December 22, 2020

*Via Email*

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

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

Dear Director Dolcini:

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

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

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

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

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

## I. Background

### A. Legal Standard

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

### B. The Petition

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

(1) Repeal its policy classifying crop seeds treated with neonicotinoid pesticides ("neonics") and other systemic insecticides as "treated articles"—thereby excluding them from the definition of "pesticide" under the California Food and Agricultural Code (FAC)—and register and regulate such seeds as "pesticides." *See generally* Petition. As the Petition describes, DPR's current policy (the "Exclusion") constitutes "a regulation exempting neonic-treated seeds from regulation under the FAC without going through the public notice-and-comment procedure that the APA requires," *Id.* at 19;

(2) List seeds treated with neonics and other systemic insecticides as "restricted materials" pursuant to FAC §§ 14001-14015, *and* take any other regulatory action necessary to protect against the environmentally harmful effects of such seeds pursuant to its duties under FAC §§ 12824, 12838, and 14102, Petition at 17-20; and

(3) Take regulatory action to support research and provide outreach and assistance regarding regenerative agricultural practices that eliminate or reduce chemical inputs—such as cultivation practices, beneficial insects, rotation, and cover crops, *Id.* at 20.

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

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



ED_006569J_00013420-00002

C. DPR's Decision

DPR denied the Petition on October 23, 2020.[2] In its decision letter (the "Decision"), DPR states that Petitioners' first and third requests "do not require rulemaking activity," and therefore require no response. Decision at 2. Accordingly, the Decision states that DPR would "not address" these requests. *Id.*

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

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

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

D. DPR's Separate Response Letter

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

## II. Request for Reconsideration

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

*i. DPR Must Respond to Petitioners' Request to Repeal the Exclusion*

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

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

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



ED_006569J_00013420-00003

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

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

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

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

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



ED_006569J_00013420-00004

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

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

*ii. The Exclusion Is Unlawful and Must Be Repealed*

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

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

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

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

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

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

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

The Petition also references several industry advertising materials highlighting the fundamental pesticidal nature of seeds treated with neonics and other insecticides. Petition at 12, 14-15 (referencing advertising materials for Syngenta's Cruiser® and Platinum®, Bayer's Gaucho® and FarMore®, BASF's Poncho® and Votivo®, Winfield United's Resonate®, and Corteva Agriscience's Lumivia® line of products). For example, the Petition references a website for seeds sold by Seminis—a subsidiary of the Bayer corporation—stating that neonic treatments on their vegetable seeds "provide targeted agricultural pest control" for "multiple pests" through "systemic activity for above and below ground insects." *Id.* at 15.[5] The site illustrates these claims with a diagram showing the range of pests the seeds are used to control:

