

1 ATID KIMELMAN (SBN: 344993)  
akimelman@nrdc.org  
2 SIMI BHAT (SBN: 289143)  
sbhat@nrdc.org  
3 NATURAL RESOURCES DEFENSE COUNCIL  
111 Sutter St, 21<sup>st</sup> Floor  
4 San Francisco, CA 94104  
Telephone: 415 875 6110  
5 Facsimile: 415 795 4799  
*Attorneys for Petitioners/Plaintiffs*  
6  
7

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of Alameda  
**02/17/2023 at 10:30:14 PM**  
By: Xian-xii Bowie,  
Deputy Clerk

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF ALAMEDA**

10 NATURAL RESOURCES DEFENSE  
COUNCIL, INC.; CALIFORNIANS FOR  
11 PESTICIDE REFORM; CENTER FOR  
BIOLOGICAL DIVERSITY, FRIENDS OF  
12 THE EARTH; and PESTICIDE ACTION  
NETWORK NORTH AMERICA,

13 Petitioners/Plaintiffs,

14 v.

15 CALIFORNIA DEPARTMENT OF  
PESTICIDE REGULATION; JULIE  
16 HENDERSON, IN HER OFFICIAL  
CAPACITY AS DIRECTOR OF THE  
17 CALIFORNIA DEPARTMENT OF  
PESTICIDE REGULATION; and DOES 1  
18 THROUGH 20,

19 Respondents/Defendants.

Case No. **23CV028215**

VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

1 **INTRODUCTION**

2 1. Petitioners/Plaintiffs Natural Resources Defense Council, Inc., Californians for  
3 Pesticide Reform, Center for Biological Diversity, Friends of the Earth, and Pesticide Action  
4 Network North America (collectively, Petitioners) challenge the failure of Respondents/Defendants  
5 California Department of Pesticide Regulation (DPR), DPR Director Julie Henderson, and Does 1  
6 through 20 (collectively, DPR or Respondents) to comply with their duties under California’s  
7 Administrative Procedure Act (APA), Cal. Gov’t Code §§ 11340 *et seq.*, when developing a policy  
8 that allows one of the largest sources of pesticide contamination in California to go unregulated under  
9 state law. DPR is responsible for regulating pesticide use in California, “tak[ing] whatever steps” are  
10 “necessary to protect the environment.” Cal. Food and Agric. Code (FAC) § 14102. DPR has  
11 effectively exempted from regulation all crop seeds treated with pesticides prior to planting  
12 (hereinafter, “treated seeds”) without following the procedures required by law, resulting in severe  
13 consequences to the environment and public health.

14 2. For decades, DPR has maintained a policy that treated seeds are not “pesticides”  
15 subject to regulation (hereinafter, the “treated-seeds policy”). Because DPR did not give notice to the  
16 public of this policy, allow members of the public to request hearings or comment on it, or otherwise  
17 comply with the requirements of the APA in adopting the treated-seeds policy, it constitutes an  
18 “underground regulation” in violation of the APA.

19 3. DPR’s failure to regulate treated seeds allows one of the most widespread uses of  
20 pesticides in California to go wholly untracked, perpetuating significant harms to California’s  
21 environment. Treated seeds are a major source of pesticide contamination of soil and water in  
22 California and across the nation. “Systemic” insecticides are especially pernicious. These highly  
23 water-soluble chemicals are designed to be absorbed by treated plants and transported throughout,  
24

1 making all parts of the plant—such as the roots, leaves, stems, and pollen—toxic to insects. One class  
2 of systemic insecticides, neonicotinoids (or “neonics”), was introduced in the early 1990s and is now  
3 the most common type of insecticide in the world, largely due to its popularity as a seed treatment.

4 4. DPR recognizes that generally only 2-3% of the neonics applied to treated seeds are  
5 absorbed by the target plant, leaving more than 90% of the pesticides in the soil, where they can  
6 persist for years and accumulate in successive planting seasons while also making their way into  
7 nearby waterways.<sup>1</sup> See DPR, Pesticide-Treated Seed Public Workshop, slide 30 (Nov. 15, 2021),  
8 [https://www.cdpr.ca.gov/docs/emon/surfwtr/pest\\_seeds/pest\\_seeds\\_slides.pdf](https://www.cdpr.ca.gov/docs/emon/surfwtr/pest_seeds/pest_seeds_slides.pdf) (Att. A). Indeed, in  
9 areas where neonic-treated seeds are the predominant neonic use, neonic pollution is often described  
10 as “ubiquitous”—with the chemicals appearing in untreated wild plants,<sup>2</sup> fields with no history of  
11 neonic use,<sup>3</sup> and local water supplies.<sup>4</sup>

12 5. A large and growing body of research identifies neonics as a leading cause of bee  
13 population decline over the past two decades.<sup>5</sup> Neonics can kill bees at extraordinarily low doses, but

---

14  
15 <sup>1</sup> See Alford and Krupke, *Translocation of the Neonicotinoid Seed Treatment Clothianidin in Maize*,  
12:3 PLOS ONE e0173836 (2017), <https://doi.org/10.1371/journal.pone.0173836>; Bijleveld van  
16 Lexmond et al., *Worldwide Integrated Assessment on Systemic Pesticides*, 22 *Env’t Science and  
Pollution Research* 1-4 (2015), <https://link.springer.com/article/10.1007/s11356-014-3220-1#Sec3>.

17 <sup>2</sup> See, e.g., Long & Krupke, *Non-Cultivated Plants Present a Season-Long Route of Pesticide  
Exposure for Honey Bees*, 7 *Nature Communications* 11629 (May 31, 2016),  
18 <https://www.nature.com/articles/ncomms11629>.

