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8
9 **THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11

12 JEFF ANDERSON, *et al.*,
13 *Plaintiffs,*

14 v.

15 GINA MCCARTHY, *et al.*,
16 *Defendants,*

17 and

18 CROPLIFE AMERICA, *et al.*,
19 *Intervenor-Defendants.*
20
21

) Case No. 3:16-cv-00068-WHA
)
)
) **PLAINTIFFS' MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF MOTION FOR SUMMARY**
) **JUDGMENT**
)
)
) Date: November 3, 2016
) Time: 8:00 a.m.
) Courtroom: 8, 19th Floor
) Judge: Hon. William Alsup
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INTRODUCTION

1
2 In the mid-2000s, commercial beekeepers and honey producers throughout the United
3 States started experiencing high death rates of their bees. This coincided with a new way of
4 applying neonicotinoid pesticides: as coatings applied to seeds before planting (the primary
5 neonicotinoid seed coatings are clothianidin, imidacloprid, and thiamethoxam). The systemic
6 nature of the pesticidal coatings meant the full plants that grew from the coated seeds, including
7 the flowers and nectar that the bees often sought out, were infused with the toxins. Moreover,
8 many beekeepers directly observed toxic dust clouds billowing from seed planting machines,
9 spreading the insecticides far from where the seeds were planted, to neighboring farms, marginal
10 vegetation visited by their bees, waterways, and even directly to their beehives.

11 It is difficult to overstate the scale of this problem, not only to the entire pollinator bee
12 industry (several of the largest and most well-known beekeepers in the country are Plaintiffs in
13 this lawsuit), but to the future of the nation's food production. Pollination is essential to growing
14 food and both managed and wild bees are essential pollinators. It has become clear in the past
15 few years that continued die-offs caused by the neonicotinoids pose serious risks to the future of
16 the beekeeping industry and to wild bees, aquatic invertebrates, birds, and many other creatures
17 that depend on a clean environment.

18 The Environmental Protection Agency (EPA) is tasked with regulating pesticides.
19 Beginning after several major bee kills during the spring planting season of 2012, EPA appeared
20 to be attempting to address the problem of neonicotinoid poisonings by engaging stakeholders in
21 the development of guidance for the interpretation and enforcement of pesticide laws (primarily
22 the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)). But somehow, between the
23 start of that process and the publication of the final document, in May of 2013, EPA's interest
24 shifted from protecting bees to protecting the seed and pesticide industries, which had invested
25 heavily in the neonicotinoid-coated seeds that were, and still are, wreaking havoc on the nation's
26 bees. EPA never once enforced FIFRA against neonicotinoid-coated seeds, instead issuing a
27 guidance that instructed federal and state inspectors that the pesticidal seeds were exempt from
28 FIFRA, implying that the affected beekeepers and honey producers should look elsewhere for

1 responsibility for their bee deaths.

2 This lawsuit, brought by nationally-representative beekeepers, farmers, and public
3 interest organizations, seeks to preserve the future viability of pollinators nationwide, to protect
4 birds from increased mortality linked to neonicotinoid-coated seeds, to protect farm soil health
5 from overuse of pesticides, and to ensure a healthful food supply. It challenges EPA's wholesale
6 failure to enforce FIFRA against neonicotinoid-coated seeds and, to the extent that its 2013
7 guidance was an amendment of an earlier rule that exempted certain pesticide-coated articles
8 from regulation, challenges that action as an improper rulemaking, outside of EPA's authority,
9 and as an arbitrary and capricious violation of the law.

10 STATUTORY AND REGULATORY FRAMEWORK

11 When Congress enacted FIFRA, it made clear that its purpose was to "regulate the use of
12 pesticides to protect man and his environment." S.Rep. No. 92-838, at 1 (1972), *reprinted in*
13 1972 U.S.C.C.A.N. 3993, 3993. "Pesticide" is defined broadly in FIFRA as any "mixture of
14 substances that are intended to prevent, destroy, repel or mitigate a pest," 7 U.S.C. § 136(u)(1),
15 and in the regulations as "any substance (or mixture of substances) intended for a pesticidal
16 purpose." 40 C.F.R. § 152.15. One of the main purposes of the 1972 FIFRA amendments
17 (giving rise to the modern FIFRA) was to "strengthen enforcement" of FIFRA by EPA. S.Rep.
18 No. 92-838, at 2, 6 ("All of these provisions are designed to provide for tighter control of
19 pesticide registration and use to insure protection to man and the environment."). EPA was
20 tasked with achieving this purpose through the pre-market review and approval of all pesticides
21 to be sold or used in the United States, including a determination that registered pesticides will
22 not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(a), (c)(5).

23 Congress empowered EPA to exempt some pesticides from this regulatory scheme. 7
24 U.S.C. § 136w(b). Pursuant to this authority, in 1988 EPA promulgated a rule exempting certain
25 pesticides known as "treated articles:"

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

(a) Treated articles or substances. An article or substance treated with, or

1 containing, a pesticide **to protect the article or substance itself** (for example,
2 paint treated with a pesticide to protect the paint coating, or wood products treated
3 to protect the wood against insect or fungus infestation), if the pesticide is
4 registered for such use.

5 40 C.F.R. § 152.25(a); 53 Fed. Reg. 15,952, 15,954-55 (May 24, 1988) (emphasis added).