---

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

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



ED_006569J_00013420-00006

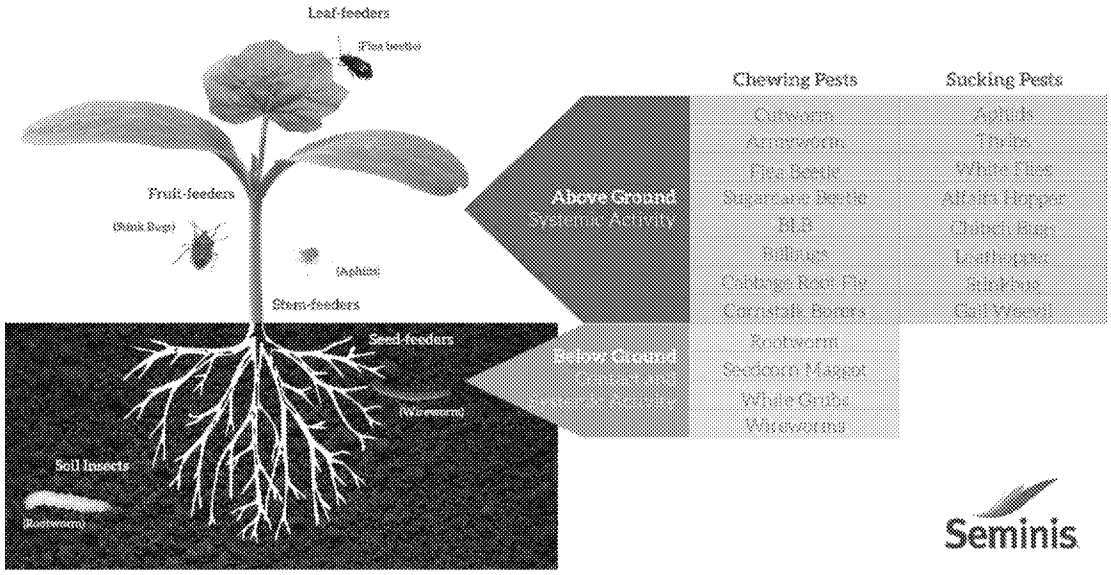


*Diagram advertising the pesticidal properties of Seminis's line of neonic-treated vegetable seeds, typically sold with FarMore® brand insecticides.*

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

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

### *iv. Additional Evidence Demonstrates that Treated Seeds Are Pesticides*

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

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

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

a. Materials from Pesticide Manufacturers

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

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

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

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

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

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



ED_006569J_00013420-00008

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

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

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

For example, a 2016 advertisement for Pioneer—a seed manufacturer owned by Corteva Agriscience—touts the "proven insect protection" of its insecticide treated seeds that "enhance early-season plant health" and are "[a]pplied as [the] standard seed treatment on most Pioneer® brand corn products that don't include DuPont™ Lumivia™ insecticide seed treatment." *Id.* at 188. A similar 2017 Canadian advertisement for the U.S. seed manufacturer DeKalb—a subsidiary of the Bayer corporation—markets the chlorantraniliprole seed treatment Lumivia™ as an option for its seeds, stating it provides "fast-acting protection up to the 4-5 leaf stage against early-season insect pests" and that it "quickly moves systemically upward throughout the plant from seed germination to V5 seedling stage, delivering protection to new growth." Appendix at 187.[8]

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

[8] DeKalb currently offers Acceleron insecticide seed treatments for its U.S. customers. *See* DeKalb, *Protect What You Plant: Protection Starts at the Seed Level* (visited Dec. 18, 2020), https://bit.ly/34t4ZBv ("DEKALB® can help to safeguard your yield from all manners of threats—from weather to insects to diseases"). Acceleron seed treatments contain neonics and other pesticides. *See* Bayer CropScience, *Acceleron® Corn Seed Protection* (visited Dec. 18, 2020), https://bit.ly/2LQRXar.



ED_006569J_00013420-00009

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

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

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

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

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

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

---

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

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

[11] *See* PMRA Broflanilide Review.



ED_006569J_00013420-00010

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

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

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

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

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

## III. Conclusion

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

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

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



ED_006569J_00013420-00011

Respectfully,

Daniel A. Raichel
Samuel D. Eisenberg
Natural Resources Defense Council
draichel@nrdc.org
(773) 319-6376

On behalf of:

Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104

Californians for Pesticide Reform
2029 University Ave., Suite 200
Berkeley, CA 94704

Center for Biological Diversity
1212 Broadway, Suite #800
Oakland, CA 94612

Friends of the Earth
2150 Allston Way, Suite 360
Berkeley, CA 94704

Pesticide Action Network North America
2029 University Ave., Suite 200,
Berkeley CA 94704

The Xerces Society for Invertebrate Conservation
628 NE Broadway, Ste. 200
Portland, OR 97232

cc (via email):
Karen Morrison, Assistant Director, Pesticide Programs Division, Karen.Morrison@cdpr.ca.gov
Russel Darling, Supervisor, Pesticide Registration Branch, Russell.Darling@cdpr.ca.gov
Jesse Cuevas, Chief Deputy Director, Jesse.Cuevas@cdpr.ca.gov
Daniel Rubin, Chief Counsel, Daniel.Rubin@cdpr.ca.gov
Julissa DeGonzalez, Legislative Director, Julissa.DeGonzalez@cdpr.ca.gov
Jeannie Alloway, Legal Assistant, Jeannie.Alloway@cdpr.ca.gov



ED_006569J_00013420-00012