19 <sup>3</sup> Main et al., *Reduced Species Richness of Native Bees in Field Margins Associated with  
Neonicotinoid Concentrations in Non-Target Soils*, *Agriculture, Ecosystems & Environment* (Jan. 1,  
2020), <http://bit.ly/2OhMB6W>.

20 <sup>4</sup> Klarich, et al., *Occurrence of Neonicotinoid Insecticides in Finished Drinking Water and Fate  
During Drinking Water Treatment*, *Env’t Science and Technology Letters* (Apr. 2017),  
21 <https://bit.ly/2PMRunk>; Sultana et al., *Neonicotinoid Pesticides in Drinking Water in Agricultural  
Regions of Southern Ontario, Canada*, *Chemosphere* (Jul. 2018), <http://bit.ly/2JZawXI>.

22 <sup>5</sup> See, e.g., Goulson, *Review: An Overview of the Environmental Risks Posed by Neonicotinoid  
Insecticides*, 50 *Journal of Applied Ecology*, 977-987 (2013), [https://doi.org/10.1111/1365-  
2664.12111](https://doi.org/10.1111/1365-2664.12111); Bijleveld van Lexmond et al., *Worldwide Integrated Assessment on Systemic Pesticides*,  
23 22 *Env’t Science and Pollution Research* 1-4 (2015),  
24 <https://link.springer.com/article/10.1007/s11356-014-3220-1#Sec3>; Janousek, et al., *Recent and*

1 even at lower levels, can have pervasive effects that reduce bee survival and reproduction. Neonics  
2 move easily in water and can persist in the environment for years, meaning they also are especially  
3 pervasive environmental contaminants. Since neonics were first introduced, U.S. agriculture has  
4 become roughly 48-times more harmful to insect life via oral toxicity, with the vast majority of that  
5 increase driven by the proliferation of neonics.<sup>6</sup>

6         6.       Neonics’ harms are not limited to insects. They have been linked with declines in bird  
7 populations, widespread contamination of water, birth defects in white-tailed deer, and the collapse of  
8 aquatic ecosystems. People may be at risk, too. Research suggests that prenatal exposure to neonics  
9 may be linked with higher risk of malformations of the developing heart and brain.<sup>7</sup>

10         7.       Given the widespread use of neonic-treated seeds, these risks are not academic. Based  
11 on the most recent estimate, somewhere from 79% to 100% of conventional corn in the U.S. is grown  
12 from a neonic-treated seed.<sup>8</sup> Most conventional cotton is also grown from neonic-treated seeds.<sup>9</sup> In  
13 California alone, neonic-treated seeds may be used on up to 4 million acres each year.<sup>10</sup> Recent  
14 research looking at 171 pregnant women from California, four other states, and Puerto Rico also

---

15 *Future Declines of a Historically Widespread Pollinator Linked to Climate, Land Cover, and*  
16 *Pesticides*, 120:5 PNAS e2211223120 (Jan. 23, 2023),  
17 <https://www.pnas.org/doi/full/10.1073/pnas.2211223120>.

18 <sup>6</sup> DiBartolomeis, et al., *An Assessment of Acute Insecticide Toxicity Loading (AITL) of Chemical*  
*Pesticides Used on Agricultural Land in The United States*. 14:8 PLOS ONE e0220029 (2019),  
19 <https://doi.org/10.1371/journal.pone.0220029>.

20 <sup>7</sup> Cimino AM, et al., *Effects of Neonicotinoid Pesticide Exposure on Human Health: A Systematic*  
*Review*. 125:2 Env. Health Perspectives 155-162 (2017),  
21 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5289916/>.

22 <sup>8</sup> Douglas and Tooker, *Large-Scale Deployment of Seed Treatments Has Driven Rapid Increase in*  
*Use of Neonicotinoid Insecticides and Preemptive Pest Management in U.S. Field Crops*, 49:8 Env’t.  
23 *Science & Technology* 5088–5097 (2015), <https://doi.org/10.1021/es506141g>.

24 <sup>9</sup> U.S. EPA, *Benefits of Neonicotinoid Insecticide Use in the Pre-Bloom and Bloom Periods of Cotton*  
7, 9 (May 3, 2017), <https://www.regulations.gov/document/EPA-HQ-OPP-2008-0844-1258>  
(reporting 9,274,500 acres of cotton harvested in the U.S., and 5,841,000 base acres treated with a  
neonic seed treatment).

<sup>10</sup> Mineau, *Neonicotinoids in California* 1 (2020),

<https://www.nrdc.org/sites/default/files/neonicotinoids-california-20200922.pdf>.

1 found that over 95% of pregnant women tested had neonics in their bodies,<sup>11</sup> and data from the  
2 Centers for Disease Control and Prevention show that about half the American population is exposed  
3 to neonics on a given day.<sup>12</sup>

4 8. Despite significant risks, DPR does not track the use of treated seeds. Thus, the full  
5 extent of the pesticide burden from treated seeds on the environment in California is unknown. DPR  
6 admits that “pesticide-treated seeds may introduce a significant contribution of pesticide mass that  
7 remains unreported.” *See* DPR, Pesticide-Treated Seed Public Workshop, slide 52 (Att. A).

8 9. The effects of DPR’s treated-seed policy extend beyond these risks from neonic-  
9 treated seeds. Seeds are often treated with pesticides before they enter California. Yet because DPR  
10 does not classify treated seeds as pesticides, it does nothing to monitor whether these pesticide-laced  
11 seeds are treated with active ingredients that are allowed to be sold or used in California. As a result,  
12 California’s environment is exposed to at least seventeen pesticide active ingredients that are not  
13 registered for use on treated seeds in California—and some that are not registered to be used as seed  
14 treatments *anywhere* in the United States. *Id.* at slides 38, 40.

