must Respond to and Grant Petitioners’ Request to Repeal the Exclusion

i. DPR Must Respond to Petitioners’ Request to Repeal the Exclusion

The Decision fails to respond to Petitioners’ first and core request: that DPR rescind the Exclusion and regulate treated seeds as pesticides. Because this constitutes a request for “repeal

² Decision on Petition for Rulemaking (“Decision”), Cal. Reg. Notice Register 2020, No. 46-Z, at 1471 (Oct. 23, 2020). For ease of reference, we use the page numbers in the original copy of the Decision rather than those in the Notice Register.

³ Letter from Val Dolcini, DPR Director, to Daniel A. Raichel and Samuel D. Eisenberg, *Response to Rulemaking Petition to Regulate Crop Seeds Treated with Neonicotinoids and Other Systemic Insecticides* (“Response”) (Oct. 23, 2020), at 2.

of a regulation” under the APA, and the Petition contains all of the information required by CGC § 11340.6, DPR must directly respond to it.

The Exclusion is a “regulation” under the APA. Petition at 19. The APA defines this term to mean “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” CGC § 11342.600. That definition is broad and encompasses all rules that an agency intends “to apply generally, rather than in a specific case.” *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571. This includes an agency’s unwritten interpretation of its statutory authority over a class of items or matters if the interpretation creates a generally applicable rule with respect to its enforcement or non-enforcement of the law. *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383, 388-89. Such an interpretation of a statute “‘amounts’ to a regulation subject to the rulemaking procedures of the APA,” *id.* at 389 (quoting *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 334), unless it is the “only legally tenable interpretation” demanded by the statutory text, CGC § 11340.9(f). That exception is narrow and “applies only in situations where the law can reasonably be read only one way,” such as where the agency’s actions are essentially “rote” or “ministerial.” *See Morning Star Co.*, 38 Cal.4th at 336-37 (internal quotation marks omitted).

The Exclusion readily meets this definition of “regulation.” It interprets the FAC definition of “pesticide” to exclude all crop seeds treated with neonics and other insecticides, creating “an unwritten, generally applicable” rule of non-enforcement that applies to all such seeds. *Capen*, 155 Cal.App.4th at 383, 385, 388-89 (holding agency’s unwritten “standard policy” interpreting ambiguous statutory exemption for certain surgical clinics from otherwise applicable licensure requirements was a “regulation” subject to the APA). The general nature of this policy is confirmed by DPR’s actual practice. DPR has never required the registration of any pesticide-treated seeds or mandated reporting of their use.

Moreover, the Exclusion does not constitute the “only legally tenable interpretation” of the FAC’s definition of “pesticide” as regards insecticide-treated seeds. CGC § 11340.9(f). To the contrary, the definition unambiguously covers insecticide-treated seeds. Petition at 13-14. Any potential ambiguity cuts in favor of Petitioners’ reading and would make the 11340.9(f) exception inapplicable. Indeed, in interpreting the virtually and materially identical definition of “pesticide” under the Federal Insecticide, Fungicide, and Rodenticide Act, the U.S. Environmental Protection Agency (U.S. EPA) found that such seeds do, in fact, constitute “pesticides.” *See* Petition at 10. While DPR claims that seeds treated “to protect the seed itself” do not constitute “pesticides” because they are not “intended” to control pests, Petitioners have provided ample evidence confirming the fundamental pesticidal purpose of insecticide-treated seeds that extends well beyond protection of the seeds themselves. *See* Petition at 13-15; *infra* Section II, A, iii-iv. Even assuming the legal status of these insecticide-treated seeds were somehow ambiguous, DPR’s Exclusion would nonetheless require formal rulemaking in accordance with the APA, *see Capen*, 155 Cal.App.4th at 388-89, which DPR has not conducted.

The Petition requests that DPR repeal the Exclusion, and therefore requests the repeal of a regulation as provided in the APA. Specifically, it states that the Exclusion is an unlawful

“regulation” adopted contrary to the plain text of the FAC and outside of the required APA procedures. Petition at 19. The Petition explicitly requests that DPR rescind the Exclusion and “regulate and track all seeds coated with systemic insecticides sold or used in California as ‘pesticides.’” Petition at 1. Further, the Petition describes the Exclusion, details the reasons why it is unwise and unlawful and must be repealed, and references DPR’s statutory authority for doing so, thereby satisfying the petition requirements of the APA. *See* Petition at 11-19; CGC § 11340.6(a)-(c). DPR does not suggest that the Petition is in any way deficient in this respect. Accordingly, because the Exclusion is a “regulation” and the Petition provides all information required by the CGC, Petitioners’ request to repeal the Exclusion constitutes a request for the “repeal of a regulation” requiring a direct response from DPR. *See* CGC §§ 11340.6, 11340.7.

