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6
7 **THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

8
9 JEFF ANDERSON, BRET ADEE, DAVID) Case No. 3:16-cv-68
HACKENBERG, POLLINATOR)
10 STEWARDSHIP COUNCIL, LUCAS)
CRISWELL, GAIL FULLER, AMERICAN) **COMPLAINT FOR DECLARATORY**
11 BIRD CONSERVANCY, CENTER FOR) **AND INJUNCTIVE RELIEF**
FOOD SAFETY, and PESTICIDE ACTION)
12 NETWORK OF NORTH AMERICA,)

13 *Plaintiffs,*)
14)

15 v.)

16 GINA MCCARTHY, Administrator, United)
States Environmental Protection Agency, and)
17 UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

18 *Defendants.*)
19)

INTRODUCTION

1
2 1. This is a civil action for declaratory and injunctive relief. Plaintiffs challenge the
3 actions and inactions of the U.S. Environmental Protection Agency and its Administrator
4 (collectively, EPA or the Agency) that have allowed the ongoing sale and use of unregistered
5 pesticide products in violation of the Federal Insecticide, Fungicide and Rodenticide Act
6 (FIFRA), 7 U.S.C. § 136 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et*
7 *seq.*

8 2. EPA has allowed millions of pounds of crop seeds coated with the active
9 insecticidal ingredients: acetamiprid, clothianidin, dinotefuran, imidacloprid, thiacloprid, and/or
10 thiamethoxam (hereinafter “neonicotinoids”) to be planted annually on more than 150 million
11 acres nationwide. Approximately 95% of the land area in the United States that has been treated
12 with neonicotinoid insecticides has been treated via planting these pesticidal coated seeds. The
13 agency has allowed this to occur without requiring the seeds’ registration under FIFRA or
14 mandatory or enforceable labeling of the seeds, and without adequate assessments of their risks.
15 EPA’s actions and inactions have caused both acute honey bee kills and chronic effects leading
16 to excess bee colony mortality, excess bird mortality, nationwide water and soil contamination,
17 and other environmental and economic harms, thereby severely damaging Plaintiff beekeepers’
18 businesses, also damaging the land and welfare of Plaintiff farmers, and damaging the interests
19 of the Plaintiff nonprofit groups.

20 3. EPA has approved several other non-neonicotinoid systemic seed coating
21 insecticides and appears poised to approve additional coating products. They present the same
22 damage to Plaintiffs and also are subject to the Claims herein.

JURISDICTION AND VENUE

24 4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28
25 U.S.C. § 1346 (United States as defendant), 28 U.S.C. §§ 2201-02 (declaratory relief), 5 U.S.C.
26 § 702 (APA), and 7 U.S.C. § 136n(a) (FIFRA).

27 5. Jurisdiction also lies in the District Court under FIFRA’s judicial review
28 provision, 7 U.S.C. § 136n(a), which provides:

District court review.

Except as otherwise provided in this Act, the refusal of the Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law are judicially reviewable by the district courts of the United States.

6. The claims in this Complaint involve “other final actions” of the Administrator not committed to her discretion. None of the actions challenged herein followed a public hearing, a Federal Register notice, or a petition. EPA acted *ultra vires* and illegally granted exemptions from FIFRA registration for new pesticidal products and took other actions that are reviewable in the District Court. Thus, jurisdiction lies properly in the District Court. 7 U.S.C. § 136n(a).

7. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgment).

8. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because one or more Plaintiffs reside in this district, and pursuant to 28 U.S.C. § 1391(e)(1)(B), because a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, in this district.

INTRADISTRICT ASSIGNMENT

9. Pursuant to Local Rule 3-2(c) and (d), assignment of this action is appropriate in the San Francisco or Oakland Divisions because one or more Plaintiffs reside in those locations.

PARTIES

Plaintiffs

10. Plaintiffs are nationally-representative beekeepers, farmers and public interest organizations harmed by EPA’s actions and inactions herein. They are addressed in those groupings.

Beekeeper Plaintiffs

11. Plaintiff **Jeff Anderson** has been the owner of California Minnesota Honey Farms for nineteen years. It is a migratory beekeeping operation based in Eagle Bend; Minnesota; and Oakdale, California. In addition to Mr. Anderson, the business employs one full-time employee, as well as three seasonal employees. He has been a commercial beekeeper

1 since 1976. Mr. Anderson is a member of the Minnesota Honey Producers Association, the
2 California State Beekeepers Association, the American Honey Producers Association, the
3 National Honey Bee Advisory Board, and the Pollinator Stewardship Council. Since about
4 2004-05, his percentage of hives lost each year has increased dramatically. In 2012, for example,
5 he had 3,150 hives in April, but by February 2013, he was down to just 998 hives, meaning he
6 lost almost 70% of hives that year. Not only is Mr. Anderson losing hives at rates that are
7 unprecedented, but remaining hives are far less robust. It is plain from recent years that he is
8 getting significant *summer* mortality—a time when bee populations should be healthy due to
9 warm weather, long days, and food abundance—from the dominant Minnesota crops: corn and
10 soybeans. It is virtually impossible for honey bees to avoid these crops in central Minnesota;
11 nearly all of them are seed-treated with a combination of two neonicotinoid pesticides,
12 clothianidin and thiamethoxam. There are other consequences of this hive health pattern which
13 adversely affect his business and livelihood. First, sick or poorly-populated hives cannot produce
14 much honey. This is apparent when observing his annual honey production records. Prior to
15 2005, he would expect to harvest an average eighty pounds of honey per live hive annually. In
16 recent seasons, Mr. Anderson's hives have averaged only about forty pounds of honey. His
17 income has drastically suffered as a result and his expenses to keep his remaining hives alive
18 have dramatically increased. The workload and personal stress are intense. His experience and
19 observations are that the exempted neonicotinoid seed coatings, toxic dust, and other
20 contamination from them have played a major role. Test results for some incidents confirm this.

21 12. Plaintiff **Bret Adee** is a resident of Bruce, South Dakota. He is a third-generation
22 commercial beekeeper and a co-owner of Adee Honey Farms. Founded in 1957, Adee Honey
23 Farms is the nation's largest beekeeping operation. It manages some 90,000 honey bee colonies
24 and has about fifty full-time employees. Its operations have been harmed over several years by
25 the neonicotinoid seed coatings. The colonies, in many cases, cannot be placed so that the
26 free-ranging bees will be able to avoid contaminated crops, dust, soil, marginal vegetation, and
27 water that results from the seed coatings, which are overused. Adee Honey Farms has
28 experienced abnormally high incidences of hive failure in recent years. Prior to 2005, they would

1 expect to lose between 3-8% of their colonies over the winter. Now, they consider it a good year
2 if they lose only 20%. In 2012, for example, they lost 42% of their hives over winter, but by the
3 time they came around to pollinate almonds in the early spring, their losses were at 55%. For the
4 summer of 2015, the Adees had a massive exposure to clothianidin dust-off that resulted in an
5 estimated 10,000 severely weakened honey bee colonies. The results to the company include lost
6 income, increased expenses and work overload, and emotional distress from seeing their animals
7 killed or weakened. Mr. Adee and his family fear for the future of their business—and
8 commercial beekeeping in general—if the current overuse of neonicotinoids and other pesticides
9 continues. Mr. Adee is the President of the Pollinator Stewardship Council and co-Chair of the
10 National Honey Bee Advisory Board. He also is a member of the American Honey Producers
11 Association, the South Dakota Beekeepers Association, and the California State Beekeepers
12 Association.

