COMMENTS OF ATTORNEYS GENERAL OF OREGON, MASSACHUSETTS, NEW YORK, HAWAII. ILLINOIS, MARYLAND, MINNESOTA, NEW MEXICO, VERMONT, AND WASHINGTON

February 9, 2024

Via Electronic Filing

EPA-HQ-OPP-2023-0420

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460-0001

Re: Advanced Notice of Proposed Rulemaking—Pesticides; Review of Requirements Applicable to Treated Seed and Treated Paint Products; Request for Information and Comments, 88 Fed. Reg. 70,626 (Oct. 12, 2023).

Dear Administrator Regan:

The Attorneys General of Oregon, Massachusetts, New York, Hawaii, Illinois, Maryland, Minnesota, New Mexico, Vermont, and Washington submit this letter in response to the U.S. Environmental Protection Agency's (EPA) above-referenced Advanced Notice of Proposed Rulemaking (Advanced Notice) requesting information and comments for EPA to consider as the agency contemplates potential action under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[1] as to the regulatory requirements applicable to seed treated with neonicotinoids and other systemic pesticides.[2]

[1] 7 U.S.C. §§ 136, *et seq.* FIFRA is the federal statute that governs the registration, distribution, sale, and use of pesticides in the U.S. Under FIFRA, EPA is authorized to act to ensure that, when applied as instructed, pesticides will not generally cause unreasonable risk to human health or the environment.

[2] While the subject Advanced Notice addresses treated paint products in addition to treated seeds, these comments of the Attorneys General address only issues having to do with the regulation of treated seeds.

We strongly support EPA's efforts in furtherance of adopting a pesticide registration rule under FIFRA Section 3(a),[3] and conforming amendments to the agency's Treated Article Exemption,[4] to allow the agency to promulgate appropriately tailored and enforceable rules applicable to pesticide-treated seed, including requirements for reporting, dust mitigation, and pesticide use instructions on product labels. As recognized by EPA in the Advanced Notice and as discussed below, it is widely understood that seeds treated with pollinator-threatening neonicotinoids and other systemic pesticides may have unreasonable adverse effects on beneficial insects and the environment. We are particularly concerned about pollinator contact with abraded seed dust—including decreased survival of bees and fitness of colonies, reduction of overwintering success and colony reproduction, damage to the brains of bee workers, and fatalities from bees coming in direct contact with the dust—and regarding harm to aquatic ecosystems.

In previous comments, several of us have expressed concerns that EPA's risk assessments regarding seeds treated with neonicotinoids have been insufficient.[5] Such insufficiencies in the agency's considerations of the risks associated with treated seeds increase the challenges associated with identifying with specificity the regulatory requirements needed to address the unreasonable risks posed by seeds treated with pesticides. We anticipate that EPA's ongoing work in this regard, including utilizing the information generated in response to this Advanced Notice, will facilitate EPA's identifying the contours and requirements for appropriate rulemaking under FIFRA Section 3 and for an appropriate amendment to the Treated Article Exemption, including with respect to provisions for enforceable reporting, labeling and dust mitigation measures to promote pollinator protection and mitigate air, soil and water contamination.[6]

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[3] 7 U.S.C. § 136a(a).

[4] 40 C.F.R. § 152.25(a). Under the Treated Article Exemption, seeds treated with neonicotinoids and other systemic pesticides are currently considered by EPA to be exempt from all provisions of FIFRA so long as the pesticide used to treat the seed is registered for such use.

[5] For example, in comments submitted May 4, 2020 (the "Interim Registration Comments") on EPA's *Proposed Interim Registration Review Decisions for the Neonicotinoid Pesticides Imidacloprid, Clothianidin, Dinotefuran, Thiamethoxam, and Acetamiprid* (85 Fed. Reg. 5,953; Feb. 3, 2020), we said**: "**First, the Final Bee Risk Assessments for clothianidin, thiamethoxam, and imidacloprid fail to examine risks to pollinators from exposure to treated seed dust created during the planting of neonicotinoid treated seeds, despite EPA's acknowledgement that seed treatment is the predominant use of these neonicotinoid insecticides and that dust from treated seeds is associated with numerous risks to honey bees and other pollinators. Second, EPA failed to finalize its non- pollinator risk assessments, and its preliminary risk assessments do not adequately assess risks from the Subject Neonicotinoid Insecticides to aquatic ecosystems, soil ecosystems, and groundwater." Interim Registration Comments at 2-3, available at https://www.regulations.gov/comment/EPA-HQ-OPP-2008-0844-1724

[6] The current lack of enforceable requirements has the effect of reducing information available about bee kills associated with the use of pesticide treated seeds. The Center for Food Safety reports, in their petition to remove treated seeds from the registration exemption, that:

Accordingly, we urge EPA promptly to adopt an appropriately tailored registration rule and revision to the Treated Article Exemption to further the agency's mandate under FIFRA to prevent unreasonable risks to the environment from those neonicotinoid and other systemic insecticides used to treat crop seeds.