The Decision states that the request to repeal the Exclusion “do[es] not require rulemaking activity,” and therefore demands no response, Decision at 2, but this misconstrues Petitioners’ request. It is Petitioners’ understanding that the repeal of an unwritten and unlawful regulation does not *necessarily* require “formal rulemaking.” *See* Petition at 19-20; CGC § 11340.7(b) (in response to a petition, an agency “may grant any other relief or take any other action as it may determine to be warranted”). But regardless of the process required, Petitioners’ request to DPR was and is explicit: “DPR has enacted a regulation exempting neonic-treated seeds,” doing so “in violation of the APA and FAC,” and therefore “must rescind it.” Petition at 19. If DPR believes that the APA requires formal rulemaking to satisfy Petitioners’ request, then Petitioners reiterate that they expressly request that DPR engage in such rulemaking as provided in Article 5 of the APA. Either way, DPR must respond directly to Petitioners’ request. CGC § 11340.7(a).

ii. The Exclusion Is Unlawful and Must Be Repealed

DPR must repeal the Exclusion because it is unlawful. Petition at 19. As set forth in the Petition, the Exclusion violates and conflicts with the plain text of the FAC and was adopted in contravention of its duties under the FAC and the required APA procedures. *See id.* at 13-19; CGC § 11340.5(a) (“No state agency shall issue, utilize, enforce, or attempt to enforce” any regulation not promulgated in accordance with the APA.). As such, DPR must not only respond to Petitioners’ request to repeal the Exclusion and commence registration and regulation of insecticide-treated seeds, it must grant that request.

iii. The Petition Provides Sufficient Information to Support Repeal of the Exclusion

DPR’s separate Response states that “additional information” beyond that contained or cited to in the Petition “is fundamental to any assessment of neonicotinoid-treated seeds,” implying that DPR must collect additional evidence in order to grant Petitioner’s request to repeal the Exclusion. Response at 2. This proposition is false. The Petition provides more than enough information to demonstrate that neonic-treated seeds fall under DPR’s jurisdiction.

In California, “[a]ny substance, or mixture of substances which is intended to be used . . . for preventing, destroying, repelling, or mitigating any pest” is a “pesticide” subject to DPR’s regulatory authority. FAC § 12753(b). Under the FAC and DPR’s current policies, non-pesticidal products combined with pesticide active ingredients require registration as “pesticides” unless: (1) DPR individually evaluates and exempts them by rule, FAC § 12803; or (2) the active

ingredient is applied “solely to protect the article/substance itself” and is not otherwise “intended to be used to control pests.”⁴ Applying that framework, DPR must register and regulate seeds treated with neonics and other similar insecticides.

The Petition describes how that neonic-treated seeds are mixtures of pesticide active ingredients with crop seeds, thus meeting the FAC definition of “pesticide.” *See* Petition at 13-15. It also demonstrates that neonic-treated seeds fail to meet either exemption criteria because they are intended to control pests beyond merely protecting the seed itself and DPR has not individually evaluated or exempted their use by rule. *Id.* at 13-16.

As the Petition outlines, neonic-treated seeds’ pesticidal impacts are twofold. A portion of pesticide active ingredient from the seed coatings is systemically absorbed into the growing seedlings and plants—providing control against insects attempting to eat the plant—while the balance bleeds into the soil, further suppressing insect populations there. *See id.* at 3-4, 14-15. This is the same manner in which neonic active ingredients are designed to work in DPR-registered products, such as neonic-impregnated fertilizers and soil treatments. *See id.* at 14.