13 13. Plaintiff **David Hackenberg** is a commercial beekeeper residing in Lewisburg,
14 Pennsylvania. He has been keeping bees for fifty-two years, through his family business
15 Hackenberg Apiaries. His experience includes serving twelve years on the National Honey
16 Board, has served as President of the American Beekeeping Federation, and as Chair and
17 co-Chair of the National Honey Bee Advisory Board. The ongoing effects of excessive
18 overwintering mortality and other excess losses of honey bees have damaged his operation. In
19 2006, he saw huge losses and was the first beekeeper known to suffer what was described by
20 scientists as Colony Collapse Disorder. These disappearances coincided with the exempted
21 neonicotinoid pesticidal seeds coming on the market in large numbers. This damage at least
22 partly resulted from the use of neonicotinoid seed coatings in row crops nationwide. This is
23 compounded by the lack of labels on the seed bags adequate to inform the crop farmers how to
24 avoid harm to bees, and the lack of any enforcement when bees are harmed by these seed
25 coating. Mr. Hackenberg has about 2,000 hives now. His annual losses have run 75-80%, or with
26 continual protein feeding, they can be held closer to 60% losses, but both these levels are
27 excessive. The economic damage to his business, increased expenses and work demand, and
28 personal stress from seeing huge numbers of his bees die have all directly harmed him. His

1 experience and direct observations are that the seed coatings, dust, and other contamination from
2 them have played a major role.

3 14. Plaintiff **Pollinator Stewardship Council (PSC)** is a nonprofit organization
4 incorporated in Kansas in 2012. It brings this action on behalf of itself and its members. The
5 mission of PSC is to defend managed and native pollinators vital to a sustainable and affordable
6 food supply from the adverse impacts of pesticides. As pollination is required for one-third of the
7 nation's food supply, PSC accomplishes its mission by: (1) ensuring that state agencies and EPA
8 enforce laws to protect pollinators from pesticides; (2) providing advocacy, guidance, and tools
9 for beekeepers to defend their bees from the detrimental effects of pesticides; and (3) raising
10 awareness about the adverse impacts of pesticides on pollinators. PSC has previously stated its
11 position in opposition to the "treated article" exemption being applied to neonicotinoid-coated
12 seeds because it leads to excessive and unnecessary use of these insecticides. Beekeepers that
13 PSC represents typically cannot escape many harmful effects of this overuse, nor will EPA or the
14 state agencies enforce against misapplication of the exempted seed coatings, even when major
15 bee kills result. Additionally, the losses inflicted on native pollinators, which lack any
16 management, in many cases may be more severe than the damage to managed pollinators. On the
17 whole, the damages resulting from the exemption EPA has given to the pesticidal coated seeds
18 are unacceptable to PSC.

19 **Farmer Plaintiffs**

20 15. Plaintiff **Lucas Criswell** resides near Lewisburg, in central Pennsylvania. He
21 farms about 1,800 acres total of mostly corn, soybeans, and small grains. He has been doing this
22 for eighteen years, and is familiar with the seed choices for these crops and the effects of using
23 different seeds as well as the effects of neonicotinoid coatings. He is very concerned about the
24 non-availability of uncoated corn seeds of the high-quality hybrid varieties. He also is concerned
25 because he has seen that the exempted neonicotinoid-coated seeds are used as a form of
26 "insurance," when in most situations farmers do not need coated seeds. As a result of their
27 overuse, he has observed harm to beneficial insects and the overall health of the soil. In the case
28 of soybeans, Mr. Criswell planted coated seeds for several years and then quit. Unlike corn, there

1 are many good uncoated soybean varieties available from seed dealers. When he switched, he
2 saw no decrease in overall average yields or profitability from his soybean acreage. He switched
3 because it was clear that the coated seeds he used in the past were causing an increase in slugs in
4 the fields, a harmful and hard-to-control crop pest. There were slug outbreaks because the
5 neonicotinoid killed beetles that kept the slugs under control. Mr. Criswell also quit because he
6 was concerned the unnecessary overuse of the chemicals violated Integrated Pest Management,
7 an important principle for his farming. He switched away from neonicotinoid-coated corn seeds
8 more recently, but it is challenging due to their near complete domination of the available corn
9 seed market. Mr. Criswell is concerned that too many farmers, including him at times, have been
10 using them unnecessarily and paying unnecessary costs for the pesticidal coating. He is
11 concerned that the overall effect harms the soil and farmers themselves in the long run.

12 16. Plaintiff **Gail Fuller** is a farmer residing near Emporia, Kansas. He farms about
13 1,000 acres of mixed grains, including sorghum, corn, barley, soybeans, and wheat. He regularly
14 used neonicotinoid-coated seeds in the past on some of his crops. He has switched to non-coated
15 seeds for all the crops where it was feasible based on seed availability. Mr. Fuller is an active
16 proponent for soil health and he has noticed that the neonicotinoids can damage soil health and
17 beneficial insects. He is concerned that he used these chemicals unnecessarily as that is not
18 consistent with good soil health or good farming. He is concerned about how the exempted
19 neonicotinoids appear to put monarch butterflies, honey bees, and other beneficial insects at risk.
20 Since cutting back on coated seeds, he has observed more biologically diverse and sustainable
21 ecosystems on and around his farmland, without reducing his typical yields.

22 **Public Interest Organization Plaintiffs**

23 17. Plaintiff **American Bird Conservancy (ABC)** is a national, nonprofit
24 membership organization, headquartered in The Plains, Virginia, dedicated to conserving native
25 birds and their habitat throughout the Americas. It brings this action on behalf of itself and its
26 members. With more than 10,000 members nationwide, ABC works to innovate and build on
27 sound science to halt extinctions, protect habitats, eliminate threats, and build capacity for bird
28 conservation. ABC has had a long-standing program to address the significant threat that

1 pesticides pose to birds. It works to cancel or restrict the registrations of the most dangerous
2 products, to improve the evaluation and monitoring of pesticides and their effects on birds, to
3 spearhead scientific research, and to engage the public in protecting birds and other wildlife. The
4 2013 ABC report, *The Impact of the Nation's Most Widely Used Insecticides on Birds*, concluded
5 that neonicotinoid-coated seeds are lethal to birds and to the aquatic biological diversity upon
6 which they depend. The nation's birds, and ABC's members, are directly and indirectly harmed
7 by the neonicotinoid seed coating chemicals that are blanketing croplands, contaminating
8 watersheds, and poisoning birds, bees, butterflies, and other organisms. ABC has advocated for
9 more than three years to EPA and other federal agencies to curb the overuse of coated seeds.
10 ABC also has urged the Agency to eliminate the coated seeds' exemption from registration as
11 pesticides under FIFRA.

12 18. Plaintiff **Center for Food Safety (CFS)** is a Washington, D.C.-based, public
13 interest, nonprofit membership organization with offices in San Francisco, CA; Portland, OR;
14 Honolulu, HI; and Washington, D.C. It brings this action on behalf of itself and its members.
15 CFS has sought to ameliorate the adverse impacts of industrial farming and food production
16 systems on human health, animal welfare, and the environment. CFS has over 730,000 members
17 nationwide. CFS seeks to protect human health and the environment by advocating for thorough,
18 science-based safety testing of new agricultural products prior to any marketing and cultivation
19 of crops in a manner that minimizes negative impacts such as increased use of pesticides and
20 evolution of resistant pests and weeds. A foundational part of CFS's mission is to further the
21 public's and CFS's members' fundamental right to know what is in their food and food
22 production methods and technologies.