6 In 2003, EPA interpreted the treated article exemption, describing how it applied to seeds that
7 had been treated with pesticides:

8 The term “for the protection of the [seed] itself” means that the pesticidal
9 protection imparted to the treated seed does not extend beyond the seed itself to
10 offer pesticidal benefits or value attributable to the treated seed.

11 Jenkins Decl., Ex. A (*Harmonization of Regulation of Pesticide Seed Treatment in Canada and*
12 *the United States* (2003 Harmonization Paper)).

13 In 2012, in response to repeated bee mortality incidents that were linked to neonicotinoid
14 pesticides, particularly the pesticidal dust-off from neonicotinoid-coated seeds, EPA Region 5
15 started work on the development of guidance for investigating alleged pesticide-related bee
16 mortality. AR 136; *see also* AR 168 (“Keen interest has been expressed by outside groups in
17 contributing to the bee guidance, which has been under development since mid-2012, following
18 a spring with an unusual number of bee mortality incidents either unexplained or which appeared
19 to be associated with treated seed.”). The goal of the guidance was to “...assist inspectors
20 conducting investigations on cases of alleged pesticide-related bee mortality to determine if a
21 pesticide was the causal agent of the bee kill and, if so, whether the pesticide was misused.” AR
22 135; *see also* 142 (“...bee kill effects could be from a misuse or a legal use—but to find out
23 whether it was legal or not, an investigator first needs to establish a link between the bee kill and
24 pesticide use.”). The final guidance, published in 2013 by EPA and titled “Guidance for
25 Inspecting Alleged Cases of Pesticide Related Bee Incidents,” included the following statement:

26 Note: Treated seed (*and any resulting dust-off from treated seed*) may be
27 exempted from registration under FIFRA as a treated article and as such *its*
28 *planting is not considered a “pesticide use.”* However, if the inspector suspects or
has reason to believe a treated seed is subject to registration (i.e., the seed is not in
compliance with the treated article exemption), plantings of that treated seed may
nonetheless be investigated.

AR 109-110 (2013 Guidance) (emphasis added). It is this blanket exemption, which includes
neonicotinoid-coated seeds and their resulting dust-off, which is the focus of Plaintiffs’ claims.

FACTUAL BACKGROUND

1
2 Pesticide-coated seeds involve “the direct application of a pesticide to the surface of a
3 seed prior to planting.” Def. Intervenor’s Mot. Intervene 4, ECF No. 26. Although
4 Defendant-Intervenor’s claim that coated seeds “provide a precise mode of applying pesticides,
5 providing protection to the seed during its most vulnerable developmental stages and before
6 emergence from the soil, resulting in numerous economic and environmental benefits,” *id.*, in
7 their common usage, the planting of pesticide-coated seeds can result in a large amount of
8 pesticides sloughing and/or dusting off the seed, and/or turning into pesticidal dust that can blow
9 not only away from the seed but well away from the target crops. AR 178. This is especially
10 true with corn seeds, an estimated ninety-five percent of which planted in the United States are
11 treated with neonicotinoid seed coatings. Def. Intervenor’s Mot. Intervene 7, ECF No. 26.

12 “[N]eonicotinoids kill insects by interfering with their central nervous system, causing
13 tremors, paralysis, and death.” *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th
14 Cir. 2015). Neonicotinoid pesticides are systemic, meaning that they are designed for the plant
15 to “absorb the chemicals and distribute them throughout the plant, into the tissues, pollen, and
16 nectar ... [S]ystemic insecticides therefore kill insects in two different ways: insects die when
17 they come into contact with the pesticide, as when they are sprayed with it, and also when they
18 ingest the plant which has absorbed the pesticide.” *Id.*

19 Another problematic route of exposure to neonicotinoid and other systemic pesticides is
20 from the dust-off caused by the planting of coated seeds. AR 178 (commercial beekeeper Randy
21 Oliver identifying “dust from fields ... dust from corn seeding ... transport of systemic pesticides
22 into crops or exposed weeds” as potential routes of pesticide exposure). The most devastating
23 effect of exposure by bees to neonicotinoid pesticides is a large number of dead bees appearing
24 in front of and surrounding a hive. AR 182-194. Other sub-lethal effects can be just as
25 devastating, including “queen failure, [inability] to navigate correctly, inability to supersede
26 during queen failure, sterile drones and/or inability to successfully copulate with virgin queens,”
27 AR 182, and “loss of vigor by foragers, lack of veteran foragers that harvest propolis, [and]
28 shortened lifespan of foragers.” AR 183. As one bee expert, Dr. Eric Mussen of University of

1 California, Davis, stated, “bees exposed to neonicotinoids looked ‘anemic;’ the bee colony is not
2 necessarily killed; there seems to be ‘downstream sickness’ and the bees tend to be sluggish.”
3 AR 141.

4 Additional effects are described in EPA’s Pesticide Fact Sheet—Clothianidin. Jenkins
5 Decl., Ex. G, at 2:

6 ...assessments show that exposure to treated seeds through ingestion may result in
7 chronic toxic risk to non-endangered and endangered small birds (e.g., songbirds)
8 and acute/chronic toxicity risk to non-endangered and endangered mammals.
9 Clothianidin has the potential for toxic chronic exposure to honey bees, as well as
10 other nontarget pollinators, through the translocation of clothianidin residues in
nectar and pollen ... [It] is a systemic insecticide that is persistent and mobile,
stable to hydrolysis, and has potential to leach to ground water, as well as runoff
to surface waters.