I. Treated Seeds, As Currently Used, Cause Unreasonable Adverse Effects on the Environment

In the Interim Registration Comments, we discussed the evidence of the impact of the use of treated seeds on the environment—particularly the impact of dust-off and the impact on waterways. With regard to pesticide dust-off, we wrote:

> [EPA's] final bee risk assessments for clothianidin, thiamethoxam, and imidacloprid in particular cite to several studies that reflect the exposure impacts from seed treatments. Additional field studies not included in the assessments also demonstrate that exposure to the dust of neonicotinoid treated seeds causes significant harm to pollinator health, including decreased survival of bees and fitness of colonies, reduction of overwintering success and colony reproduction, damage to the brains of bee workers, and fatalities from bees coming in contact with abraded seed dust, especially in high humidity environments. Studies also show that abraded, pesticide-laden seed dust migrates off the agricultural field during the planting process, contaminating nearby grass and flowers, and that seed treatment is an important route of exposure in bees, on par with oral consumption of contaminated pollen and nectar.[7]

Our comments also addressed the harm that use of treated seeds has caused aquatic ecosystems:

> Given evidence within the scientific literature that most of the neonicotinoid on a treated seed is not taken up by the plant and has been repeatedly demonstrated to migrate off-field, it is reasonable to assume that most of neonicotinoid contamination in non-target environments originates from the predominant type of application—seed treatment. Off-field migration of neonicotinoids causes harm to ecological and hydrological resources.

"Beekeepers typically do not report their dust-off kills systematically as there are no Federal or State enforcement responses due to the exemption that is the focus of this Petition." Citizen Petition to the United States Environmental Protection Agency at 21, n. 47, available at https://www.centerforfoodsafety.org/files/2017-04-25_coated-seeds-petition-final-1_33314.pdf. And EPA's 2013 Guidance for Inspecting Alleged Cases of Pesticide-Related Bee Incidents ("2013 Guidance") makes it clear that inspectors will only inspect treated seeds as a cause if they somehow have "reason to believe a treated seed … is not in compliance with the treated article exemption." 2013 Guidance at 7-8, available at https://www.epa.gov/sites/default/files/2013-09/documents/bee-inspection-guide.pdf. Unfortunately, the current landscape of unenforceable admonitions by EPA in this context are insufficient to protect human health and the environment.

[7] Interim Registration Comments at 35.

> Neonicotinoid pollution of aquatic ecosystems, surface waters, groundwater and sediments is persistent and accumulating.[8]

These concerns remain today. Indeed, EPA has acknowledged that exposure of bees to dust from treated seeds is a major concern. In its January 14, 2020, *Final Bee Risk Assessment to Support the Registration Review of Clothianidin and Thiamethoxam* ("Final Bee Risk Assessment"),[9] EPA stated that an "important route of exposure [for bees] includes contact with abraded seed coat dust during planting … This pathway has been associated with numerous incidents of honey bee mortality."[10] EPA added:

> The extent to which honey bees are exposed via contact with abraded seed coat dust is influenced by many factors including the physio-chemical properties of the seed coating, seed planting equipment, use of seed lubrication agents (*e.g.*, talc), environmental conditions (wind speed, humidity), and hive location in relation to sowing and prevailing winds. Off-site drift of contaminated seed coat dust can contribute to residues on plants, soil, and surface water to which bees may be exposed through direct contact and ingestion of surface water, pollen, and nectar.[11]

With respect to aquatic ecosystems, EPA has said that "risks of concern were identified for all four neonicotinoid insecticides (clothianidin, thiamethoxam, dinotefuran, and imidacloprid) to freshwater invertebrates on both an acute and chronic basis."[12]

In this regard, EPA should also address, with enforceable rules, risks associated with improper disposal of unused treated seeds under FIFRA, including the use of treated seeds as fuel for a bioethanol plant, resulting in water and soil pollution, and the potential for significant threats to human health and the environment. In an August 5, 2022, letter to Administrator Regan, New Jersey Senator Cory Booker provided a dramatic example of the unreasonable adverse effects associated with such use of pesticide-treated seeds, describing an "ongoing environmental and public health disaster in Mead, Nebraska,"[13] where an ethanol plant used

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[8] *Id.* at 36-7.

[9] *Final Bee Risk Assessment to Support the Registration Review of Clothianidin and Thiamethoxam* (Jan. 14, 2020), Doc. No. EPA-HQ-OPP-2011-0865-1164, [hereinafter Final Bee Risk Assessment].

[10] Final Bee Risk Assessment at 58.

[11] *Id.*

[12] *Clothianidin and Thiamethoxam Proposed Interim Registration Review Decision Case Numbers 7620 and 7614* (Jan. 2020), at 40, Doc. Nos. EPA-HQ-OPP-2011-0865 and EPA-HQ-OPP-2011-0581, available at https://www.epa.gov/sites/default/files/2020-01/documents/clothianidin_and_thiamethoxam_pid_final_1.pdf

[13] Letter from Senator Cory Booker to the Honorable Michael S. Regan, Aug. 5, 2022, available at

seeds pre-treated with pesticides as a feedstock to produce ethanol. As the *Lincoln Star* has reported, beehives in the Mead area collapsed; pet dogs became violently ill; and residents reported numerous respiratory problems.[14]

Thus, the unreasonable risks associated with the use and disposal of treated seeds are manifest and EPA should regulate to address those risks to satisfy the agency's mandate under FIFRA.