23 19. Plaintiff **Pesticide Action Network of North America (PANNA)** is an Oakland,
24 California-based, nonprofit corporation that serves as an independent regional center of Pesticide
25 Action Network International, a coalition of public interest organizations in more than ninety
26 countries. It brings this action on behalf of itself and its members, particularly small-scale
27 farmers, beekeepers, farmworkers, and indigenous members. For nearly thirty years, PANNA
28 has worked to replace the use of hazardous pesticides with healthier, ecologically sound pest

1 management across the United States and around the world. PANNA provides scientific
2 expertise, public education and access to pesticide data and analysis, and policy development and
3 coalition support to more than 100 affiliated organizations in North America. PANNA has more
4 than 125,000 members across the United States. PANNA's members live, work, farm, and
5 recreate in areas of the country where pesticides such as the neonicotinoid insecticides are
6 applied, and in which the pesticides and contaminated dust drift and transport occurs, and thus
7 have a strong interest in ensuring that EPA protect public health and the environment from this
8 contamination. PANNA's members are highly concerned by the effects of the unregulated
9 neonicotinoid-coated seeds on honey bees, bumble bees, butterflies, beneficial invertebrates,
10 wild pollinators, water, aquatic invertebrates, food chains, ecosystem sustainability generally,
11 and ultimately on humans via food and water consumption. The lack of enforceable labeling on
12 these pesticidal seeds, and their prophylactic overuse, violate bedrock principles PANNA seeks
13 to protect as far as only using pesticides as a last resort, and then only when they have strong and
14 clear warnings and enforceable use directions. PANNA has urged EPA to eliminate the coated
15 seeds' exemption from registration as pesticides. PANNA has also urged EPA (as well as the
16 United States Department of Agriculture and Department of Justice) to address issues around the
17 lack of fairness, transparency, and farmer choice in the seed marketplace.

18 *Defendants*

19 20. Defendant **Gina McCarthy** is the Administrator of EPA and is being sued in her
20 official capacity. In her role as the EPA Administrator, Administrator McCarthy oversees EPA's
21 implementation of FIFRA.

22 Defendant **United States Environmental Protection Agency** is the agency of the United
23 States Government with primary responsibility for implementing FIFRA. EPA has allowed the
24 ongoing sale and use of unregistered pesticide products in the form of neonicotinoid-coated
25 seeds and took other actions described herein.

STATUTORY BACKGROUND

Federal Insecticide, Fungicide, and Rodenticide Act

21. FIFRA governs pesticide commercialization and application in the United States. The definition of “pesticide” is (in pertinent part), a “mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u)(1). FIFRA makes it unlawful, with a few minor exceptions, for any “person in any State [to] distribute or sell to any person any pesticide that is not registered” under the Act. 7 U.S.C. § 136a(a); see also 7 U.S.C. § 136j(a)(1). FIFRA prohibits EPA from registering a pesticide if its use would have “unreasonable adverse effects on the environment.” 7 U.S.C § 136a(c)(5).

22. The Administrator is required to provide public notice and comment opportunities for registrations under 7 U.S.C. § 136a(c)(4):

Notice of application.

The Administrator shall publish in the Federal Register, promptly after receipt of the statement and other data required pursuant to paragraphs (1) and (2), a notice of each application for registration of any pesticide if it contains any new active ingredient or if it would entail a changed use pattern. The notice shall provide for a period of 30 days in which any Federal agency or any other interested person may comment.

23. EPA’s FIFRA-implementing regulations also contain procedural requirements for product registration, including, but not limited to, requiring publication of two classes of notices in the Federal Register. Under 40 C.F.R. § 152.102:

The Agency will issue in the Federal Register a notice of receipt of each application for registration of a product that contains a new active ingredient or that proposes a new use. After registration of the product, the Agency will issue in the Federal Register a notice of issuance. The notice of issuance will describe the new chemical or new use, summarize the Agency’s regulatory conclusions, list missing data and the conditions for their submission, and respond to comments received on the notice of application.

24. The culmination of the registration process, if followed, is EPA’s official approval of a label for the pesticidal product, including use directions and appropriate warnings on safety and environmental risks. It is a violation of FIFRA for any person to sell or distribute a

1 “misbranded” pesticidal product. 7 U.S.C. § 136j(a)(1)(E). FIFRA is explicit in requiring EPA to
2 find a product misbranded, and may not be used, if:

3 (F) the labeling accompanying it does not contain directions for
4 use which are necessary for effecting the purpose for which the
5 product is intended and if complied with, together with any
6 requirements imposed under section 136a(d) of this title, are
7 adequate to protect health and the environment; [or]

8 (G) the label does not contain a warning or caution statement
9 which may be necessary and if complied with, together with any
10 requirements imposed under section 136a(d) of this title, is
11 adequate to protect health and the environment.

12 7 U.S.C. § 136(q)(1).

13 25. With regard to exemptions from FIFRA, the “Administrator may exempt from the
14 requirements of this subchapter by regulation any pesticide which the Administrator determines
15 either (1) to be adequately regulated by another Federal agency, or (2) to be of a character which
16 is unnecessary to be subject to this subchapter in order to carry out the purposes of this
17 subchapter.” 7 U.S.C. § 136w(b).

18 26. EPA’s implementing regulation for such exemptions, at 40 CFR § 152.25,
19 provides (in pertinent part):

20 Exemptions for pesticides of a character not requiring FIFRA
21 regulation.

22 The pesticides or classes of pesticides listed in this section have
23 been determined to be of a character not requiring regulation under
24 FIFRA, and are therefore exempt from all provisions of FIFRA
25 when intended for use, and used, only in the manner specified.

26 (a) Treated articles or substances. An article or substance treated
27 with, or containing, a pesticide to protect the article or substance
28 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.

The “treated article” exemption regulation does not address pesticidal coated seeds of any kind.

1 ***Administrative Procedure Act***

2 27. The APA provides for judicial review of final agency actions. “Agency action” is
3 defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the
4 equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The APA provides that “[a]
5 person suffering legal wrong because of agency action, or adversely affected or aggrieved by
6 agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5
7 U.S.C. § 702.

8 28. Under the APA, a reviewing court shall “hold unlawful and set aside agency
9 action, findings, and conclusions” that it finds to be “arbitrary, capricious, an abuse of discretion,
10 or otherwise not in accordance with the law,” “in excess of statutory jurisdiction, authority, or
11 limitations, or short of statutory right,” or “without observance of procedure required by law.” 5
12 U.S.C. §§ 706(2)(A), (C), (D).

13 29. Further, under the APA, a reviewing court has the authority to “compel agency
14 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

15 **FACTS**

16 ***Background***

17 30. Neonicotinoid-coated seeds are “pesticide” products under FIFRA because they
18 are a “mixture of substances that are intended to prevent, destroy, repel or mitigate a pest.” 7
19 U.S.C. § 136(u)(1). EPA officials have indicated that their current interpretation of 40 CFR
20 § 152.25(a), the so-called “treated article” exemption, quoted *supra*, eliminates “all provisions of
21 FIFRA,” thus eviscerates EPA’s power to require registration of neonicotinoid-coated seeds or to
22 mandate or enforce label warnings and use directions on the containers (typically bags) of the
23 coated seeds that are loaded into planting machinery and sown by America’s crop farmers.

24 31. The systemic nature of neonicotinoid-coated seeds renders them qualitatively and
25 quantitatively different from “treated articles” such that they do not meet the terms of the
26 exemption. Seeds coated with liquid formulations of clothianidin, thiamethoxam, imidacloprid,
27 dinotefuran, acetamiprid, and/or thiacloprid are pesticide delivery devices. The essential purpose
28 of this technology is to carry the active ingredient via the growing plants’ circulatory system into

1 every living tissue of the plant, which ultimately is typically thousands of times greater in
2 dimension and mass than the crop seed itself.