11 PROCEDURAL HISTORY

12 Plaintiffs filed this action on January 6, 2016. ECF No. 1. Defendants moved to dismiss
13 for lack of subject matter jurisdiction on March 3, 2016. ECF No. 21. Defendant-Intervenors
14 moved to intervene on March 16, 2016. ECF No. 26. Plaintiffs opposed both motions, ECF Nos.
15 52, 57, the Court heard argument on May 12, 2016, ECF No. 61, and on May 13, 2016, the Court
16 issued a written order denying the Motion to Dismiss and granting the Motion to Intervene. ECF
17 No. 62. The Court found that “the factual dispute between the parties—whether the 2013
18 Guidance constituted final agency action—is “so intertwined” with the merits that a
19 ‘jurisdictional finding of genuinely disputed facts is inappropriate.’” *Id.*

20 On August 25, 2016, Plaintiffs moved to enlarge time for the filing of summary judgment
21 motions, in order to provide time for motions on the administrative record and discovery. ECF
22 No. 77. On August 29, 2016, the Court ordered any record motion to be filed by September 8,
23 2016, and stated that the Court would rule on the extension request after ruling on any record
24 motion. ECF No. 80. On September 2, 2016, Plaintiffs moved to compel completion of the
25 record, to compel production of documents, and for leave to conduct limited discovery. ECF No.
26 81. EPA filed its opposition on September 6, 2016. ECF No. 84. On September 7, 2016, the
27 Court issued an order requiring in camera review of certain documents, denying leave to conduct
28 discovery, and instructing Plaintiffs to “lay out any alleged shortfalls in the administrative

1 record” in their summary judgment brief. ECF No. 86.

2 STANDARD OF REVIEW

3 Summary judgment is appropriate if no genuine issue of material fact exists and the
4 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v.*
5 *Catrett*, 477 U.S. 317, 322-23 (1986). An issue is “material” if its resolution could affect the
6 outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7 The Administrative Procedure Act (APA) provides the basic framework for judicial
8 review of agency action, inaction, and delays. 5 U.S.C. § 702. Under the APA, an agency must
9 publish notice of a proposed rule in the Federal Register and provide comment opportunities to
10 the public before adopting a rule. 5 U.S.C. § 553(b), (c). The APA defines “rule” as “the whole
11 or a part of an agency statement of general or particular applicability and future effect designed
12 to implement, interpret, or prescribe law or policy...” *Id.* § 551(4).

13 The APA provides that if, based on a review of the administrative record, a court
14 concludes an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in
15 accordance with law,” or the action has been adopted “without observance of procedure required
16 by law,” the reviewing court “shall ... hold unlawful and set aside”—that is, vacate—the
17 challenged agency action. 5 U.S.C. § 706(2)(A), (B).¹

18 ARGUMENT

19 **I. EPA’s Failure to Enforce FIFRA Provisions Against Neonicotinoid-Coated Seeds Is** 20 **an Unlawful Abdication of Its Statutory Responsibilities.**

21 As alleged in Plaintiffs’ second claim (Claim II), EPA has categorically failed to enforce
22 FIFRA’s provisions against neonicotinoid-coated seeds and their associated pesticidal dust-off,
23 despite these seeds qualifying as “pesticides.” Pls.’ Compl. ¶¶ 80-84, ECF No. 1. These
24 pesticidal seeds represent by far the largest use of this popular class of insecticides, used, per
25 EPA’s admission, on approximately 142 million acres of corn, soybeans, and many other crops
26 annually. EPA’s Answer ¶¶ 2, 34, ECF No. 67. This vast nationwide extent illustrates EPA’s
27

28 ¹ Plaintiffs have standing to bring these claims. *See* Declaration of Bret Adee, filed concurrently with this motion.

1 policy of non-enforcement constituting a gross abdication of its statutory duty to regulate
2 pesticides to protect humans and the environment. Because Plaintiffs do not challenge an
3 individual enforcement action, and FIFRA offers a meaningful standard by which to judge
4 EPA's inaction, this Court has the authority to review EPA's policy of non-enforcement. There
5 is no dispute that EPA exempts coated seeds from FIFRA requirements and EPA's
6 administrative record offers no evidence of EPA ever enforcing FIFRA provisions (i.e.,
7 registration and enforceable labeling) against coated seeds. Accordingly, Plaintiffs request
8 declaratory judgment that EPA's failure to enforce FIFRA against this class of pesticides is
9 unlawful.

10 **A. The Court Has Power to Review EPA's Failure to Enforce FIFRA as an**
11 **Abdication of Its Statutory Responsibilities.**

12 Federal agencies may not ignore the word of Congress; to the contrary, agencies only
13 have the authority to act or not act conferred upon them by statute. *See Lyng v. Payne*, 476 U.S.
14 926, 937 (1986). The APA provides for judicial review of agency actions and inactions,
15 empowering courts to "compel agency action unlawfully withheld." 5 U.S.C. §§ 701-706;
16 706(1). Based on APA § 701(a)(2), courts have refused to review individual instances of
17 non-enforcement, citing a "presumption of unreviewability" akin to prosecutorial discretion.
18 *Heckler v. Chaney*, 470 U.S. 821 (1985). However, while prosecutorial discretion may apply to
19 *individual* agency decisions not to enforce, the presumption of unreviewability does not apply to
20 wholesale agency abdication of its statutory responsibilities, such as a policy of non-enforcement
21 as to an entire class of conduct. *See Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166,
22 171 (D.D.C. 2000).