The Petition also references several industry advertising materials highlighting the fundamental pesticidal nature of seeds treated with neonics and other insecticides. Petition at 12, 14-15 (referencing advertising materials for Syngenta’s Cruiser® and Platinum®, Bayer’s Gaucho® and FarMore®, BASF’s Poncho® and Votivo®, Winfield United’s Resonate®, and Corteva Agriscience’s Lumivia® line of products). For example, the Petition references a website for seeds sold by Seminis—a subsidiary of the Bayer corporation—stating that neonic treatments on their vegetable seeds “provide targeted agricultural pest control” for “multiple pests” through “systemic activity for above and below ground insects.” *Id.* at 15.⁵ The site illustrates these claims with a diagram showing the range of pests the seeds are used to control:

⁴ DPR, *Letter to Pesticide Product Registrants and Stakeholders Regarding Registration Requirements for Products Made from Pesticide Impregnated Materials and Bearing Pesticide Claims*, California Notice 2015-13 (Dec. 10, 2015), <https://bit.ly/3f1xpFc> (emphasis in original); *see also* DPR, *Regarding the Exemption from California’s Regulatory Requirements, Pesticides that Are Exempt from Federal Requirements Pursuant to FIFRA Section 25(b)(2), Initial Statement of Reasons and Public Report*, 3 (1999) (“1999 ISOR,” Petition Attachment C).

⁵ Bayer, Seminis: Neonics Vegetable Seed Treatment Information (visited Dec. 2, 2020), <https://bit.ly/3hIwaw0>.

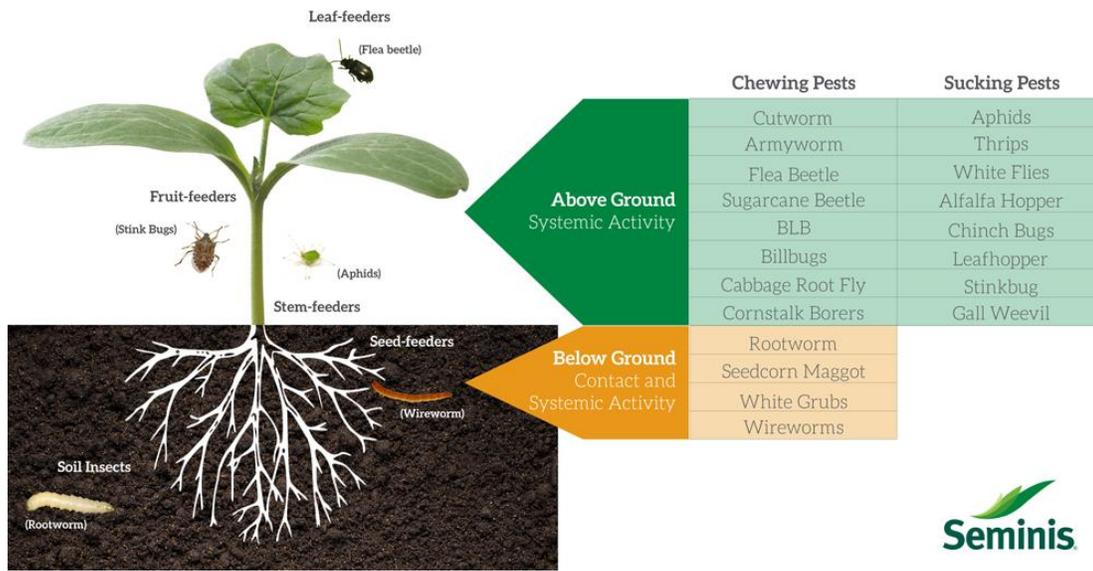


Diagram advertising the pesticidal properties of Seminis's line of neonic-treated vegetable seeds, typically sold with FarMore® brand insecticides.

All neonic-treated seeds work—and are intended to work—in this manner. Their pesticidal purpose is well known to academics, agronomists, seed dealers, farmers, and chemical manufacturers, and is enthusiastically marketed to farmers and other potential buyers. Indeed, DPR's own registration documents for seed treatment products discussed in the Petition confirm that these pesticides control pests that do not consume or otherwise damage crop seeds. For example, Bayer's Gaucho® 600 seed treatment product, cited in the Petition at 14-15, is registered with DPR for target pests such as flies, butterflies, mosquitoes, midges, gnats, wasps, bees, and hornets.⁶

While we are encouraged that DPR is taking additional steps to learn more about the marketing, advertising, and effectiveness of insecticide-treated seeds, no further research is required to determine that they fall within DPR's jurisdiction. DPR's categorical Exclusion is based on a flawed and frankly surprising premise that these seeds are not used to control pests beyond only those that attack crop seeds themselves. The Petition provides ample evidence that seeds treated with neonics and similar insecticides have much broader pesticidal purposes and impacts, and thereby constitute "pesticides" under California law, requiring registration and all other appropriate regulation.