3 32. Further, the dried-on coatings do not, in the vast majority of their uses, protect the
4 seed itself against any disease or other risk to the seed while it is in the bag, the planting
5 machine, or the field. The neonicotinoid ingredients are aimed at protecting the crop plants, later
6 in time, as demonstrated by the EPA-approved labels placed on the bottles/containers of the
7 liquid coating products, of which 31 (of 32) state that the neonicotinoid ingredients are
8 formulated to kill “chewing and sucking insect pests” of the *plants*, not of the *seeds*. Moreover,
9 the warnings frequently indicate that the neonicotinoids actually may *harm* the seeds and result
10 in reduced germination and/or reduction of seed and seedling vigor. (Other non-neonicotinoid
11 active ingredients in the coating liquids may protect the seed itself.)

12 33. In short, the alleged neonicotinoid “treatment” at issue here is not “for the
13 protection of the article itself”—the seed—as required by 40 CFR § 152.25(a). Thus, “treated
14 seeds” is a misnomer for what are in fact neonicotinoid delivery devices. They are referred in
15 this Complaint as “coated seeds.”

16 34. Only a small fraction of the active neonicotinoid ingredient that is coated onto a
17 seed actually gets absorbed into the live plant. Depending on the crop, up to 95% is either
18 scraped off the seeds and blown away as dust during machine planting, or sloughed off into the
19 surrounding soil and groundwater. Pervasive use of these chemicals, particularly on corn and
20 soybeans, is resulting in pesticidal treatment of vast areas extending far beyond the planted area
21 of the fields, now including several hundreds of millions of acres in the United States. Pesticidal
22 effects from those scraped and sloughed-off coatings result in the surrounding soil, in blowing
23 dust, in marginal vegetation of all kinds, in honey bees and other pollinators, in surface and
24 groundwater, and in non-target birds and other wildlife far beyond the planted fields.

25 35. EPA’s interpretation of the “treated article” exemption as applied to neonicotinoid
26 seed coatings has never been stated in a regulation promulgated through APA notice and
27 comment procedures.
28

1 36. EPA stated a view on the “treated article” exemption in a 2003 paper issued
2 jointly by EPA and the Pest Management Regulatory Agency of Canada, *Harmonization of*
3 *Regulation of Pesticide Seed Treatment in Canada and the United States* (hereinafter
4 “Harmonization Paper”).¹ The Harmonization Paper mentions pesticide-treated seeds, but it
5 provides no coverage or analysis of systemic, neonicotinoid-coated, seeds. Rather than
6 supporting an interpretation that systemic, neonicotinoid-coated seeds properly fit within the
7 “treated article” exemption described in 40 CFR § 152.25(a), the Harmonization Paper instead
8 states that neonicotinoid-coated seeds are *excluded* from the exemption:

9 The term “for the protection of the [seed] itself” means that the
10 pesticidal protection imparted to the treated seed *does not extend*
11 *beyond the seed itself...*

11 *Id.* at 2 (emphasis added).

12 37. Clear and convincing evidence from across the nation shows that the pesticidal
13 effect of the scraped, blown, and sloughed-off neonicotinoid coatings “extends beyond the seed
14 itself,” and extends far beyond the full-grown plants. Uncontained dust and contamination from
15 these coatings is killing honey bees by the many millions and imposing a potentially catastrophic
16 hazard to aquatic systems across the nation. Both freshwater and marine systems and the
17 invertebrate and vertebrate wildlife—such as fish and waterfowl—that they contain are being
18 harmed. In addition to direct mortality to birds from ingesting neonicotinoid-coated seeds,
19 indirect mortality is resulting from the destruction of rural invertebrate life across a vast portion
20 of the United States. These neonicotinoid delivery devices are planted year after year and the
21 active ingredients have long half-lives in most soils, exceeding the planting intervals. Thus, the
22 contamination has swiftly built up to, and past, harmful levels in America’s lands and waters.

23 38. The sweeping risks of the systemic insecticides appear to have been unforeseen
24 by the registrants of the neonicotinoid liquid coating products, or by EPA in applying its “treated
25 article” exemption. Blind application of the exemption is in violation of FIFRA and *ultra vires*
26 and has allowed these unregistered and unlabeled insecticides to outcompete and displace other,
27

28 ¹ April 11, 2003, pp. 1-2, available at perma.cc/3MUH-B9VQ (last accessed Jan. 5, 2016).

1 less-risky, *FIFRA-registered* insecticides and other crop protection methods in U.S. agricultural
2 markets. Their aggressive marketing has directly led to vastly more use of insecticides on crops
3 for which no insecticides were needed or used by farmers in the years before these products were
4 sold. This prophylactic use of coated seeds is fundamentally incompatible with the principles of
5 Integrated Pest Management.

6 39. While completely failing to regulate coated seeds themselves, EPA has approved
7 the coating products (the pesticides themselves), *see infra* Table 1, but in doing so has failed to
8 fully assess the effects of the systemic pesticide beyond the seed coating process.

9 40. In 2013, EPA publicly issued a new directive to federal and state inspectors and
10 FIFRA enforcement personnel, *Guidance for Inspecting Alleged Cases of Pesticide-Related Bee*
11 *Incidents* (2013 Guidance).² It was issued in response to the numerous 2012-2013 honey bee
12 kills caused by contaminated dust flowing off of neonicotinoid-coated seeds and the planting
13 machines when they are planted. The 2013 Guidance provides a new interpretation of the scope
14 of the “treated article” exemption with respect to coated seeds:

15 Treated seed (*and any resulting dust-off from treated seed*) may be
16 exempted from registration under FIFRA as a treated article and as
such its planting is *not considered a “pesticide use.”*

17 *Id.* at 7 (emphasis added).

18 41. The 2013 Guidance directly affects beekeepers and other Plaintiffs in that it states
19 there will not be investigation or enforcement against any of their bee kills or other harm caused
20 by neonicotinoid-coated seeds or resulting contaminated dust because the kills and other harm
21 incidents are “not considered a ‘pesticide use.’” By exempting harmful pesticidal effects from
22 the pesticidal dust, EPA’s investigation and enforcement directive is inconsistent with the
23 “treated article” exemption, which only exempts articles treated “to protect the article or
24 substance itself,” meaning “that the pesticidal protection imparted to the treated seed *does not*
25 *extend beyond the seed itself.*” 40 CFR § 152.25(a); Harmonization Paper at 2 (emphasis added).

26 42. The vast majority of the liquid coating products that are put on the crop seeds at
27

28 ² Available at perma.cc/P5VX-JS6T (last visited Jan. 5, 2016).

1 issue were “conditionally registered” under FIFRA, indicating that key information needed for
2 their full risk evaluation was not produced by the registrants at the time of registration. The
3 pervasive risks at the planting stage, which is done by farmers, cannot be effectively protected
4 against by providing label warnings and use directions to the “upstream” seed coating
5 companies. The full scope of harms have been revealed by extensive scientific monitoring and
6 analysis, including an authoritative global review of over 800 published studies conducted under
7 the auspices of the expert International Union for the Conservation of Nature.³

8 43. FIFRA generally prohibits EPA from registering a pesticide if its use would have
9 “unreasonable adverse effects on the environment.” This involves weighing costs versus
10 benefits. A thorough review of the published science on crop yields has shown that the use of
11 neonicotinoid-carrying seeds actually provides no net yield benefit to farmers across the majority
12 of crop-planting contexts in the United States.⁴ EPA’s own recent comprehensive national
13 “benefits assessment” regarding coated soybean seeds confirmed this.⁵ Instead they are
14 prophylactically planted despite providing no yield benefits in the large majority of farm
15 contexts. In the process they impose tremendous costs on pollinators, other beneficial
16 invertebrates, aquatic systems, birds, the environment, and the economy.