23 In *Heckler*, the Supreme Court addressed the question of reviewability of agency failure
24 to enforce in the context of the Food and Drug Administration (FDA)'s refusal to enforce the
25 Federal Food, Drug and Cosmetic Act (FFDCA) as to lethal injection drugs. 470 U.S. at 823.
26 The Court reasoned that the unsuitability of judicial review of an agency's decision to refuse
27 enforcement is based in part on the "complicated balancing of a number of factors which are
28 peculiarly within [an agency's] expertise," including all the particulars of an individual case. *Id.*

1 at 831. The Court was clear that the presumption of unreviewability was just that, a presumption
2 that may be rebutted “where the substantive statute has provided guidelines for the agency to
3 follow in exercising its enforcement powers.” *Id.* at 833.

4 The *Heckler* Court recognized that, in examining FDA’s refusal of a prisoners’ petition to
5 enforce the FFDCA against lethal injection drugs, it was not in “a situation where it could
6 justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that
7 is so extreme as to amount to an abdication of its statutory responsibilities.” *Id.* at 833 n.4 (citing
8 *Adams v. Richardson*, 480 F.2d 1159 (1973)). In *Adams*, the D.C. Circuit found it could review
9 the Secretary of Education’s failure to enforce the Civil Rights Act and end segregation of public
10 schools receiving federal funds. 480 F.2d at 1161-62. Although the agency argued that
11 enforcement of the Act was committed to its discretion, the court was not swayed:

12 More significantly, this suit is not brought to challenge HEW’s decisions with
13 regard to a few school districts in the course of a generally effective enforcement
14 program. To the contrary, appellants allege that HEW has *consciously and*
15 *expressly adopted a general policy which is in effect an abdication of its statutory*
duty. We are asked to interpret the statute and determine whether HEW has
correctly construed its enforcement obligations.

16 *Id.* at 1162 (emphasis added). When reviewing a *policy* of not enforcing a statute wholesale, the
17 *Heckler* Court’s concerns are simply not implicated because a court can more readily conclude
18 that abdication of statutory responsibility is contrary to the will of Congress. Cass R. Sunstein,
19 *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 678-79 (1985).

20 The Ninth Circuit recently articulated the exception to the *Heckler* presumption of
21 unreviewability where the agency has “consciously and expressly adopted a general policy that is
22 so extreme as to amount to an abdication of its statutory responsibilities.” *Garcia v. McCarthy*,
23 No. 14-15494, 2016 WL 2731915, at *2 (9th Cir. May 11, 2016) (internal citations omitted)
24 (finding *Adams* retained its vitality in the situation of which it is cited in *Heckler*). In contrast to
25 Plaintiffs’ Claim II at bar, the plaintiffs’ claim against EPA in *Garcia* was not a challenge to
26 EPA’s wholesale policy of non-enforcement, but rather a challenge to a specific instance of
27 enforcement of Title VI of the Civil Rights Act through a settlement. *Id.* Indeed, the plaintiffs
28 were not challenging a failure to act at all because EPA had already acted. *Id.*; *see also Montana*

1 *Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Lab. Rel. Auth.*, 898 F.2d 753,
2 756 (9th Cir. 1990) (recognizing *Heckler* presumption of unreviewability does not apply when
3 agency has consciously and expressly adopted a general policy so extreme as to amount to an
4 abdication of its statutory responsibilities).

5 Other courts have similarly recognized “agency decisions not to regulate an entire class
6 of conduct ... are essentially policy choices” and may be reviewed for compliance with
7 Congressional mandates and intent. *Alliance for Bio-Integrity*, 116 F. Supp. 2d at 171. While
8 there is “no basis for review of [an agency’s] single-shot non-enforcement decision,” the D.C.
9 Circuit has held that “an agency’s statement of a general enforcement policy may be reviewable
10 for legal sufficiency where the agency has ... articulated it in some form of universal policy
11 statement.” *Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 351 (D.D.C. 2007).

12 Here, it is clear from FIFRA’s language and legislative history that Congress did not
13 intend to allow EPA to wholesale exempt a broad class of pesticides from registration,
14 particularly where those pesticides have unreasonable adverse effects on the environment. The
15 crux of FIFRA is its pre-market review and approval of pesticides, in no small part to determine
16 whether they would be harmful to humans or the environment (i.e., “have unreasonable adverse
17 effects on the environment.”). S.Rep. No. 92-838, at 1; 7 U.S.C. § 136a(c)(5). FIFRA’s
18 command is clear that “no person in any [s]tate may distribute or sell to any person any pesticide
19 that is not registered under this subchapter.” 7 U.S.C. §§ 136a(a); 136j(a)(1)(A). Unregistered
20 pesticides shall not be distributed or sold. *Id.*; 40 C.F.R. § 152.15. EPA has the authority over
21 registrations and enforcement of FIFRA’s prohibition against the sale of unregistered pesticides.
22 *Id.* § 136a (requirements for registration of pesticides, including requirement that EPA not
23 register a pesticide that will cause unreasonable adverse effects to the environment); § 136k
24 (EPA authority to issue stop sale or use order and seize unlawful pesticide); § 136l (EPA
25 authority to assess civil and criminal penalties for violations); § 136q(b) (EPA recall authority);
26 § 136w (EPA authority to promulgate regulations to carry out FIFRA, to exempt pesticides from
27 regulation, and other authorities to enforce FIFRA). Congress also specified which pesticides
28 may be exempted and how, requiring that when EPA exempts pesticides, it does so “by

1 regulation” after a determination that they are either: (1) regulated sufficiently by another
 2 agency; or (2) unnecessary to be subject to FIFRA. *Id.* § 136w(b). FIFRA thus provides the
 3 standard by which to judge EPA’s policy of non-enforcement. Because Plaintiffs challenge
 4 EPA’s wholesale non-enforcement of FIFRA, not a single-shot enforcement decision, neither the
 5 *Heckler* presumption of unreviewability nor APA § 701(a)(2) prevents this Court’s review of
 6 EPA’s non-enforcement of FIFRA as to neonicotinoid-coated seeds and pesticidal dust-off.