II. EPA Should Require Adequate Reporting and Use Regulations for Treated Seeds to Protect Pollinators, Mitigate Resource Contamination, and Enable State Enforcement

In direct support of the concurrent review of Interim Registrations, this Advanced Notice should address these significant risks and harms, through EPA development of specific regulations regarding reporting, labeling, and contamination mitigation to ensure enforceable actions will meet specific risk reduction goals. As a baseline, EPA should make the current language with respect to the use of treated seeds in "Labeling Instructions for Pesticide-Treated Seed and Pesticide-Treated Paint Products" – "Ref. 5" in this docket –mandatory and enforceable, including the following requirements:

- "Cover or collect treated seeds spilled during loading and planting in areas (such as in row ends)."[15]
- "Bury spilled seed at a depth of 6 inches or double the planting depth, whichever is greater"[16]
- "Bury all spilled seed at least [XX]* feet away from bodies of water. [**NOTE: The burial distance will either be 30 feet or the maximum runoff buffer distance, whichever is greater. The runoff buffer distance will be determined during the registration review of the chemical case.]"* [17]

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https://www.booker.senate.gov/imo/media/doc/letter_to_epa_on_neonicotinoid_coated_seeds.pdf .

[14] *See* Chris Dunker, *'Chemicals don't just disappear' — Persistence by researchers, residents uncovers pesticide contamination at Mead plant*, Lincoln Journal Star (Feb. 7, 2021), https://journalstar.com/news/local/chemicals-dont-just-disappear-persistence-byresearchers-residents-uncovers-pesticide-contamination-at-meadplant/article_8d31dc75-dcdf-5ed5-b263-c4e158b4a11c.html#tracking-source=hometop-story.

[15] *Labeling Instructions for Pesticide-Treated Seed and Pesticide-Treated Paint Products* at 3 (September 2023), Doc. No. EPA-HQ-OPP-2023-0420-0002**,** found at https://www.regulations.gov/document/EPA-HQ-OPP-2023-0420-0002

[16] *Id*.

[17] *Id*.

"Do not contaminate bodies of water when disposing of equipment wash water."[18]

Moreover, EPA should consider making mandatory this advisory statement on dust reduction in Ref. 5: "Fluency agents are recommended to be applied to treated seed prior to the planting."[19] And we propose that EPA specify that any fluency agents for treated seeds must exclude those that contain environmentally harmful ingredients, including plastic polymers. We also urge that the efficacy of this general statement about applying fluency agents be reviewed as soon as EPA identifies a target percentage reduction of dust off that is determined to be protective of pollinators and the environment.

And the 2020 Final Bee Risk Assessment suggests other good candidates for labeling requirements to help address the risks associated with pesticide dust exposure. As noted above, it stated:

> "The extent to which honey bees are exposed via contact with abraded seed coat dust is influenced by many factors including the physio-chemical properties of the seed coating, seed planting equipment, use of seed lubrication agents (*e.g.*, talc), environmental conditions (wind speed, humidity), and hive location in relation to sowing and prevailing winds."[20]

Labeling thus might restrict the use of certain seed treatments, restrict the type of seed planting equipment used, and impose conditions based on "environmental conditions (wind speed, humidity), and hive location in relation to sowing and prevailing winds."[21] Moreover, robust, well-tailored, and enforceable regulations regarding efficient reporting of the use and disposal of treated seeds, minimally burdensome on small operations and more robust for larger ones, as well as for mitigating air, soil and water contamination, should be developed to ensure the agency can satisfy FIFRA's mandate to protect the environment from those unreasonable adverse effects associated with the use of treated seeds.

Finally, many states and jurisdictions across the United States are taking actions that go beyond current federal regulations to control bee-toxic chemicals. For example, New York State recently passed the Birds and the Bees Protection Act, prohibiting the prophylactic use of neonicotinoid treated seeds pending availability of untreated seed.[22] As noted in the State FIFRA

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[18] *Id.*

[19] *Id.*

[20] Final Bee Risk Assessment at 58.

[21] *Id.*

[22] *Governor Hochul Signs "Birds and Bees"* Act, press release, Dec. 22, 2023, https://www.governor.ny.gov/news/governor-hochul-signs-birds-and-bees-act-nation-leading-legislation-protect-new-yorkers-and

Issues Research and Evaluation Group submission to EPA,[23] the regulatory framework governing pesticide treated seeds must be improved to enable tracking of active ingredients used in seed treatments, and state-level enforcement of state-specific restrictions.

III. CONCLUSION

We applaud EPA's efforts to adopt an appropriately drawn FIFRA Section 3(a) rule, and conforming amendments to the Treated Article Exemption, to address well documented adverse effects to the environment from the use and disposal of seeds treated with neonicotinoids and other systemic pesticides and urge the agency's prompt action in this regard.

Respectfully submitted,

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[23] State FIFRA Issues Research and Evaluation Group, Treated Seed Issue Paper (August 31, 2022), EPA-HQ-OPP-2023-0420-0014.

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