15 10. DPR has a duty to prohibit or regulate pesticides as necessary to “protect the  
16 environment.” FAC § 14102. It also must “endeavor to eliminate from use in the state any pesticide  
17 that endangers the agricultural or nonagricultural environment, is not beneficial for the purposes for  
18 which it is sold, or is misrepresented.” *Id.* §12824. By effectively exempting treated seeds from  
19 regulation as pesticides under California law, DPR has shirked its duties, leading to environmental  
20

---

21 <sup>11</sup> Buckley, et al., *Exposure to Contemporary and Emerging Chemicals in Commerce among*  
22 *Pregnant Women in the United States: The Environmental Influences on Child Health Outcome*  
23 *(ECHO) Program*, 56:10 Env’t. Science & Technology 6560-6579 (2022),  
<https://pubs.acs.org/doi/10.1021/acs.est.1c08942>.

24 <sup>12</sup> Ospina et al., *Exposure to Neonicotinoid Insecticides in the U.S. General Population*, 176 Env’t.  
Research 108555 (2019) <https://bit.ly/2q11yRf>.

1 harms described above. Furthermore, by failing to follow APA requirements, DPR prevented those  
2 impacted by its treated-seeds policy from commenting on the policy before it was adopted.

3 11. Petitioners advocate for pesticide policies that are protective of the environment and  
4 human health. Petitioners, by this verified Complaint for Declaratory Relief and Petition for Writ of  
5 Mandate, seek (1) a declaration that DPR’s treated-seeds policy is an underground regulation in  
6 violation of the California APA; (2) an injunction preventing DPR from maintaining its treated-seeds  
7 policy and requiring DPR to comply with the APA in regulating treated seeds; and (3) a writ of  
8 mandate directing DPR to regulate treated seeds in compliance with the APA.

9 **PARTIES**

10 12. Petitioner NRDC is a national, nonprofit environmental membership organization  
11 whose purpose is to safeguard the Earth—its people, its plants and animals, and the natural systems  
12 on which all life depends. NRDC, which was founded in 1970 and is organized under the laws of the  
13 State of New York, has offices in San Francisco and Santa Monica. NRDC has over 360,000  
14 members nationwide, over 57,000 of whom live in California. In California, NRDC has worked for  
15 decades to protect the state’s people, water, and wildlife from the threats posed by toxic pesticides.  
16 NRDC’s pollinator initiative seeks to safeguard keystone pollinating species—such as California’s  
17 more than 1,500 native bee species—from recent dramatic population losses driven in large part by  
18 widespread neonic use.

19 13. Petitioner Californians for Pesticide Reform (CPR) is a statewide coalition of more  
20 than 200 organizations working to fundamentally shift the way hazardous pesticides are used in  
21 California. CPR prioritizes building leadership in communities living on the front lines of pesticide  
22 exposure and has been on the forefront of successful campaigns to restrict and eliminate the use of  
23 harmful synthetic pesticides. CPR advocates for Californians’ right to know in advance about  
24

1 planned pesticide use and for increased transparency about the health and environmental harms  
2 associated with pesticides.

3 14. Petitioner Pesticide Action Network North America (PANNA) is a Berkeley-based  
4 nonprofit organization that serves as an independent regional center for Pesticide Action Network  
5 International, a coalition of over 600 public interest organizations in more than 90 countries. For  
6 more than 30 years, PANNA has worked to replace hazardous and unnecessary pesticide uses with  
7 socially-just and ecologically sound pest management across North America. PANNA provides  
8 scientific expertise, public education, access to pesticide data and analysis, policy development, and  
9 other support to partner organizations. PANNA's California membership includes a number of  
10 groups who directly represent or advocate on behalf of small-scale farmers, farmworkers, children,  
11 and rural residents.

12 15. Petitioner The Center for Biological Diversity (Center) is a California non-profit  
13 corporation with offices throughout the United States, and an office in Mexico. The Center's mission  
14 is to secure a future for all species, great and small, hovering on the brink of extinction through  
15 science, policy, education, and environmental law. The Center has a full-time staff of scientists,  
16 lawyers, and other professionals who work exclusively on campaigns to save species and their  
17 habitats. The Center is actively involved in species and habitat protection issues throughout the  
18 United States, including the U.S. territories, as well as outside of the United States, and works to  
19 secure protections for all species. One of the Center's flagship programs is its environmental health  
20 program, which focuses on the adverse impacts of pesticides. The Center has over 89,000 members  
21 who live throughout the world, including California. The Center's members rely on the Center to  
22 represent their interests in protecting biodiversity and conserving threatened and endangered species  
23 and their habitats.

1           16.     Petitioner Friends of the Earth (FoE), is a nonprofit, membership-based organization  
2 with offices located in California and Washington, DC. FoE currently has over 273,000 members  
3 nationwide, 40,331 of whom are in California. In addition to these members, FoE has more than 5.9  
4 million online activist supporters across the country. FoE’s primary mission is to defend the  
5 environment and champion a more healthy and just world by collectively ensuring environmental and  
6 social justice, human dignity, and respect for human rights and peoples’ rights. FoE engages in  
7 advocacy, legal, political, and organizing work to implement its overarching mission. One of FoE’s  
8 longstanding flagship programs advocates for public education and precautionary assessment and  
9 oversight of organisms derived from genetic engineering. Relatedly, FoE advocates against harmful  
10 pesticides, including neonics and other systemic pesticides, that often work in tandem with  
11 genetically engineered species. FoE works with its membership, farmers, farmworkers, and other  
12 frontline communities potentially impacted by genetic engineering applications and dangerous  
13 pesticide use, as well as government officials, to address the need for precautionary regulation and  
14 robust oversight of all genetic engineering and neonic use.