7 **B. EPA’s Failure to Enforce FIFRA Against Neonicotinoid-Coated Seeds and**
 8 **Pesticidal Dust-Off Is an Unlawful Abdication of Its Responsibilities.**

9 There is no real dispute that EPA exempts neonicotinoid-coated seeds and pesticidal
 10 dust-off from FIFRA registration and other provisions and does not enforce FIFRA against them,
 11 despite their widespread use. AR 109; EPA’s Answer ¶ 2, ECF No.67 (averring that “between
 12 2010 and 2014, approximately 142 million acres on average were planted with seeds treated with
 13 [neonicotinoid] pesticides”). EPA’s only real dispute goes to whether this Court may review
 14 EPA’s inactions and its policy of exempting this massive class of use from FIFRA. This Court
 15 has that authority because Plaintiffs do not complain of one or two isolated instances of
 16 non-enforcement, but rather a policy of non-enforcement. EPA’s failure to enforce FIFRA
 17 against neonicotinoid-coated seeds and pesticidal dust-off is a “consciously and expressly
 18 adopted general policy,” which “amounts to an abdication of its statutory responsibilities” that
 19 this Court has the power to remedy. *Heckler*, 470 U.S. at 833 n.4.

20 **1. EPA’s Policy of Non-Enforcement as to Coated Seeds Is Undisputed.**

21 EPA’s policy of exemption of neonicotinoid-coated seeds and dust-off from FIFRA’s
 22 requirements was first articulated in the 2013 Inspection Guidance. AR 109; *see* Statutory and
 23 Regulatory Framework section, *supra* pp. 2-4. This provides a “focal point for judicial review”
 24 of EPA’s policy of non-enforcement. *See Alliance for Bio-Integrity*, 116 F. Supp. 2d at 171.
 25 EPA admits that “it has not brought an enforcement action with respect to misapplication of the
 26 treated article exemption to treated seed, either before or after the 2013 Inspection Guidance.”
 27 EPA’s Answer ¶ 68, ECF No. 67. Plaintiffs are unaware of any enforcement by EPA against
 28 neonicotinoid-coated seeds or pesticidal dust-off and no evidence of such enforcement can be

1 found in the administrative record. This is unsurprising, given that neither EPA nor
 2 Defendant-Intervenors dispute that EPA does not require neonicotinoid-coated seeds to be
 3 registered or have enforceable label language. *See* Def. Intervenors' Mot. to Intervene 5, ECF
 4 No. 26 (distinguishing between "treated seed and seed treatments" and stating that "every *seed*
 5 *treatment* identified in Plaintiffs' complaint has been registered..." (emphasis added)); Defs.
 6 Mem. Law Supp. Mot. Dismiss Compl., ECF No. 21. Indeed, EPA has acknowledged in a prior
 7 agency order that "users of unregistered pesticides are not required to follow the labeling," such
 8 as the labeling on the bags of exempted pesticidal seeds. Jenkins Decl., Ex. F, at 2.

9 Plaintiffs requested limited discovery relevant to Claim II to determine, *inter alia*,
 10 whether EPA has ever enforced FIFRA against any coated seeds, articulated its policy of
 11 non-enforcement internally or in communications with registrants, or made the requisite
 12 determinations that these coated seeds would be appropriate for exemption from FIFRA, i.e.,
 13 would not have unreasonable adverse effects on the environment. Pls.' Mot. Leave Conduct
 14 Limited Discovery 4-5, ECF No. 81; Keats Decl., Ex. C., ECF No. 81-4. Plaintiffs renew their
 15 request for limited discovery to the extent this Court finds the evidence in the administrative
 16 record insufficient to grant summary judgment in favor of Plaintiffs on Claim II.²

17 **2. EPA's Policy of Non-Enforcement Violates FIFRA.**

18 FIFRA is clear that pesticides which have "unreasonable adverse effects on the
 19 environment" may not be registered, and thus such pesticides are strictly prohibited from use or
 20 sale. 7 U.S.C. § 136a(a), (c)(5). FIFRA authorizes EPA to exempt pesticides from the

21
 22 ² This Court and other district courts have followed Ninth Circuit precedent in allowing
 23 discovery and considering extra-record documents in failure to act cases. *Vietnam Veterans of*
 24 *Am. v. C.I.A.*, No. 09-0037, 2011 WL 4635139, at *5 and n.3 (N.D. Cal. Oct. 5, 2011) (discovery
 25 is not limited to the administrative record for failure to act claim); *Friends of Earth, Inc. v.*
 26 *Mosbacher*, No. 02-04106, 2007 WL 962949, at *2 (N.D. Cal. Mar. 30, 2007) (denying a motion
 27 to strike extra-record evidence in failure to act case); *Firebaugh Canal Water Dist. v. U.S.*, No.
 28 88-00634, 2010 WL 3702664, at *1-2 (E.D. Cal. Sept. 17, 2010) (failure to act cases not limited
 to the administrative record because there is no administrative record for an inaction); *Sierra*
Club v. U.S. Dept. of Transp., 245 F. Supp. 2d 1109, 1119 (D. Nev. 2003) (recognizing need for
 discovery to support in failure to act claim and granting plaintiffs' motion to compel); *Bundorf v.*
Jewell, 142 F. Supp. 3d 1138, 1148 (D. Nev. 2015) (refusing to strike declaration with
 information outside record because an APA § 706(1) claim is not limited to the administrative
 record).