17 44. The lack of yield benefits in most cases, and actual yield reductions in many
18 cases, as demonstrated in the scientific literature and other reliable reports, reinforces the
19 experience of Plaintiff farmers Criswell and Fuller. Despite paying for the seed coating
20 protections when purchasing seeds in the past, the farmers’ yields did not benefit; and the
21 beneficial insects in or near their farms and other aspects of their soil health were harmed.

23 ³ Van der Sluijs J.P., *et al.*, *Conclusions of the Worldwide Integrated Assessment on the risks of*
24 *neonicotinoids and fipronil to biodiversity and ecosystem functioning*, Environ. Sci. Pollut. Res.
(2014), available at perma.cc/7RVA-FMA7.

25 ⁴ S. Stevens and P. Jenkins, *Heavy Costs: Weighing the Value of Neonicotinoid Insecticides in*
26 *Agriculture*. Report by the Center for Food Safety, Washington, D.C. (2014), available at
perma.cc/8PMB-LEWU.

27 ⁵ C. Myers, E. Hill, A. Jones, T. Kiely, and N. Anderson, *Benefits of Neonicotinoid Seed*
28 *Treatments to Soybean Production*, US Environmental Protection Agency, Washington, D.C.
(2014), available at perma.cc/46ZY-CYLP.

1 45. Honey bee kill incidents caused by neonicotinoid-coated seeds have numbered in
2 the hundreds and likely the thousands in recent years. These have likely killed hundreds of
3 millions of individual bees due to acute dust-off kills and chronic damage to bee hives. As a
4 result, for Plaintiff beekeepers Anderson, Adee, and Hackenberg, and other beekeepers
5 represented by Plaintiff Pollinator Stewardship Council, their honey production and the overall
6 profitability of their business have drastically declined, while their workloads and personal stress
7 have multiplied.

8 46. The costs of neonicotinoid-coated seeds and their resulting contamination include,
9 at a minimum, these foreseeable categories: 1) harmful honey bee colony effects and resulting
10 reduced yields of pollinated crops; 2) reduced production of honey and other bee products; 3)
11 financial harm to beekeepers and consumers; 4) loss of ecosystem services; and 5) market
12 damage from contamination events.⁶ Estimated, cumulative, direct and indirect costs of this
13 contamination to date across these five categories are in the tens of *billions* of dollars.

14 47. The harm to solitary bees, which are essential pollinators, is nationwide and
15 incalculable. Being unmanaged and often living in the contaminated soil, species such as
16 ground-nesting mining bees, alkali bees, squash bees, and long-horned sunflower bees
17 are harmed by repeated and persistent use of neonicotinoid-coated seeds. Adverse impacts to
18 other species of solitary bees that are not ground nesters also has been identified, particularly the
19 high toxicity of neonicotinoids to blue orchard bees and alfalfa leafcutter bees. While blue
20 orchard and leafcutter bees do not nest in the soil, they rely on plant materials and mud for
21 building their brood cells and can be exposed to contamination through those nesting materials
22 and other routes. None of these risks to solitary bees are captured in EPA's risk assessments for
23 the coating products.

24 48. A recent scientific study from England showed high and unexpected
25 contamination in honey bee hives resulting from canola seed coating products that came from
26
27

28 ⁶ S. Stevens and P. Jenkins, *supra* n.4 at 12-15.

1 marginal vegetation near the canola fields rather than from the canola pollen itself.⁷ Honey bees
2 examined in the study were collecting enough neonicotinoids to damage their productivity and
3 reproduction rate. The levels also could harm wild pollinators and other caterpillars and bugs
4 living near arable fields. A recent Canadian study found unexpectedly high levels of
5 neonicotinoids in the surface dust of arable fields and evidence that this dust blows into
6 adjoining fields, contaminating them and putting surface-living beneficial species at risk.⁸ These
7 studies all point to contamination through pathways that EPA overlooked when it approved
8 coatings for the same crops addressed in the studies.

9 49. New comprehensive studies document the severe aquatic contamination
10 associated with neonicotinoids, which are water soluble.⁹ Their rising contamination of fields,
11 puddles, ditches, streams, groundwater, lakes, rivers, and marine areas is now being documented.
12 Researchers across the United States are finding high levels exceeding vital standards set to
13 protect aquatic life. The coatings applied to crop seeds are a primary source of the
14 contamination. EPA's approvals of the coating products failed to predict, assess, or mitigate this
15 damage to the nation's waters.

16 50. The Center for Food Safety report, *Water Hazard—Aquatic Contamination by*
17 *Neonicotinoid Insecticides in the United States*, describes widespread ongoing contamination in
18 excess of safe levels, including several studies exceeding benchmark levels set by EPA.¹⁰ It
19 documents contamination caused by coated seeds in a wide variety of rural habitats nationwide,
20

21 ⁷ Botias, *et al.*, *Neonicotinoid Residues in Wildflowers, a Potential Route of Chronic Exposure*
22 *for Bees*, *Environ. Sci. Technol.* 49 (21) pp. 12731–12740 (2015) available at
perma.cc/G2PY-UF25.

23 ⁸ Victor Limay-Rios *et al.*, *Neonicotinoid insecticide residues in soil dust and associated parent*
24 *soil in fields with a history of seed treatment use on crops in Southwestern Ontario*, *Environ.*
Toxicol. Chem., Accepted Article (2015), available at perma.cc/4PTA-HQRN.

25 ⁹ C. A. Morrissey, P. Mineau, J. H. Devries, F. Sanchez-Bayo, M. Liess, M. C. Cavallaro, K.
26 Liber, *Neonicotinoid contamination of global surface waters and associated risk to aquatic*
invertebrates: A review, *Environment International* 74, 291-303 (2015), available at
perma.cc/VPP7-U34W.

27 ¹⁰ M. Carnemark, P. Jenkins, and L. Walker, *Water Hazard—Aquatic Contamination by*
28 *Neonicotinoid Insecticides in the United States*, Center for Food Safety, Washington, D.C.
(2015) available at perma.cc/4BXS-Z8P6.

1 typically via pathways that EPA failed to consider adequately when it approved the coating
2 products.

3 51. New studies document harmful synergistic effects of these seed coatings on the
4 environment, including to honey bees. For example, neonicotinoids combined with existing mite
5 and pathogen infections in honey bees cause greater harm than the infections alone. The same is
6 true of the combination of neonicotinoids and the fungicidal chemicals that are typically coated
7 onto crop seeds (including those treated with neonicotinoids). In addition, resistance is
8 developing among the targeted insect pests to these pesticidal seed coatings. EPA failed to
9 consider these factors as it has applied the “treated article” exemption to the coated seeds.

10 52. If EPA had followed the FIFRA-mandated registration process for the pesticidal
11 seeds at issue, most or all of them likely would not have been registered, not been heavily
12 advertised and sold, and not inflicted the damages to all of the Plaintiffs that they now inflict.
13 Their use already has been suspended in Europe because of damage to honey bees; and the
14 Provinces of Ontario and Quebec are taking strong measures to reduce their use, after official
15 findings that their vast over-planting was unsustainable and had led to repeated destruction of
16 valuable bee colonies and decimation of Canadian beekeeper livelihoods.