15           17.     Petitioners and their members are interested persons in this litigation because they  
16 have been and will continue to be adversely impacted by DPR’s failure to comply with the  
17 requirements of the APA in adopting its treated-seeds policy. Petitioners and their members have an  
18 interest in ensuring that DPR complies with all legal requirements in promulgating regulations.  
19 Petitioners’ members regularly work in, reside in, visit, observe, recreate in, and/or otherwise enjoy  
20 areas across California that are impacted by neonic-treated seeds and intend to continue doing so in  
21 the future. Petitioners’ members regularly derive professional, aesthetic, spiritual, recreational,  
22 economic, conservation, educational, and other benefits from the endangered and threatened species  
23 that live in these areas and would be impacted by the neonic seeds at issue and intend to continue  
24



1 doing so in the future. These interests are harmed by DPR's violations of law, including its failure to  
2 allow Petitioners to comment on DPR's treated-seeds policy.

3 18. For example, an NRDC member who is an organic farmer in Woodland, California, is  
4 deeply concerned about the disappearance of pollinating insects and other species she routinely looks  
5 for and enjoys seeing on her farm. Her farm is surrounded by conventional agriculture, and she  
6 reasonably believes widespread, unchecked use of treated seeds in conventional agriculture is  
7 contributing to pollinator and other wildlife declines, harming her interest in looking for and seeing  
8 these species, as well as her interests having natural pollination of her crops.

9 19. Similarly, a Center member regularly visits California Central Valley rivers and  
10 riparian areas about three to four times a year to observe and enjoy spring run chinook salmon and  
11 steelhead trout, green sturgeon (southern Distinct Population Segment), and valley elderberry  
12 longhorn beetle in their habitats, which are near many agricultural operations likely to use treated  
13 seeds. He also regularly observes and enjoys seeing San Joaquin kit fox and California tiger  
14 salamander in their natural habitats, which are also near many agricultural operations likely to use  
15 treated seeds. These species are known to be harmed by neonics and a variety of other pesticides  
16 often found on treated seeds. As a result, this member's interest in observing these species is harmed  
17 by the risk that these species will be harmed by treated seeds.

18 20. A FoE and PANNA member and beekeeper has managed more than 1,200 hives for  
19 over 40 years. In the winter, he takes his bee colony to California to pollinate almond trees in the  
20 Central Valley. There is a strong likelihood that neonic-treated seeds are used in this region due to its  
21 high concentration of conventional agriculture. Thus, this member's bee colony has likely been  
22 exposed to significant risk of harm from exposure to crops grown from such seeds and from soil and  
23 water polluted with neonics. Indeed, like other commercial beekeepers in the U.S., this FoE and  
24

1 PANNA member has suffered dramatic losses of hives, which he reasonably attributes to the use of  
2 neonics in conventional agriculture and land management.

3 21. A CPR member who lives in Sonoma County is a registered nurse. She has a PhD in  
4 sociology and health policy and is knowledgeable about environmental health issues related to  
5 drinking water. This member gets her drinking water from purchased well water in a region where  
6 treated seeds are likely to be used. She is reasonably concerned about impacts to her health from  
7 groundwater contamination caused by such treated seeds.

8 22. Respondent DPR is a department of the California Environmental Protection Agency  
9 (Cal EPA). DPR was established in 1991 by then Governor Pete Wilson when he reorganized the Cal  
10 EPA. *See* Gov't Reorg. Plan No. 1 of 1991, § 27, effective July 17, 1991; FAC §§ 11451-11460. As a  
11 result, DPR is empowered, among other duties, to undertake the promulgation of regulations as part  
12 of the pesticide regulatory program in California, subject to the obligations and limitations of all  
13 applicable state, federal, and other laws, including the Food and Agricultural Code and the APA.

14 23. Respondent Julie Henderson is the Director of DPR and is sued in her official  
15 capacity. As Director, Henderson is ultimately responsible for the implementation of DPR's treated-  
16 seeds policy.

17 24. Respondents Does 1 through 20, inclusive, are persons, agencies, or subdivisions of a  
18 state agency that are responsible in some way for the actions described herein. Petitioners are  
19 ignorant of the true names of Does 1 through 20, and therefore sue these defendants by such fictitious  
20 names. Petitioners will seek leave of the Court to amend this Complaint to specifically identify each  
21 such defendant as required and as the capacity and identity of each such defendant becomes known.

1 **JURISDICTION AND VENUE**

2 25. This Court has jurisdiction over the subject matter of this action pursuant to California  
3 Code of Civil Procedure section 1085, California Government Code section 11350, and Article VI  
4 section 10 of the California Constitution. Petitioners seek relief for an actual case and controversy,  
5 and Petitioners have performed all conditions precedent to filing this suit or are excused from such  
6 conditions.

7 26. The alleged violations of the California APA have occurred in the state of California.  
8 Venue is proper in this Court pursuant to Code of Civil Procedure section 401 because DPR is a state  
9 agency, and the California Attorney General has an office in Alameda County.

10 27. Pursuant to Code of Civil Procedure section 388, Petitioners will furnish the Attorney  
11 General with a copy of their Complaint within 10 days after filing.

12 **STATEMENT OF FACTS**

13 Statutory and Regulatory Background

14 28. Pesticides are regulated by both the California DPR and by the United States  
15 Environmental Protection Agency (“EPA”). *See generally* FAC Div. 7, Ch. 2; 7 U.S.C. §136 *et seq.*

16 29. California law defines “pesticide” as “[a]ny substance, or mixture of substances which  
17 is intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying,  
18 repelling, or mitigating any pest . . . .” FAC § 12753(b).