1 requirements of FIFRA under two conditions: when they are already regulated by another
2 agency, or when they are unnecessary to be regulated under FIFRA. *Id.* § 136w(b). There is no
3 dispute that neonicotinoid-coated seeds and their pesticidal dust-off are not regulated by another
4 agency. The question is thus whether they are “of a character which is unnecessary to be subject
5 to [FIFRA] in order to carry out the purposes of [FIFRA];” i.e., whether they may be properly
6 exempted from FIFRA. *Id.*

7 Neonicotinoid-coated seeds and their associated pesticidal dust-off may not be exempted
8 from FIFRA because, as explained above, they have unreasonable adverse effects on the
9 environment, including particularly devastating impacts to pollinators and other wildlife. EPA’s
10 own Fact Sheet stated clothianidin-coated seeds pose both acute and chronic risks to broad
11 classes of species. Jenkins Decl., Ex. G. The European Union prohibited their use on seeds of
12 most crops since 2013, largely due to dust effects on bees, and all neonicotinoids were prohibited
13 as of January 1, 2016, from use in all National Wildlife Refuges because the U.S. Fish and
14 Wildlife Service: “...determined [] prophylactic use, such as a seed treatment, of the
15 neonicotinoid pesticides that can distribute systematically in a plant and can potentially affect a
16 broad spectrum of non-target species.” Jenkins Decl., Exs. B, C. These impacts are caused by
17 two features of these pesticidal seed products: the systemic nature of the neonicotinoid coatings
18 (whereby the neonicotinoid pesticide is incorporated into future plant growth, providing
19 “systemic” protection for the full plant, not just the seed) and the “high acute risk” to bees from
20 the pesticidal dust-off associated with their planting. Jenkins Decl., Ex. B, at 1.

21 EPA and Defendant-Intervenors appear to rely on the registration of certain pesticide
22 products “as seed coatings” for their defense, suggesting that the coated seeds themselves and
23 their associated pesticidal dust-off do not require additional registration. *See* EPA’s Answer
24 ¶¶ 2, 24, 42, ECF No. 67; Def. Intervenors’ Mot. Intervene 4-12, ECF No. 26. This defense
25 relies on the application of the “treated article exemption” to neonicotinoid-coated seeds and
26 their pesticidal dust-off. Again, the exemption provides that articles “treated with, or containing,
27 a pesticide ... registered for such use” are determined to be of a character not requiring
28 regulation under FIFRA. 7 U.S.C. § 136w(b).

1 The treated article exemption includes a condition, however, that is of critical importance
2 to this case: in order to be exempt, the pesticide used in the treated article must “protect the
3 article or substance itself...” *Id.* The exemption provides two examples of such exempted
4 articles: “paint treated with a pesticide to protect the paint coating, or wood products treated to
5 protect the wood against insect or fungus infestation.” *Id.* In 2003, EPA described how this
6 exemption applied to seeds that had been treated with pesticides:

7 The term “for the protection of the [seed] itself” means that the pesticidal
8 protection imparted to the treated seed does not extend beyond the seed itself to
offer pesticidal benefits or value attributable to the treated seed.

9 Jenkins Decl., Ex. A (2003 Harmonization Paper). The systemic neonicotinoid-coated seeds
10 Plaintiffs challenge in this action do not qualify for this exemption because the pesticidal
11 protection of the systemic neonicotinoids extend beyond the seed itself, to the future full plant
12 (through the systemic nature of the pesticide) and to the air, soil, and water surrounding the seed
13 (through the sloughed-off coatings and the pesticidal dust-off associated with the planting of the
14 seeds). Other articles treated with registered pesticides, but whose pesticidal protections are
15 externalized beyond the product itself, have been subject to EPA registration with fully
16 enforceable FIFRA labels. An example is anti-fouling paint used on boat hulls intended to deter
17 fouling by barnacles and other unwanted sea life. Jenkins Decl., Ex. E (illustrative sample of
18 boat paint with EPA-mandated label). This is despite the fact that the treated article exemption
19 regulation specifically mentions “for example, paint treated with a pesticide to protect the paint
20 coating” as generally qualifying for the exemption. 40 C.F.R. § 152.25(a). However,
21 anti-fouling paint has pesticidal effects that go beyond protecting the paint itself, to affecting
22 fouling organisms, thus it did not qualify for the exemption. Similar to the hull paint example,
23 the externalized effects of the neonicotinoid-coated seeds and their dust-off on marginal plants,
24 soil, water, bees, birds and other beneficial species disqualify them from the exemption. EPA’s
25 policy of non-enforcement of FIFRA against these seeds violates the law.