1 53. Table 1 indicates unregistered pesticidal crop seeds (with their various coating
2 products, all of which coatings EPA approved since January 1, 2010):

3 **TABLE 1:**

4 **canola, rapeseed and mustard seed** – coated with Prosper Evergol (clothianidin)
5
6 **corn, cotton, sorghum, soybean and sugarbeet seeds** – coated with Poncho Votivo/
7 Poncho 1250 Votivo (clothianidin)
8 **cotton seeds** – coated with Ernesto Quantum (clothianidin)
9 **soybean seeds** – coated with Inovate (clothianidin)
10 **barley, buckwheat, corn, millet, oats, popcorn, rye, sorghum, teosinte, triticale,**
11 **wheat, potato seed pieces, carrot, onion bulbs, leek, bunching onion, broccoli seeds** –
12 coated with Sepresto 75 WS (clothianidin)
13 **barley, oat and wheat seeds** – coated with NipsIt Suite Cereals Seed Protectant
14 (clothianidin)
15 **sugarbeet, barley, buckwheat, millet, oats, rye, teosinte, triticale and wheat** – coated
16 with Poncho/GB126 (clothianidin)
17 **canola seeds** – coated with Helix Vibrance (thiamethoxam)
18 **potato seed pieces** – coated with CruiserMAXX Potato Extreme (thiamethoxam)
19 **soybean seeds** – coated with CruiserMAXX Vibrance, Avicta Complete Beans, SYT0511,
20 and SYT0113 (thiamethoxam)
21 **small grain cereal seeds** – coated with Cruiser Vibrance Quattro (thiamethoxam)
22 **barley and wheat seeds** – coated with Dynashield Foothold Virock (imidacloprid)

23
24 54. The number of different crop seeds totals at least twenty-five. They are sold by
25 various seed marketers under a large variety of product line names or numbers that typically, but
26 not always, include the seed coatings. A non-exhaustive sample list includes: 1) Wyffels Hybrid
27 corn lines W1526RIB; W1528RIB; and W1690, shipped coated with Poncho;¹¹ and 2) the

28

¹¹ See perma.cc/9N92-QAC5.

1 Pioneer Brand T Series of soybean seeds coated with Pioneer Premium Seed Treatment.¹² On
2 information and belief, since January 1, 2010, EPA's actions and inactions have enabled
3 additional pesticidal crop seeds to be commercialized with no registration beyond those in
4 Table 1; their exemption also is included in this Complaint.

5 55. Under 7 U.S.C. § 136w(b), the "Administrator *may* exempt from the requirements
6 of this subchapter *by regulation* any pesticide which the Administrator determines either (1) to
7 be adequately regulated by another Federal agency, or (2) to be of a character which is
8 unnecessary to be subject to this subchapter in order to carry out the purposes of this
9 subchapter." (Emphasis added). Here, the Administrator has not issued any regulation exempting
10 either coated seeds generally or neonicotinoid-coated seeds specifically. Nor has the
11 Administrator made any determination that coated seeds are "of a character which is unnecessary
12 to be subject to" FIFRA, including that the use and planting of such seeds will not cause
13 "unreasonable adverse effects on the environment." *Id.* § 136a(c)(5).

14 56. Application of the "treated article" exemption to these pesticidal seeds was clearly
15 erroneous, arbitrary and capricious, an abuse of discretion, *ultra vires*, in violation of the law and
16 not supported by science.

17 57. All of the same facts apply to other non-neonicotinoid, systemic seed coating
18 products that EPA has already approved or indicated its intent to approve, including, but not
19 limited to, fipronil, sulfoxaflor, cyantraniloprole, and flupyradifurone. Some of these may not yet
20 have been registered for seed coating use; however, based on EPA's practices with the
21 neonicotinoids, it is foreseeable EPA will approve them for that additional use. If so approved,
22 they will present essentially the same class of harms to Plaintiffs as do the neonicotinoid-coated
23 seeds.

24 ***Facts Related to Labels on Neonicotinoid-coated Seed Bags and Tags***

25 58. The labels required by EPA to be placed onto the bags or other containers, or onto
26 the affixed tags, of the unregistered pesticidal seeds include some sparse warnings superficially
27 aimed at protecting pollinators and other environmental values. These amount to admissions of

28 _____
¹² See perma.cc/R8X8-FV9A.

1 their pesticidal effects. Nevertheless, the language is unenforceable by EPA’s own explicit
2 policies and statements. The language is utterly inadequate to reduce or mitigate the harm caused
3 by contaminated neonicotinoid dust and talc, or treated plants themselves, to honey bees—
4 including those owned by Plaintiff beekeepers—because the labels are for seeds that are not
5 considered to be a “pesticide use.” (see 2013 Guidance, *supra*). Further, the bag labels are
6 inadequate to protect against the vast spectrum of other environmental and economic impacts,
7 including, but not limited to, damage to soil health and extensive water contamination described
8 herein.

9 59. As a direct consequence of EPA’s coated seeds exemption, there is no regulation
10 or enforcement against environmental contamination or bee kills caused by the coated seeds by
11 EPA or by its cooperating State Lead Agencies. EPA has instructed enforcement agents that the
12 bag label language is not mandatory. EPA is fully aware of harm occurring to honey bees and the
13 environment as a result. Many such incidents simply go uninvestigated. Even massive colony kill
14 reports may never lead to enforcement of label language on the seed bags because they are not
15 registered pesticides. Plaintiff beekeepers have no incentive to report such kills to the Agency
16 due to the lack of enforcement. EPA’s own policies blind it to the magnitude of the damage.

17 60. There are several other defects in the existing bag/tag label language, including,
18 but not limited to, the omission of adequate warnings about the massive and harmful ongoing
19 surface and groundwater contamination.

20 61. FIFRA, 7 U.S.C. § 136(q)(1), is explicit in stating a pesticidal product, such as
21 these coated seeds, is misbranded and may not be used if:

22 (F) the labeling accompanying it does not contain directions for
23 use which are necessary for effecting the purpose for which the
24 product is intended and if complied with, together with any
25 requirements imposed under section 136a(d) of this title, are
26 adequate to protect health and the environment; [or]

27 (G) the label does not contain a warning or caution statement
28 which may be necessary and if complied with, together with any
requirements imposed under section 136a(d) of this title, is
adequate to protect health and the environment.

62. The seed coaters who apply the coatings to the various crop seeds are not the applicators of the pesticidal products; the crop farmers are, including the Plaintiff farmers herein. The farmers are the users who need mandatory label warning and use directions in order to protect the environment. It is arbitrary and capricious for EPA to assume that the seed coaters—applying the liquid coatings mostly in industrial buildings—can be given warnings and use directions adequate to ensure that FIFRA's environmental effects standards will be achieved for the actual pesticidal use of the seeds in the environment.

63. Despite prior requests, the Agency has failed to correct its misapplication of the “treated article” exemption. Plaintiffs do not challenge the language of the exemption in 40 CFR § 152.25, rather EPA’s misapplication and inconsistent interpretation of that regulation. No agency administrative process exists to rein in EPA’s own *ultra vires* actions.

FIRST CAUSE OF ACTION

EPA’s Rule Exempting Coated Seeds from FIFRA Registration Is Ultra Vires

64. Plaintiffs reallege and incorporate by reference paragraphs 1 through 63, as though fully alleged herein.

65. Pesticide-coated seeds are “pesticides” themselves because they are a “mixture of substances intended for preventing, destroying, repelling, or mitigating any pest” 7 U.S.C. § 136(u)(1). Coating of seeds with neonicotinoids does not protect the seed itself, as required to fit under the “treated article” exemption, at 40 CFR § 152.25(a).