19 30. The FAC directs DPR to register and otherwise regulate pesticides sold and used in  
20 California. *See* FAC Div. 7, Ch. 2, Art. 4. Registration is not a mere rubber stamp: DPR may refuse  
21 to register a pesticide if, after a hearing, it finds that the pesticide has “serious uncontrollable adverse  
22 effects,” is “of less public value or greater detriment to the environment than the benefit received by  
23 its use,” can be replaced by a reasonable alternative that is less destructive to the environment, is  
24

1 “detrimental” to domestic animals or to public health and safety “when properly used,” or is “of little  
2 or no value for the purpose for which it is intended.” *Id.* § 12825(a)-(e).

3 31. It is unlawful to possess or use any pesticide in California that has not been registered  
4 with DPR. *See id.* § 12995.

5 32. DPR also has a continuing duty to “endeavor to eliminate from use in the state any  
6 pesticide that endangers the agricultural or nonagricultural environment, is not beneficial for the  
7 purposes for which it is sold, or is misrepresented.” *Id.* § 12824.

8 33. Because of its treated seeds policy, DPR is not fulfilling its responsibilities to register  
9 pesticides, prevent illegal possession and use of unregistered pesticides, and endeavor to eliminate  
10 dangerous pesticides as to treated seeds.

11 34. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), much like the  
12 FAC, defines a “pesticide,” in relevant part, as “any substance or mixture of substances intended for  
13 preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u). Pesticides must be  
14 registered with EPA before they are sold, *id.* § 136a(a), and EPA must register a pesticide if it  
15 determines, *inter alia*, that the pesticide’s use will not cause “unreasonable adverse effects on the  
16 environment.” *Id.* § 136a(c)(5)(C), (D).

17 35. EPA is also authorized to exempt certain pesticides from FIFRA’s regulatory  
18 requirements, including “any pesticide” that is “of a character which is unnecessary to be subject to”  
19 the Act’s requirements in order to carry out its purposes. 7 U.S.C. § 136w(b). Pursuant to this  
20 authority, EPA has exempted certain pesticide “treated articles,” specifically, articles “treated with, or  
21 containing, a pesticide to protect the article or substance itself,” rather than to serve a broader  
22 pesticidal purpose. 40 C.F.R. § 152.25(a). EPA policy presumes that seeds treated with pesticides  
23 have only been treated for the protection of the seed itself, and so treated seeds are not regulated by  
24

1 EPA. See Pest Management Regulatory Agency, *Harmonization of Regulation of Pesticide Seed*  
2 *Treatment in Canada and the United States* 1-2 (Apr. 11, 2003),  
3 [https://www.epa.gov/sites/production/files/2013-09/documents/bee-inspection-guide.pdf](https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/cps-spc/alt_formats/pacrb-<br/>4 <u>dgapcr/pdf/pubs/pest/pol-guide/dir/dir2003-02-eng.pdf</u>; see also EPA, <i>Guidance for Inspecting</i><br/>5 <i>Alleged Cases of Pesticide-Related Bee Incidents</i> 7-8 & n.17 (May 9, 2013),<br/>6 <a href=) (“Treated  
7 seed (and any resulting dust-off from treated seed) may be exempted from registration under FIFRA  
8 as a treated article and as such its planting is not considered a ‘pesticide use.’ However, if the  
9 inspector suspects or has reason to believe a treated seed is subject to registration (*i.e.*, the seed is not  
10 in compliance with the treated article exemption), plantings of that treated seed may nonetheless be  
11 investigated.”).

12 36. Nevertheless, EPA considers treated seeds to be “pesticides” under federal law.  
13 Indeed, “EPA’s longstanding position” is that “pesticide-treated seeds are considered to be pesticides  
14 themselves because they are a mixture of substances that are intended to prevent, destroy, repel or  
15 mitigate a pest.” EPA, Response to Center for Food Safety (CFS) *et al.* Citizen Petition to the U.S.  
16 Environmental Protection Agency Seeking Rulemaking or a Formal Agency Interpretation for Plant  
17 Seeds Coated with Systemic Insecticides 30 (Sep. 27, 2022) (Att. B). DPR has encouraged EPA to  
18 use its authority to regulate pesticide treated seeds. See Letter from Julie Henderson, DPR Director,  
19 to Edward Messina, EPA Office of Pesticide Programs Director (Aug. 5, 2022) (Att. C).

20 37. DPR may exempt federally-exempted pesticides from state regulation, but only “by  
21 regulation” and only after the agency “individually evaluates each listed substance exempted  
22 pursuant to the federal authority and concurs in the decision by [EPA] to exempt that substance.”  
23 FAC § 12803(a). The exemption regulation may not be overbroad and must not eliminate “those  
24

1 specific requirements . . . that are necessary to protect the public health or the environment.” *Id.*  
2 § 12803(b).

3 38. In 1999, following EPA’s adoption of certain exemptions under FIFRA, including the  
4 treated article exemption, DPR issued a regulation adopting all except two of those exemptions. *See* 3  
5 Cal. Code Regs. § 6147.

6 39. In its Initial Statement of Reasons on those exemptions, DPR explained that it had  
7 chosen not to include EPA’s treated article exemption in the proposed regulation. *See* DPR, Initial  
8 Statement of Reasons and Public Report 3 (1999) (Att. D).

9 DPR’s Treated-Seeds Policy

10 40. DPR has not followed APA procedures to adopt a general policy on treated seeds  
11 under the FAC. Nor has DPR ever formally promulgated an exemption for treated seeds.

12 41. Nonetheless, DPR has a policy of excluding all treated seeds from regulation as  
13 pesticides under the FAC (the “treated-seeds policy”).