26 **II. EPA’s Blanket Exemption of Neonicotinoid-Coated Seeds and Pesticidal Dust-Off**
27 **Violates the APA’s Rulemaking Procedures, Is Ultra Vires, and Contrary to Law.**

28 The APA provides that a reviewing court shall hold unlawful and set aside agency action

1 which is arbitrary and capricious, ultra vires, or taken without observance of legally required
2 procedure. 5 U.S.C. §§ 702, 704, 706(2). In Claims I, III, and IV, Plaintiffs allege that EPA has
3 improperly and arbitrarily exempted neonicotinoid-coated seeds and their dust-off from
4 registration as pesticides under FIFRA, including full environmental effects reviews, including
5 potentially on threatened and endangered species, and enforceable labeling that go along with
6 pesticide registrations. This exemption is expressed in EPA’s statement in the 2013 Guidance
7 that treated seeds and their dust-off are “not considered a ‘pesticide use.’” AR 109. This
8 statement was an amendment to a legislative rule, and thus a legislative rule itself, that “create[d]
9 rights, impose[d] obligations, or effect[ed] a change in existing law pursuant to authority
10 delegated by Congress.” *Hemp Indus. Ass’n v. Drug Enf’t Admin.*, 333 F.3d 1082, 1088 (9th Cir.
11 2003); *see also, e.g., Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004).

12 **A. The Record Certified and Lodged by EPA Is Not Complete.**

13 EPA prepared and certified an administrative record for this action, purporting to include
14 all “non-deliberative documents and materials directly or indirectly considered by the Agency in
15 issuing the [2013] Inspection Guidance,” as well as “all emails and memoranda discussing
16 whether the agency should proceed by guidance versus some other procedure and/or discussing
17 whether the guidance would constitute final agency action,” pursuant to this Court’s Order on
18 EPA’s Motion to Dismiss. ECF No. 76-1; ECF No. 83-1. EPA’s certified record is not
19 complete, as demonstrated by the numerous redactions throughout the provided documents and
20 by references in included documents to several documents that were not included. *See* ECF No.
21 81. This brief is necessarily compromised by Plaintiffs’ limited access to relevant and
22 admissible evidence that would support Plaintiffs’ claims. Plaintiffs thus renew their request for
23 access to all relevant documents and an opportunity for additional briefing after reviewing them.

24 This Court will have the opportunity to review the un-redacted record documents and
25 whatever other documents EPA provides the Court in response to its September 7, 2016, Order,
26 ECF No. 86. Plaintiffs request that the Court pay particular attention to several documents: (1)
27 **AR 168**, titled “Draft Guidance for Investigation of Alleged Cases of Pesticide-Related Bee
28 Mortality: Pros and Cons of Issues Surrounding Review and Release of the Guidance,” which

1 has approximately two-thirds of its content redacted yet appears directly responsive to this
2 Court's order; and (2) **AR 171-172**, email from Ohio Chief Division of Plant Health regarding
3 the bee guidance (and apparently its legal effect), which is almost completely redacted. These
4 documents between EPA and state regulatory officials appear to go directly to the question of the
5 purpose of the 2013 Guidance and are thus both necessarily part of the administrative record and
6 responsive to the Court's earlier order regarding production of record documents. ECF No. 62.
7 In addition, Plaintiffs direct the Court's attention to **AR 151**. Reference is made on this page to a
8 document titled "2012 Indiana Bee Kill Investigations, Ping Wan, Office of the Indiana State
9 Chemist, Nov. 7-8, 2012; PowerPoint presented at Region 5 Lab Directors' Meeting." This
10 document, relevant to the factual basis of this action, was not included in the administrative
11 record.

12 These documents are not internal deliberations by EPA, nor are they deliberations
13 "solely" with co-regulators. A document can be "deliberative" only if its disclosure would
14 frustrate the purposes of the privilege (i.e., candid discussion within the agency), *Carter v. U.S.*
15 *Dept. of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002), and disclosure of these documents—
16 communications with state officials who are subject to their own states' public records laws—
17 would not frustrate that purpose. Even if the documents are in fact deliberative, "[t]he
18 deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if
19 his or her need for the materials and the need for accurate fact-finding override the government's
20 interest in non-disclosure." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir.
21 1984). Thus, Plaintiffs urge this Court to reject EPA's claims of deliberative privilege and order
22 disclosure of all relevant evidence. *See* Pls.' Mot. to Complete AR, ECF No. 81.

23 The administrative record contains no documents related to Plaintiffs' Claim IV, which
24 alleges that the EPA-required coated seeds bag labels are inadequate, non-mandatory, and
25 unenforceable (and thus EPA's actions requiring these labels were arbitrary and capricious, *see*
26 Section II.E., below). To the extent that these facts are needed for this Court to grant Plaintiffs
27 summary judgment, or to the extent that the absence of these facts may lead the Court to grant
28 Defendants' or Defendant-Intervenors' motion(s) instead, Plaintiffs renew their request for an

1 opportunity to supplement the record with relevant documents. Plaintiffs have included some
2 relevant documents as attachments (*see* Section II.E, below), but these documents, and all other
3 relevant documents in EPA’s possession, should be part of the administrative record.

4 Plaintiffs also request that the Court consider several questions when reviewing the *in*
5 *camera* documents. First, do any of the redactions or referenced documents provide evidence, or
6 might lead to relevant evidence, regarding the relationship between neonicotinoid-coated seeds
7 and harms to pollinator bees? Second, do any of the redactions or referenced documents provide
8 evidence regarding whether EPA considers neonicotinoid-coated seeds and/or the pesticidal
9 dust-off to be exempted from FIFRA, and if so, on what basis and when did EPA reach this
10 conclusion? EPA has assiduously avoided answering this question. *See* Defs. Mem. Law Supp.
11 Mot. Dismiss Compl. 10-12, ECF No. 21.