66. The pesticidal effects of neonicotinoid-coated seeds extend in area and time far beyond the seed itself to the entire crop plant. These pesticidal effects contaminate the soil, dust, water, and surrounding vegetation, as well as non-target animals. Extensive bee kills and nationwide water pollution, bird mortalities, and other environmental and economic harms have resulted from the pesticidal dust EPA explicitly exempted. This pesticidal effect—millions of times greater in areal extent than the extent of the pesticidal effect on the seeds themselves—is contrary to the terms of the “treated article” exemption, at 40 CFR § 152.25(a).

67. Agency action includes the “whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Section

1 551(4) of the APA describes a “rule” as “the whole or a part of an agency statement of general or
2 particular applicability and future effect designed to implement, interpret, or prescribe law or
3 policy or describing the organization, procedure, or practice requirements of an agency.”

4 68. EPA’s 2013 Guidance includes the Agency’s statement that applies generally to
5 all plantings of pesticide-coated seeds, which describes EPA’s exemption for pesticide-coated
6 seeds and any “dust-off” from the registration requirements of FIFRA. EPA’s coated seed
7 exemption statement in the 2013 Guidance marks the consummation of agency decision-making
8 as to neonicotinoid-coated seeds. Since issuing the 2013 Guidance, EPA has not required FIFRA
9 registration for any neonicotinoid-coated seeds and has given no indication that it intends to do
10 so in the future, or that this decision is tentative in nature.

11 69. EPA’s exemption statement in the 2013 Guidance affects the rights and
12 obligations of the users of coated seeds and those that are damaged by that use, in that EPA and
13 its inspectors, including state cooperators, will not investigate bee deaths from plantings of
14 neonicotinoid-coated seeds and their toxic dust-off, thus directly harming Plaintiff beekeepers.
15 Further, producers/sellers of the pesticidal seeds are not required to seek registration before the
16 sale of their pesticides and EPA will not impose FIFRA’s registration requirements on them.

17 70. EPA’s statement in its 2013 Guidance regarding the exemption of
18 pesticide-coated seeds and their “dust-off,” that planting them is “not considered a ‘pesticide
19 use’” under FIFRA, is the equivalent of a rule because it is an “agency statement” of “general
20 applicability” to producers and users of coated seeds with “future effect,” which prescribes the
21 law and/or policy on exemption of coated seeds.

22 71. EPA’s exemption of coated seeds and their dust as stated in the 2013 Guidance,
23 and its other actions as alleged herein that enabled use of unregulated coated seeds, are
24 sufficiently final agency actions for judicial review.

25 72. An agency’s power is no greater than that delegated to it by Congress, and the
26 APA requires that courts “shall... hold unlawful and set aside agency action, findings, and
27 conclusions found to be... in excess of statutory jurisdiction, authority, or limitations, or short of
28 statutory right.” 5 U.S.C. § 706(2)(C).

1 73. FIFRA gives EPA no authority to exempt such sweepingly harmful pesticidal
2 compounds from registration.

3 74. Under the FIFRA provision for “[e]xemption of pesticides,” EPA “may exempt
4 from the requirements of this subchapter by regulation any pesticide which the Administrator
5 determines either (1) to be adequately regulated by another Federal agency, or (2) to be of a
6 character which is unnecessary to be subject to this subchapter in order to carry out the purposes
7 of this subchapter.” 7 U.S.C § 136w(b).

8 75. This provision does not give EPA authority to exempt a whole class of pesticides.
9 It only gives EPA the authority to exempt “any pesticide” if certain criteria are met. Either that
10 pesticide must already be adequately regulated by another federal agency or it must be “of a
11 character which is unnecessary to be subject to” FIFRA. Neither of those criteria applies here.

12 76. EPA can only approve registration of a pesticide if it “will not generally cause
13 unreasonable adverse effects on the environment” when used in accordance with widespread and
14 commonly recognized practice. 7 U.S.C. § 136a(c)(5). However, neonicotinoid-coated seeds do
15 have unreasonable adverse effects on the environment, as alleged herein. EPA has no authority to
16 exempt this whole class of pesticides from FIFRA requirements in view of their unreasonable
17 adverse effects.

18 77. Additionally, 7 U.S.C § 136w(b) specifically commands that if EPA is to exempt
19 any pesticide, such as coated seeds, it must make the requisite “determination” that the pesticide
20 is not of a character that must be regulated; that is, it will not have an unreasonable adverse
21 effect on the environment. Nevertheless, EPA has failed to make that required determination for
22 any of the seeds herein.

23 78. In sum, EPA’s exemption for coated seeds goes beyond the Agency’s authority
24 under FIFRA because EPA does not have authority to exempt a whole harmful class of
25 pesticides and EPA failed to make any adequate determination that the use of coated seeds does
26 not have an unreasonable adverse effect on the environment. EPA’s exemption is therefore *ultra*
27 *vires* and invalid.

1 79. EPA's actions and inactions have allowed distribution, sale, and use of numerous
2 pesticidal seeds planted on over 150 million acres nationally, which are causing ongoing
3 unreasonable adverse effects on the environment and the economy; including, but not limited to,
4 extensive soil and water contamination, thereby harming all of the Plaintiffs. Plaintiff beekeepers
5 are suffering excessive bee kills and severe ongoing economic and personal damages.

6 SECOND CAUSE OF ACTION

7 *EPA's Failure to Regulate and Enforce Against the Entire Class of Pesticidal* 8 *Neonicotinoid-Coated Seeds under FIFRA Is Unlawful*

9 80. Plaintiffs reallege and incorporate by reference paragraphs 1 through 79, as
10 though fully alleged herein.

11 81. Under FIFRA, "no person in any State may distribute or sell to any person any
12 pesticide that is not registered" pursuant to FIFRA. 7 U.S.C. § 136a(a). EPA has the authority to
13 enforce registration requirements and to prevent sales of misbranded pesticides. *Id.* §§ 136a(a),
14 136k(a), 136l, 136w(a)(1), 136(q). EPA also has the authority to register pesticides, but only if
15 they will not generally cause unreasonable adverse effects on the environment when used in
16 accordance with widespread and commonly recognized practice. 7 U.S.C. § 136a(c)(5). Finally,
17 EPA has the authority to exempt a pesticide from FIFRA requirements, but only if certain criteria
18 are met. 7 U.S.C. § 136w(b). As such, FIFRA and its regulations provide a meaningful standard
19 against which to judge EPA's exercise of its enforcement discretion.

20 82. EPA has categorically failed to enforce any FIFRA requirements against
21 neonicotinoid-coated seeds, an entire class of pesticides representing likely 150 million acres of
22 use nationwide. EPA's non-enforcement policy is embodied in its 2013 Guidance where it states
23 that planting of coated seeds, as well as their resulting toxic "dust-off," are "not considered a
24 'pesticide use.'" 2013 Guidance at 7. EPA's policy of non-enforcement can also be seen in
25 practice, through the scores of coated seed products available in the marketplace that are
26 unregistered. See Table 1, *supra*.

27 83. EPA's policy choice to not regulate this entire class of conduct (the sale, labeling,
28 and planting of neonicotinoid-coated seeds) has nothing to do with individual non-enforcement

1 decisions. Instead, EPA has a broad policy of exemption of these products from FIFRA, which
2 amounts to an abdication of the Agency's statutory responsibilities. EPA's announcement of this
3 policy in the 2013 Guidance, as well as by its other actions described herein, provide focal points
4 for judicial review.