14 42. DPR has repeatedly stated that it interprets the term “pesticide” in FAC  
15 section 12753(b) not to include treated seeds. In addition, to Petitioners’ knowledge, DPR has *never*  
16 registered or otherwise regulated a treated seed as a pesticide. Petitioners contend that these  
17 statements and actions evince DPR’s policy of excluding all treated seeds from regulation. Because  
18 DPR did not follow APA procedures, this treated-seeds policy is an invalid underground regulation.

19 43. DPR’s Chief Counsel confirmed in March 2020 that “the only written policy DPR has  
20 on the status of the treated article exemption/pesticide-treated seeds” is a statement accompanying  
21 DPR’s decision not to adopt the treated articles exemption issued by EPA. *See* Email from Daniel  
22 Rubin, DPR Chief Counsel, to Daniel Raichel, NRDC Staff Attorney (Mar. 30, 2020, 4:49 PM) (Att.  
23 E).

24

1           44.     Since then, DPR has stated on numerous occasions that it does not consider treated  
2 seeds to meet the definition of a “pesticide” and that it excludes treated seeds from registration or any  
3 other regulation.

4           45.     At a public workshop on November 15, 2021, DPR presented slides stating that  
5 “[p]esticide-treated seeds do not fall under State definition of a pesticide and are *exempt* from . . .  
6 reporting.” *See* DPR, Pesticide-Treated Seed Public Workshop, slide 49 (Att. A). At that workshop,  
7 DPR officials reiterated that “[p]esticide treated seeds however do not fall under the state definition  
8 of a pesticide and therefore are exempt from [state pesticide] reporting,” DPR, Pesticide-Treated Seed  
9 Public Workshop at 41:10 (Nov. 15, 2021), <https://www.youtube.com/watch?v=FjEbRGXaCYU>, and  
10 also stated that “at this time DPR considers all pesticide treated seeds . . . [to] fall under ‘not intended  
11 to be used’ as a pesticide,” *id.* at 68:38; *see also id.* at 90:40 (“[P]esticide treated seeds do not meet  
12 the state definition of a pesticide.”).

13           46.     DPR has also communicated its treated-seeds policy to the federal government. *See*  
14 Email from Regina Sarracino, DPR Official, to Donna Marciano, DPR Official (May 17, 2021,  
15 11:26:58 AM) (Att. F) (“I spoke with USDA APHIS and let them know that DPR doesn’t regulate  
16 either treated or untreated seed . . . .”); *see also Cal. Advoc. for Nursing Home Reform v. Bonta*, 130  
17 Cal. Rptr. 2d 823, 846 (Cal. Ct. App. 2003) (establishing agency policy in part based on “internal  
18 [agency] e-mails, transcriptions of which were received in evidence”).

19           47.     DPR also reiterated its treated-seeds policy in response to Petitioners’ September 2020  
20 rulemaking petition requesting, pursuant to California Government Code section 11340.6, that DPR  
21 regulate neonic-treated seeds and other seeds treated with systemic insecticides. DPR rejected the  
22 petition in its entirety, stating that “[t]o the extent that neonicotinoid-treated seeds are treated with  
23 neonicotinoids to protect the seed itself, DPR does not consider them to be ‘pesticides’ under [FAC]  
24

1 section 12753, as they are not ‘intended to be used’ to control any pests. Because DPR does not  
2 regulate these products as ‘pesticides,’ they are not registered.” DPR, Decision on Petition for  
3 Rulemaking at 2 (Att. G); *see also* Rulemaking Petition to Regulate Crop Seeds Treated with  
4 Neonicotinoids and Other Systemic Insecticides (Sep. 23, 2020) (Att. H); Letter from Val Dolcini,  
5 DPR Director, to Daniel Raichel and Samuel Eisenberg, NRDC (Oct. 23, 2020) (Att. I).

6 48. In December 2020, Petitioners filed a request for reconsideration pursuant to  
7 California Government Code section 11340.7. Request for Reconsideration (Dec. 22, 2020) (Att. J).  
8 DPR denied Petitioners’ request in January 2021, reaffirming its prior rationale and explaining  
9 further that “DPR determines, on a case-by-case basis, whether any given product or substance is a  
10 ‘pesticide’ requiring registration.” DPR, Decision on Reconsideration 3 (Jan. 21, 2021) (Att. K).

11 49. In a letter accompanying DPR’s denial of the request for reconsideration, DPR further  
12 stated the following:

13 since 2003, the U.S. Environmental Protection Agency (U.S. EPA) has publicly stated  
14 that pesticide-treated seeds fall under the treated articles exemption where: (1) the  
15 pesticide used for the treatment is registered for use on the seed, and; (2) the treatment  
16 is to protect the seed itself. To the extent those criteria are met for a treated seed product,  
17 DPR does not consider the product to be a ‘pesticide’ under Food and Agricultural Code  
18 section 12753, as the product is not ‘intended to be used’ to control any pests.

19 *See* Letter from Val Dolcini, DPR Director, to Daniel Raichel and Samuel Eisenberg, NRDC, at 1  
20 (Jan. 21, 2021) (Att. L). According to the letter, DPR is investigating “whether, contrary to U.S.  
21 EPA’s longstanding position, seeds treated with systemic insecticides are necessarily treated to  
22 provide protection beyond the seed itself.” *Id.* DPR noted that “[i]f companies are offering to sell in  
23 California treated seeds that themselves serve a pesticidal purpose, or seed treatments with claims  
24 that exceed what is allowed under the registered label, DPR will proceed with the appropriate  
enforcement action for violations of state pesticide law.” *Id.* at 2.



