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10
11 **THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 CENTER FOR FOOD SAFETY and) Case No. 21-9640
14 PESTICIDE ACTION NETWORK NORTH)
15 AMERICA,)
16) **COMPLAINT FOR DECLARATORY**
17 *Plaintiffs,*) **AND EQUITABLE RELIEF**
18)
19 v.) Administrative Procedure Act Case
20)
21 UNITED STATES ENVIRONMENTAL)
22 PROTECTION AGENCY and MICHAEL)
23 REGAN, ADMINISTRATOR, UNITED)
24 STATES ENVIRONMENTAL)
25 PROTECTION AGENCY,)
26)
27)
28 *Defendants.*)
_____)

1 Plaintiffs Center for Food Safety and Pesticide Action Network North America
2 (Plaintiffs) on behalf of themselves and their members, allege as follows:

3 INTRODUCTION

4 1. This is an action for declaratory and equitable relief challenging the failure of the
5 United States Environmental Protection Agency (EPA or the agency) to answer Plaintiffs' 2017
6 legal rulemaking petition, which the agency is required to do by law. The 2017 petition called on
7 EPA to close a regulatory loophole that allows seeds coated with systemic pesticides (coated seeds)
8 to evade the registration and labeling requirements of the Federal Insecticide, Fungicide, and
9 Rodenticide Act (FIFRA). EPA's failure to respond to the petition and close the loophole means
10 these pesticides are continuing to cause environmental harm unabated.

11 2. Coated seeds are crop seeds that have been coated with systemic pesticides,
12 primarily neonicotinoid insecticides. Insecticides are a subcategory of pesticides. Neonicotinoids
13 and other systemic pesticides are absorbed into the plant's circulatory system as the plant grows
14 and are predominately intended to have an external pesticidal effect on pests and predators of the
15 growing plant. Crops grown from coated seeds—including corn, soybean, and sunflower—cover
16 almost 180 million acres of U.S. farmland each year. This is the equivalent acreage of over one-
17 and one-half Californias.

18 3. Coated seeds have devastating environmental impacts. First, the pesticidal coating
19 does not remain on the seed. The prophylactic pesticide coatings abrade off the seed as dust
20 during planting, or slough off the seed into the surrounding soil. Overall, only 5% of the
21 prophylactic coating is taken up by the plant,¹ leaving 95% to contaminate the air, soil, vegetation,
22 and waterways. Second, beyond coating the seed itself, these systemic pesticides spread through all
23 living tissues of the growing plant, protecting the plant from pests but also spreading the
24 poisonous effects to non-target species. As a result of both these pathways, beneficial insects,
25 valuable pollinators, and birds—including threatened and endangered insects and birds protected
26 under the Endangered Species Act (ESA)—are killed or injured. The most dramatic impacts of

27
28 ¹ R. Sur & A. Stork, *Uptake, Translocation and Metabolism of Imidacloprid in Plants*, 56 *Bulletin of Insectology* 35-40 (2003).

1 coated seeds have come in the mass die-offs of honey bees and wild native bees they have caused.
2 Excessive honey bee mortality and related wild pollinator declines are a major crisis for American
3 agriculture.

4 4. Currently EPA entirely exempts coated seeds from FIFRA's pesticide's premarket
5 licensing, registration, assessment, and labeling regime. Instead the agency has a de facto practice
6 of applying the "Treated Article" Exemption in its regulations, 40 C.F.R. §152.25(a), despite the
7 plain language of the Treated Article Exemption foreclosing the possibility that coated seeds are
8 treated articles. Because the coated seeds are not treated primarily to protect the seed itself, but
9 rather to protect the *growing plant*, they cannot be properly exempted as "treated articles" under the
10 regulation. As a result, EPA has completely failed to assess the risks of these unregulated pesticides.
11 It has also never provided the public with any justification for its exemption or codified that
12 practice in its regulations.

13 5. On January 6, 2016, CFS filed a case challenging EPA's position that coated seeds
14 are exempt from the requirements of FIFRA, as stated in the agency's 2013 Guidance for
15 Inspecting Alleged Cases of Pesticide-Related Bee Incidents. EPA moved to dismiss the case on
16 grounds that its 2013 guidance was not final agency action and thus not justiciable. The court
17 denied EPA's motion.² However at the summary judgment stage after review of the full
18 administrative record the court held the 2013 guidance was not final agency action and therefore
19 unreviewable.³

20 6. In summary, the Court granted summary judgment to EPA because the agency had
21 never actually publicly and formally admitted its Treated Seeds policy for exempting coated seeds.
22 Instead the agency has for decades intentionally evaded any judicial review by failing to issue any
23 final agency action on the topic.