5 84. EPA's inactions and policy of non-enforcement are causing ongoing unreasonable
6 adverse effects on the environment and the economy; including, but not limited to, extensive soil
7 and water contamination, thereby harming all of the Plaintiffs. Plaintiff beekeepers are suffering
8 excessive bee kills and severe ongoing economic and personal damages.

9 **THIRD CAUSE OF ACTION**

10 ***EPA's Rule Exempting Coated Seeds from FIFRA Is Invalid for Failure to Comply with APA*** 11 ***§ 553 Rulemaking Procedures***

12 85. Plaintiffs reallege and incorporate by reference paragraphs 1 through 84, as
13 though fully alleged herein.

14 86. EPA's coated seed exemption is a "rule" as alleged above in paragraphs 67-71.
15 For legislative or substantive rules, the APA requires certain procedures (including notice and
16 comment). 5 U.S.C. § 553.

17 87. EPA's coated seed exemption effectively amends and/or is inconsistent with the
18 "treated article" exemption, 40 C.F.R. § 152.25(a)—which expressly applies only to articles
19 treated with pesticides "to protect the article or substance itself"—as EPA's coated seed
20 exemption includes "dust-off" from the seeds, which causes clear pesticidal effects beyond the
21 seeds themselves.

22 88. EPA's coated seed exemption significantly affects the rights and interests of those
23 who plant coated seeds and those who are impacted by those plantings, and departs from the
24 existing practice of and requirement for considering articles that have pesticidal effects beyond
25 themselves to be pesticides.

26 89. EPA has, in practice, treated the coated seeds exemption as binding, and has not
27 regulated coated seed products, consistent with its statement in the 2013 Guidance that coated
28 seed plantings are not pesticide use.

1 90. Consequently, the 2013 Guidance and EPA's coated seed exemption therein
2 amount to a legislative rule subject to APA rulemaking procedures. 5. U.S.C. § 553.

3 91. EPA did not follow APA rulemaking procedures (including notice by publication
4 in the Federal Register and opportunity for public comment) when it issued the 2013 Guidance
5 containing EPA's statement of exemption from FIFRA for pesticide-coated seeds and their toxic
6 dust. Because EPA issued the 2013 Guidance with the exemption rule without going through
7 APA § 553 rulemaking procedures, EPA's actions are invalid.

8 92. EPA's actions and inactions have allowed distribution, sale, and use of numerous
9 pesticidal seeds planted on close to 150 million acres nationally and are causing ongoing
10 unreasonable adverse effects on the environment and the economy; including, but not limited to,
11 extensive soil and water contamination, thereby harming all of the Plaintiffs. Plaintiff beekeepers
12 are suffering excessive bee kills and severe ongoing economic and personal damages.

13 **FOURTH CLAIM**

14 *Application of the "Treated Article" Exemption to Neonicotinoid-coated Seeds Is Arbitrary* 15 *and Capricious and Violates FIFRA and the APA*

16 93. Plaintiffs reallege and incorporate by reference paragraphs 1 through 92, as
17 though fully alleged herein.

18 94. All of the coated crop seed products listed in Table 1, *supra*, fall outside the
19 "treated article" exemption in 40 CFR § 152.25(a). EPA improperly granted them exemptions
20 from FIFRA regulation.

21 95. The full environmental risks of the coated seeds have not been addressed by EPA
22 at the upstream stage of registering the liquid coatings, as would be necessary for the seeds in
23 Table 1 to fit within the exemption. Also, EPA required labels for bags and tags of each of those
24 coated crop seeds with purported warnings for the farmers planting them, including Plaintiff
25 farmers here. EPA approved those labels at the same time the Agency was fully aware that the
26 bag/tag warnings were inadequate, non-mandatory, and unenforceable.

27 96. EPA's new interpretation of the exemption as to coated seeds and "resulting
28 dust-off" in its 2013 Guidance is inconsistent with and violates its own interpretation in the

1 Harmonization Paper, which expressly stated that the exemption was limited to instances where
2 the coating was “*for the protection of the [seed] itself*” [which] *means that the pesticidal*
3 *protection imparted to the treated seed does not extend beyond the seed itself.*” (Emphasis
4 added).

5 97. EPA’s exemption of the neonicotinoid-coated seeds is inconsistent with its
6 *non*-exemption of anti-fouling boat paint, anti-microbial products, and other similar articles that
7 cause pesticidal effects beyond the treated article itself.

8 98. EPA’s inconsistent misapplication of the “treated article” exemption and other
9 actions allowed the distribution, sale, and use of unregistered pesticidal products in violation of
10 FIFRA’s registration requirements. 7 U.S.C. § 136a(a).

11 99. In addition, for all the unregistered pesticidal seeds in Table 1, EPA did not
12 announce a “notice of receipt of application” or a “notice of issuance” in the Federal Register, in
13 violation of FIFRA and its implementing regulations. 7 U.S.C. § 136a(c)(4); 40 C.F.R.
14 § 152.102.

15 100. EPA’s failure to register the pesticidal seeds or to publish Federal Register notices
16 for them denied the Plaintiffs essential information and denied them FIFRA-required public
17 comment opportunities. EPA denied Plaintiffs and the public the ability to submit information in
18 response to the required notices that may have convinced the Agency not to allow the use of
19 those coated seeds in the first instance, or to cancel or re-classify them after they were allowed.
20 Further, EPA denied Plaintiff beekeepers and farmers knowledge that may have allowed them to
21 avoid some of the harmful effects of the coated seed products as applied in the field.

22 101. EPA’s application of the “treated article” exemption to these coated seed products
23 was plainly erroneous, inconsistent, arbitrary and capricious, an abuse of discretion, and
24 otherwise violated FIFRA, its implementing regulations, and the APA.

25 102. Plaintiffs aver, on information and belief, that other neonicotinoid-coated and
26 non-neonicotinoid-coated seeds bear the same legal defects as those specified herein in Table 1.
27 This Complaint and all of its Claims applies to all such crop seeds.
28

1 103. EPA's actions and inactions are causing ongoing unreasonable adverse effects on
2 the environment and the economy; including, but not limited to, extensive soil and water
3 contamination, thereby harming all of the Plaintiffs. Plaintiff beekeepers are suffering excessive
4 bee kills and severe ongoing economic and personal damages.

5 **REQUEST FOR RELIEF**

6 WHEREFORE, Plaintiffs respectfully seek an Order of this Court:

- 7 1. Declaring that EPA's action of exempting the pesticidal coated seeds from FIFRA
8 registration is *ultra vires* and contrary to law;
- 9 2. Declaring that the unregistered seeds for all of the at least twenty-five different
10 crops coated with neonicotinoids, as per Table 1, *supra*, and all other crop seeds
11 similarly situated, do not fit within the "treated article" exemption from pesticide
12 regulation in 40 CFR § 152.25(a) and must be regulated as pesticidal products
13 under FIFRA;
- 14 3. Enjoining EPA from allowing any new unregistered neonicotinoid-coated seeds
15 of any crops;
- 16 4. Enjoining EPA from allowing any new unregistered seeds of any crops if they are
17 coated with other systemic insecticides that cause pesticidal effects extending
18 beyond the coated seed and plant itself;
- 19 5. Awarding Plaintiffs the costs of this litigation, including reasonable attorneys'
20 fees and expert witness fees; and
- 21 6. Granting such other relief as the Court deems just and proper.
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1 Respectfully submitted this 6th day of January, 2016 in San Francisco, California.

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3 /s/ Adam Keats

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