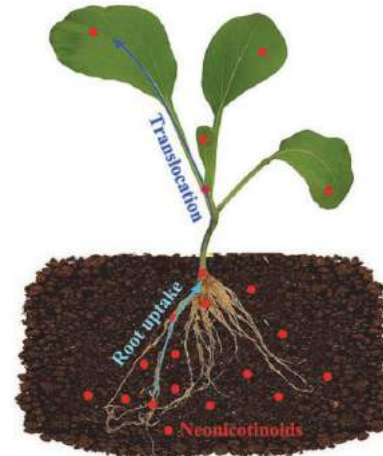
1           50.     Petitioner NRDC filed a Public Records Act (“PRA”) request with DPR requesting all  
2 documents related to “any [DPR] determination, policy, position, or opinion regarding whether  
3 treated seeds or any treated seed product(s) constitute a ‘pesticide’ or ‘pesticides’ within the meaning  
4 of Cal. Food & Agric. Code § 12753(b),” including “[a]ny and all determinations or opinions related  
5 to whether or not a specific treated seed product or group of treated seed products must be registered  
6 or otherwise regulated.” *See* NRDC, Request for Records Related to California Department of  
7 Pesticide Regulation Determinations Regarding the Legal Status of Pesticide-Treated Crop Seeds or  
8 Treated Seed Products (Oct. 14, 2021) (Att. M).

9           51.     None of the records produced in response to that PRA request revealed any case-by-  
10 case determinations as to whether a treated seed product constitutes a “pesticide.” *See* Letter from  
11 April H. Gatling, DPR Senior Staff Attorney, to Lucas Rhoads, NRDC Staff Attorney (Dec. 21,  
12 2021) (Att. N) (explaining that DPR provided two sets of documents in response to NRDC’s PRA  
13 request); Responsive Documents Produced by DPR (Att. O) (combined PDF of both sets of  
14 responsive documents produced by DPR).

15           52.     Rather, DPR’s public statements reveal that it knows that neonic-treated seeds have  
16 pesticidal effects beyond the seed itself, even as DPR refuses to regulate such seeds due to its treated-  
17 seeds policy. At the November 15, 2021, public workshop, DPR presented slides explaining that  
18 neonic seed treatments provide “[l]ocalized plant protection” and that they “protect[] against soil and  
19 aboveground pests.” *See* DPR, Pesticide-Treated Seed Public Workshop, slide 8 (Att. A) (reproduced  
20 below as Figure 1). The same presentation contains a graphic depicting neonics as being in the soil  
21 around a plant. *Id.* Yet more than one year later, DPR has yet to register or otherwise regulate any  
22 neonic-treated seeds.

## Why are pesticide-treated seeds used?

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



Li et al., 2018. *Chemosphere*.



**Figure 1:** PowerPoint Slide presented by DPR at its November 15, 2021, public workshop, showing that pesticide-treated seeds have effects beyond the seed itself.

53. As demonstrated by its November 15, 2021, statements, DPR recognizes that neonic coatings added to seeds are designed to be systemically absorbed into the later-emerging seedlings and crop plants to repel or kill pest insects. Furthermore, treated seeds are advertised for this purpose. For example, and as explained in Petitioners’ petition for rulemaking, promotional materials for Gaucho® 600 Flowable—a neonic seed treatment product—state that it “provides unmatched protection against the worst insects, acting both on contact to protect the roots and systemically to protect the plant.”<sup>13</sup> This is the same manner the neonic active ingredient would be intended to work were it applied as a soil application from a DPR-registered product. Similarly, Syngenta’s brochure for its neonic-containing Cruiser® line of neonic seed treatment products states that those products

<sup>13</sup> Bayer Crop Science, *Gaucho 600 Seed Treatment*, <https://bit.ly/307hAbV>.

1 provide “convenient, seed-delivered protection” against pest insects, indicating the seeds are devices  
2 for delivering an intended pesticidal effect.<sup>14</sup> Despite being aware of such examples, upon  
3 information and belief, DPR has yet to initiate any enforcement actions against any such treated  
4 seeds.

5 54. DPR’s actions confirm that it does not consider any treated seed—regardless of  
6 whether it was treated to provide protection beyond the seed itself or advertised for that purpose—to  
7 be a pesticide. Indeed, in the more than 20 years since DPR interpreted the term “pesticide” to  
8 exclude treated articles, upon information and belief, DPR has not registered or otherwise regulated a  
9 single treated seed product.

10 55. In sum, DPR’s longstanding policy is to exclude all treated seeds from any regulation  
11 as pesticides under the FAC.

12 DPR’s Treated-Seeds Policy is an Invalid “Underground Regulation”

13 56. DPR adopted its treated-seeds policy without following the requirements of the  
14 California APA, thereby creating an invalid “underground regulation.”

15 57. The APA provides that “[n]o state agency shall issue, utilize, enforce, or attempt to  
16 enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application,  
17 or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion,  
18 bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as  
19 a regulation and filed with the Secretary of State pursuant to this chapter.” Cal. Gov’t Code  
20 § 11340.5(a).

21  
22 <sup>14</sup> Syngenta, *Cereals Seed Treatment Portfolio Brochure*, 7 (2012), [bit.ly/3wXWmg6](http://bit.ly/3wXWmg6); see also BASF  
23 United States, *Poncho® 600 Seed Treatment*, <https://bit.ly/3c24Mrg> (“Poncho® 600 seed treatment  
24 provides broad-spectrum efficacy against a range of soil and plant pests.”); BASF, *Poncho®  
Votivo®*, [bit.ly/3I2tYzC](http://bit.ly/3I2tYzC) (stating the product “contains a systemic agent that is absorbed by roots  
immediately, so pests do not get the opportunity to strike”).