26 ² *Anderson v. McCarthy*, No. C 16-00068 WHA, 2016 WL 2770544, at *3 (N.D. Cal. May 13,
27 2016).

28 ³ *Anderson v. McCarthy*, No. C 16-00068 WHA, 2016 WL 6834215, at *4 (N.D. Cal. Nov. 21,
2016).

1 7. Accordingly, on April 26, 2017, CFS filed a formal rulemaking petition. The
2 petition was a comprehensive 43-page scientific and legal document detailing the numerous
3 environmental impacts that the broad use of coated seeds causes, outlining EPA’s authority under
4 FIFRA, and explaining why EPA’s position is incorrect. The petition was supported by 81 citations
5 and supporting documents filed concurrently. Thus the petition provided both a legal blueprint
6 and legal impetus for EPA to either (1) amend the Treated Article exemption to clarify that it does
7 not apply to seeds coated with systemic pesticides, or (2) in the alternative publish a final, formal,
8 agency interpretation in the Federal Register stating that EPA interprets the Treated Article
9 Exemption not to apply to coated seeds. CFS further requested that EPA enforce FIFRA’s
10 numerous pesticide registration and labeling requirements for each separate crop seed product that
11 is coated with a neonicotinoid or other systemic pesticidal chemical. CFS urged the agency to grant
12 the requests within 180 days of filing. Eleven organizations and beekeepers endorsed the petition,
13 including American Beekeeping Federation, American Bird Conservancy, American Honey
14 Producer’s Association, Pollinator Stewardship Council, Bret Adee, Jeff Anderson, Lucas Criswell,
15 Gail Fuller, and David Hackenberg. The petition is attached as Exhibit A.

16 8. In December 2018, EPA opened a public notice and comment period in response
17 to the petition.⁴ Many commenters were concerned that EPA’s hands-off approach to coated seed
18 regulation has a devastating impact on bees and other pollinators.⁵ Commenters agreed that the
19 Treated Article Exemption should not apply to coated seeds because that interpretation is contrary
20 to the purposes and intent of FIFRA,⁶ and that EPA is “improperly using the treated article
21 exemption as a way to abdicate itself of its duties under FIFRA.”⁷

23
24 ⁴ EPA, *Petition Seeking Revised Testing Requirements of Pesticides Prior to Registration; Request for
Comment*, 83 Fed. Reg. 66260 (Dec. 26, 2018).

25 ⁵ EPA, *Petition Seeking Revised Testing Requirements of Pesticides Prior to Registration*, Docket No. EPA-
26 HQ-OPP-2018-0805-0009, 0013, 0015, 0024, 0040, 0083 (Dec. 2018).

27 ⁶ *Id.* at EPA-HQ-OPP-2018-0805-0083.

28 ⁷ *Id.* at EPA-HQ-OPP-2018-0805-0069.

1 9. EPA's failure violates the mandates of the Administrative Procedure Act (APA),
2 because EPA cannot unlawfully withhold or unreasonably delay a petition response. 5 U.S.C.
3 § 706(1). Nearly five years after Plaintiffs first lodged the 2017 Petition, EPA has still failed to
4 respond. Irreparable environmental harm has continued unanalyzed and unabated in the interim.
5 Plaintiffs' interests are continuing to be harmed by EPA's inaction and lack of oversight regarding
6 coated seeds.

7 10. Accordingly, this Court should hold that EPA's failure to act in response to the
8 petition violates the APA and order EPA to respond to Plaintiffs' 2017 Petition by a Court-ordered
9 date certain and without further unlawful delay.

10 JURISDICTION

11 11. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal
12 question) and 1346 (United States as Defendant).

13 12. Plaintiffs have a right to bring this action pursuant to the APA. 5 U.S.C.
14 §§ 551-559, 702-706.

15 13. The relief requested is specifically authorized pursuant to 28 U.S.C. §§ 1651 (writs)
16 and §§ 2201 to 2202 (declaratory relief), as well as under the APA, 5 U.S.C. §§ 701-706. An actual
17 controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory
18 judgments).

19 VENUE

20 14. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e) because one or
21 more Plaintiffs reside in this District.

22 PARTIES

23 *Plaintiffs*

24 15. Plaintiffs Center for Food Safety (CFS) is a nationwide nonprofit organization with
25 offices in San Francisco, California, Portland, Oregon, and Washington, DC. Founded in 1997,
26 CFS's mission is to empower people, support farmers, and protect the earth from the harmful
27 impacts of industrial agriculture. CFS has over a million members, including members in every
28 state across the country, including many thousands of conservationists, gardeners, farmers, and

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