iv. Additional Evidence Demonstrates that Treated Seeds Are Pesticides

DPR must repeal the Exclusion and needs no supplemental information to do so. However, additional evidence highlighting insecticide-treated crop seeds' pesticidal purpose is not hard to find. In the attached Appendix to this response, Petitioners provide a broad sample of additional

⁶ See, e.g., DPR, *Product Information Report for Gaucho 600 Flowable* (visited Dec. 15, 2020), <https://bit.ly/2WjalUA>. Petitioners understand that the use of this product is also constrained by its federal label. That label, however, also lists many non-seed eating insects that the product is designed to control, including aphids, chinch bugs, Hessian flies, whiteflies, grasshoppers, thrips leafhoppers, and leaf beetles. See U.S. EPA, *Updated Registration for Gaucho 600 Flowable* (Feb. 27, 2019), <https://bit.ly/37n0utO>.

examples of publicly available information further confirming the pesticidal nature of insecticide-treated seeds.⁷ The Appendix contains three types of materials, as follows:

a. Materials from Pesticide Manufacturers

The first section of the Appendix contains advertising or promotional materials from pesticide seed treatment product manufacturers explaining how their products are designed to control pests beyond those that attack crop seeds themselves. For example, NuFarm advertises its Senator® 600 FS seed treatment as a “seed applied insecticide” that “provides unbeatable protection against the toughest early season pests” and “starts working on contact to protect the roots.” Appendix at 39. This pesticidal effect lasts due to “its systemic activity” that “keeps protecting young plants to help ensure a good stand.” *Id.* NuFarm also lists under “Pests Controlled” species like “aphids” and “leafhoppers,” that do not eat or damage crop seeds. *Id.* at 40.

These materials are not limited to neonic-based products. For example, Syngenta’s Seedcare product guide (“Seedcare Guide”) describes how the cyantraniliprole seed treatment Fortenza® Duo is designed to control pests both systemically in the plant as well as through soil contact:

Mode of Action: Applied as a seed treatment, FORTENZA Duo is quickly taken up by the roots and moves upward in the plant through the xylem system, controlling a broad range of above ground insects. The product is also distributed into the soil around the root zone forming a bulb of protection against below ground insects. It is a soil systemic product. Insects are controlled mainly by ingestion but some contact activity can also be observed. FORTENZA Duo provides excellent crop protection resulting from a rapid feeding inhibition and long lasting residual effect.

Id. at 14. Similarly, the description for the abamectin seed treatment Avicta® explains how it offers “seed-delivered protection” by migrating from the seed into soil: “Mode of Action: After release from seed coatings, AVICTA moves alongside the growing roots, thereby protecting young plants from nematodes attacking the vital root systems.” *Id.* at 15. These statements demonstrate that treated seeds are sold with coatings designed to protect roots, leaves, and other parts of the growing plant—not merely the seed during transportation and planting.

The Seedcare Guide also details how chemical companies involve themselves in the manufacture and sales of treated seeds, blurring the lines between the seeds and chemical products they sell to seed dealers, and highlighting how the resulting mixture of seed and insecticide coating is sold as a single pesticidal unit. For example, it explains that “[s]eeds and seed treatment technologies . . . form an integrated solution that is conveniently supplied in the seed bag” and “protect[s] against early disease and pests.” Appendix at 4. It further elaborates that treated seeds are “a combination of genetics and seed-applied technologies” and that “[o]nly a high-quality application onto [a] seed helps to ensure the desired in-field performance.” *Id.* Helpfully, Syngenta’s Seedcare service assists customers in “assess[ing] and manag[ing] application quality,” including “selecting the right equipment and placing it in the best configuration for

⁷ Some of the documents in the Appendix have been excerpted for convenience. Full original copies of all of the documents in the Appendix are available at the links provided in the table of contents.

their plant.” *Id.* at 4, 6. Syngenta even “provide[s] product marketing support, to help customers demonstrate the benefits and value of [Syngenta’s] seed treatment brands” and “to help create demand for the brands.” *Id.* In short, Syngenta helps its seed-dealer customers manufacture and promote Syngenta-branded treated seeds.

b. Materials from Manufacturers, Dealers, and Sellers of Pesticide-Treated Seeds

The second section of the Appendix contains advertising or promotional materials from seed manufacturers, dealers, and other sellers—some of which are also subsidiaries of pesticide manufacturers. These materials show how manufacturers’ pesticidal claims are repeated by treated-seed sellers to seed purchasers.