1           58.     The APA defines a “regulation” as “every rule, regulation, order, or standard of  
2 general application or the amendment, supplement, or revision of any rule, regulation, order, or  
3 standard adopted by any state agency to implement, interpret, or make specific the law enforced or  
4 administered by it, or to govern its procedure.” *Id.* § 11342.600. California courts have articulated a  
5 two-part test for identifying “regulations” subject to the APA:

6           First, the agency must intend its rule to apply generally, rather than in a specific case.  
7           The rule need not, however, apply universally; a rule applies generally so long as it  
8           declares how a certain class of cases will be decided. Second, the rule must implement,  
9           interpret, or make specific the law enforced or administered by the agency, or . . . govern  
10          the agency’s procedure.

11          *Cal. Advocs. for Nursing Home Reform v. Bonta*, 130 Cal. Rptr. 2d 823, 828 (Cal. Ct. App. 2003)  
12 (cleaned up).

13           59.     DPR’s treated-seeds policy is a regulation within the meaning of California  
14 Government Code section 11342.600. First, it determines whether a “certain class” of substances—all  
15 seeds treated with pesticides—are considered pesticides. The policy therefore applies generally.  
16 Second, the rule interprets or makes specific the statutory definition of “pesticide,” which itself  
17 makes no mention of treated seeds. *See* FAC § 12753.

18           60.     Among the actions required by the APA when devising and implementing regulations,  
19 DPR must give the public notice of its proposed regulatory action, Cal. Gov’t Code §§ 11346.4,  
20 11346.5; issue the complete text of its proposed regulation with a statement of the reasons for its  
21 adoption, *id.* §§ 11346.2(a), (b); give interested parties an opportunity to comment on the proposed  
22 regulation and to request a public hearing, *id.* § 11346.8(a); respond in writing to public comments,  
23 *id.* § 11346.9(a)(3); and forward a file of all materials on which the agency relied in the rulemaking  
24 process to the Office of Administrative Law, *id.* § 11347.3(a)-(c). DPR also must secure the review



1 with the APA. As a result, significant adverse environmental effects from DPR's failure to regulate  
2 treated seeds would continue unabated, contrary to the California Legislature's policy that DPR  
3 regulate pesticides to prevent such harm.

4 66. Petitioners will serve a copy of this Petition, once filed, on the Attorney General's  
5 office to give notice of Petitioners' intent to bring this proceeding as private attorneys general under  
6 California Code of Civil Procedure section 1021.5.

7 **FIRST CAUSE OF ACTION**

8 **(By all Petitioners against all Respondents)**

9 **(Petition for Writ of Mandate - Cal. Civ. Proc. Code § 1085; Violation of the California**  
10 **Administrative Procedure Act)**

11 67. Petitioners hereby incorporate by reference all facts alleged in paragraphs 1 through  
12 66 herein as though fully set forth.

13 68. Respondents have a ministerial duty to comply with the APA before promulgating or  
14 implementing regulations.

15 69. Petitioners have a beneficial interest in Respondents' compliance with that ministerial  
16 duty.

17 70. DPR's treated-seeds policy is a regulation as defined by California Government Code  
18 section 11342.600.

19 71. Respondents have adopted the treated-seeds policy without following the requirements  
20 of the APA. Cal. Gov't Code § 11340 *et seq.* Until Respondents have complied with the APA, DPR's  
21 treated-seeds policy is invalid and may not be enforced or used in any way by Respondents. *Id.*  
22 § 11340.5(a).

23 72. Petitioners will suffer irreparable injury if Respondents' implementation of DPR's  
24 treated-seeds policy is not enjoined.



1  
2 **(Injunctive Relief - Cal. Civ. Proc. Code § 526; Violations of the California Administrative  
Procedure Act)**

3 79. Petitioners hereby incorporate by reference all facts alleged in paragraphs 1 through  
4 78 herein as though fully set forth.

5 80. Petitioners are entitled to the relief demanded, which consists of restraining  
6 Respondents, their employees, agents, officers, and all persons acting on Respondents' behalf from  
7 maintaining DPR's treated-seeds policy and requiring DPR to comply with the APA in regulating  
8 treated seeds.

9 81. Petitioners and members of the public generally will suffer irreparable injury if DPR  
10 continues to implement the treated-seeds policy in the absence of compliance with the APA's  
11 standards.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Petitioners pray for the following relief against Respondents:

14 1. For a writ of mandate pursuant to California Code of Civil Procedure section 1085  
15 ordering Respondents, their employees, agents, officers, and all persons acting on Respondents'  
16 behalf to comply with their ministerial duty to follow the requirements of the APA when adopting  
17 and implementing any and all rules, guidelines, or other regulations governing treated seeds.

18 2. For a declaration that DPR's treated-seeds policy is invalid as an "underground  
19 regulation" based upon DPR's failure to comply with the requirements of the APA.

20 3. For a permanent injunction preventing Respondents, their employees, agents, officers,  
21 and all persons acting on Respondents' behalf from maintaining DPR's treated-seeds policy and  
22 requiring DPR to comply with the APA in regulating treated seeds.





1 **VERIFICATION**

2

3 I, DANIEL RAICHEL, am Acting Director of the Pollinator Initiative for the Natural  
4 Resources Defense Council, Inc., a party to this action, and am authorized to make this verification  
5 on its behalf. I have read the foregoing PETITION FOR WRIT OF MANDATE AND VERIFIED  
6 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents. I am  
7 informed and believe and on that ground allege that the matters stated in the PETITION FOR WRIT  
8 OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE  
9 RELIEF are true.

10 I declare under penalty of perjury under the laws of the State of California that the foregoing  
11 is true and correct.

12

13 Executed on February 17, 2023, at Chicago, IL.

14

15 

16 \_\_\_\_\_  
17 DANIEL RAICHEL  
18 Natural Resources Defense Council, Inc.