For example, a 2016 advertisement for Pioneer—a seed manufacturer owned by Corteva Agriscience—touts the “proven insect protection” of its insecticide treated seeds that “enhance early-season plant health” and are “[a]pplied as [the] standard seed treatment on most Pioneer® brand corn products that don’t include DuPont™ Lumivia™ insecticide seed treatment.” *Id.* at 188. A similar 2017 Canadian advertisement for the U.S. seed manufacturer DeKalb—a subsidiary of the Bayer corporation—markets the chlorantraniliprole seed treatment Lumivia™ as an option for its seeds, stating it provides “fast-acting protection up to the 4-5 leaf stage against early-season insect pests” and that it “quickly moves systemically upward throughout the plant from seed germination to V5 seedling stage, delivering protection to new growth.” Appendix at 187.⁸

Large independent seed sellers make similar claims in their seed catalogs. For instance, the 2020 catalog for the Rispens Seeds company indicates that all of its sweet corn seed has neonic-containing Cruiser® or Poncho® treatments, stating that they “provide contact and systemic protection against Flea Beetles up to the five true-leaf stage, and are effective against plant damage and stand loss caused by Wireworms, Seed Corn Maggots, White Grubs, Southern Corn Leaf Beetles, Chinch Bugs and suppress Black Cutworms.” *Id.* at 110. Similarly, the Seedway 2021 vegetable seed catalog notes that Cruiser® treatments control a variety of pests and that Cruiser® is their “standard seed treatment” for bush beans and sweet corn. *Id.* at 53. The Rupp 2020 vegetable seed catalog prominently advertises its Cruiser® and FarMore®-treated seeds by placing the official logo for those chemical treatments next to the seed variety name. *See generally id.* at 137-86. It also notes that “[m]ost of our seed is treated,” but that “some varieties [are] available untreated” if the customer specially requests untreated seeds on the order form. *Id.* at 139. Likewise, the Seedway catalog indicates treated seeds by icon or initials of the treatment brand name, and states “[o]ur seed, unless specified by the customer, will be treated with our standard seed treatment.” *Id.* at 102. These seeds are being sold, in part, for their pesticidal effectiveness, and these pesticidal claims are a key part of the marketing of the treated seeds.

⁸ DeKalb currently offers Acceleron insecticide seed treatments for its U.S. customers. *See* DeKalb, *Protect What You Plant: Protection Starts at the Seed Level* (visited Dec. 18, 2020), <https://bit.ly/34t4ZBy> (“DEKALB® can help to safeguard your yield from all manners of threats—from weather to insects to diseases”). Acceleron seed treatments contain neonics and other pesticides. *See* Bayer CropScience, *Acceleron® Corn Seed Protection* (visited Dec. 18, 2020), <https://bit.ly/2LORXar>.

c. Pesticide-Treated Seeds Offered for Sale in California on Amazon

The third section of the appendix contains screenshots of insecticide-treated seeds offered for sale on the Amazon platform, highlighting how smaller seed sellers also parrot the same pesticidal claims. For instance, a webpage advertising FarMore®-treated pumpkin (crous) seeds, states that they provide “broad-spectrum protection against soilborne disease, as well as early season protection against striped cucumber beetles.” Appendix at 197.

These additional materials represent a small sample of those readily available on the internet and no doubt also embody the types of verbal representations made to California seed purchasers by local and national sellers. As with those cited in the Petition, these materials make clear that insecticide-treated seeds are designed to control a wide range of soil and plant pests—well beyond only those that eat or damage crop seeds. While these materials attest to the fundamental and well-known pesticidal nature of these seeds, it is that nature that makes them pesticides under California law and subject to DPR jurisdiction—not the advertisements themselves.

As discussed in the Petition, failure to repeal the Exclusion as required by law will maintain a large and unacceptable gap in DPR’s regulatory authority—tacitly allowing the use of any state-authorized products regardless of their pesticidal, environmental, or human health impacts, so long as they enter the state on a seed. For example, while Petitioners disagree with its legal interpretation, the University of California Integrated Pest Management (UC IPM) advises farmers that the neonic-based “Farmore FI400 is not labeled for use in California, but seed treated in and obtained from another state can be legally used in California even for a chemical not registered on cucurbits in California.”⁹ DPR must reject this illegal and unsupportable loophole for a large, growing, and rapidly evolving class of insecticide products by repealing the Exclusion.

v. *All Pesticide-Treated Seeds Designed to Have Pesticidal Activity Beyond Protection of the Seeds Themselves Constitute Pesticides under California Law, Whether or Not the Active Ingredient Is Technically “Systemic”*

The Petition explicitly pertains to “neonic-treated seeds and those coated with other systemic insecticides.” Petition at 1. Petitioners wish to clarify, however, that other insecticide-treated crop seeds may constitute “pesticides” under California law, regardless of whether the active ingredient in the treatment is technically considered “systemic.” For example, U.S. EPA and Canada’s Pest Management Regulatory Agency (PMRA) are currently considering registration of the “meta-diamide” broflanilide as a seed treatment.¹⁰ While believed to be “non-systemic,” the chemical nonetheless moves into soils, thereby delivering an intended pesticidal impact.¹¹ Any similar insecticide treatments intended to provide pest protection beyond crop seeds themselves constitute “pesticides” under the FAC, requiring DPR registration and regulation.

⁹ UC IPM, *How to Manage Pests: UC Pest Management Guidelines – Cucurbits* (visited Sept. 22, 2020), <https://bit.ly/3mLanHp>.

¹⁰ See U.S. EPA, *EPA Proposes Registration of New Active Ingredient to Control Corn Rootworm and Other Pests* (Oct. 19, 2019), <https://bit.ly/39G0EOA>; PMRA, *Proposed Registration Decision PRD2020-06, Broflanilide, Cimegra, Teraxxa and Teraxxa F4* (Jun. 11, 2020), <https://bit.ly/3mFMTTV> [hereinafter “PMRA Broflanilide Review”].

¹¹ See PMRA Broflanilide Review.

B. DPR Must Reconsider Its Denial of Petitioners' Request to List Insecticide-Treated Seeds as Restricted Materials and Take Other Required Regulatory Action

The Decision states that because DPR does not regulate insecticide-treated seeds as “pesticides”—and DPR “cannot regulate as a ‘restricted material’ a product that is not a ‘pesticide’”—the Petition’s request to list insecticide-treated seeds as restricted materials falls “outside DPR’s jurisdiction.” Decision at 2.

As discussed, insecticide-treated seeds are “pesticides” falling under DPR’s jurisdiction and requiring regulation as such. *See supra* Section II, A. Accordingly, DPR must reconsider its denial of Petitioners’ request to regulate seeds treated with neonics and other similarly harmful insecticides as restricted materials.

The Decision also opines in the alternative that, even assuming that insecticide-treated seeds meet the FAC definition of “pesticide,” DPR “does not have sufficient information” to designate them “restricted materials.” Decision at 2. The Petition, however, provides sufficient information to show that neonic-treated seeds meet multiple criteria for mandatory restricted materials designation. *See* Petition at 5-8, 17. Accordingly, DPR must designate neonic-treated seeds as restricted materials.

Additionally, as DPR notes, “restricted materials designation is one of several tools available to DPR to mitigate adverse effects.” Decision at 3. For this reason, the Petition also requests that DPR take any other regulatory action necessary to protect against the harmful effects of such seeds pursuant to its duties under FAC §§ 12824, 12838, and 14102, which includes formal rulemaking. Petition at 17-20. Accordingly, this too constitutes a request for the adoption of a regulation in accordance with CGC § 11340.6. DPR must respond to this request. *See id.* § 11340.7. Further, whether or not DPR lists seeds treated with neonics or other insecticides as restricted materials, it must consider other regulatory action to prevent environmental harms from their use—such as use restrictions, either through its current proposed regulations for agricultural neonic uses or otherwise.¹²

III. Conclusion

For the foregoing reasons, DPR must reconsider its determinations in the Decision and grant Petitioners’ requests to: (1) repeal the Exclusion and register and regulate insecticide-treated seeds in accordance with the FAC; (2) list seeds treated with neonics or other harmful insecticides as restricted materials and/or pursue other regulatory action to satisfy its duties under the FAC. In accordance with CGC § 11340.7(a), (c), we look forward to DPR’s response within 30 days.

Thank you for your time and attention to this request. If you have any questions, please do not hesitate to contact us.

¹² *See* DPR, Text of Proposed Regulations for Purposes of Pre-Regulatory Webinars (Apr. 4, 2020), <https://bit.ly/3qJFeX5>.

Respectfully,



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