12 **B. EPA’s Blanket Exemption of Coated Seeds and Pesticidal Dust-Off Was a**
13 **Final Agency Action.**

14 As with EPA’s Motion to Dismiss, the primary issue regarding Claims I, III, and IV is
15 whether the expression of the blanket exemption in the 2013 Guidance constituted a final agency
16 action. As this Court previously observed, “[i]f the 2013 Guidance did consummate a new rule,
17 and thus a final agency action, then defendants clearly violated federal law by failing to comply
18 with rulemaking requirements.” Order Denying Mot. Dismiss 4, ECF No. 62. Although
19 Plaintiffs believe the administrative record to be incomplete, it is sufficient to demonstrate that
20 the blanket exemption that EPA stated in the 2013 Guidance is a final agency action.

21 **1. The Blanket Exemption in the 2013 Guidance Document Was an**
22 **Amendment to a Legislative Rule and Therefore an Agency Action.**

23 The first component of a “final agency action” is an “agency action.” *Grand Canyon*
24 *Trust v. Williams*, 38 F. Supp. 3d 1073, 1076-77 (D. Ariz. 2014). The APA defines “agency
25 action” broadly to include “the whole or a part of an agency rule, order, license, sanction, relief,
26 *or the equivalent or denial thereof*, or failure to act.” 5 U.S.C. § 551(13) (emphasis added). The
27 threshold for finding an “agency action” is not high. *See Whitman v. Am. Trucking Ass’ns, Inc.*,
28 531 U.S. 457, 478 (2001) (explaining the word “action” in “agency action” as used in the APA is

1 meant to “cover comprehensively every manner in which an agency may exercise its power.”).

2 An “agency action” includes “a statement that announces a rule of law, imposes
3 obligations, determines rights or liabilities, or fixes legal relationships.” *High Country Citizens’*
4 *All. v. Norton*, 448 F. Supp. 2d 1235, 1249 (D. Colo. 2006). The Ninth Circuit has found that
5 statements within memoranda are final agency actions actionable under the APA. *Siskiyou Reg’l*
6 *Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 553-554 (2009) (finding agency action
7 sufficiently alleged where plaintiffs point to interpretation as well as specific instances of agency
8 action implementing interpretation); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015,
9 1021 (D.C. Cir. 2000) (finding petitioners need not challenge whole “guidance” but rather the
10 elements that consist of the agency’s settled position, as under the APA, a “rule” may consist of
11 “part of an agency statement of general or particular applicability and future effect”); *CropLife*
12 *Am. v. EPA*, 329 F.3d 876, 881-83 (D.C. Cir. 2003) (finding that EPA statement in press release
13 regarding acceptance of third-party human studies for evaluating pesticide safety was a binding
14 rule). A reviewing court does not have to rubber stamp an agency’s own characterization of its
15 action. *CropLife Am.*, 329 F.3d at 883 (“[T]he agency’s characterization of its own action is not
16 controlling if it self-servingly disclaims any intention to create a rule with the ‘force of law,’ but
17 the record indicates otherwise.”).

18 The “treated article exemption,” 40 C.F.R. § 152.25(a), is a legislative rule promulgated
19 pursuant to EPA’s authority under FIFRA. *See infra* pp. 2-3. In 2003, in the Harmonization
20 Paper, EPA interpreted this rule, describing how the treated article exemption applied to seeds
21 coated with pesticides. Jenkins Decl., Ex. A. The 2003 Harmonization Paper was an interpretive
22 rule because it explained, but did not add to, the substantive law that existed in the form of the
23 legislative rule. *See Hemp Indus. Ass’n*, 333 F.3d at 1087. In contrast, the blanket exemption
24 stated in the 2013 Guidance *amended* the treated article exemption, stating for the first time that
25 all treated seeds and any pesticidal dust-off from any treated seed were “not considered a
26 ‘pesticide use’” under FIFRA. AR 109-110.

27 This statement was a clear departure from EPA’s prior interpretation of how the treated
28 article exemption applied to seeds. Whereas in 2003 EPA preserved the treated article

1 exemption's restriction that the pesticide *only protect the article or substance itself*, in 2013 it
2 dispensed with this important limitation and also expanded the exemption to include pesticidal
3 dust-off. AR 109; 40 C.F.R. § 152.25(a). The difference is significant, both legally and
4 practically. As previously described, there is a substantial difference between pesticidal effect
5 that is limited to the seed itself and pesticidal effect that extends beyond the seed, whether to the
6 future full plant (through the systemic nature of the neonicotinoid pesticides) or to surrounding
7 air, soil, water, plants, and numerous non-target invertebrates, including valuable pollinators, as
8 well as to birds (through the sloughed-off coatings and pesticidal dust-off). Thus, by amending
9 the treated article exemption, EPA "chang[ed] a legislative rule retroactively through the process
10 of disingenuous interpretation of the rule to mean something other than its original meaning."
11 *Hemp Indus. Ass'n*, 333 F.3d at 1091. The statement in the 2013 Guidance was clearly not "the
12 unremarkable reiteration of EPA's longstanding view of the treated article exemption in 40
13 C.F.R. § 152.25(a)," as EPA argued in its Motion to Dismiss. Defs.' Mem. Law Supp. Mot.
14 Dismiss Compl. 11, ECF No. 21.

15 As the D.C. Circuit put it, the "phenomenon we see in this case is familiar." *Appalachian*
16 *Power*, 208 F.3d at 1020. Congress passed FIFRA, which broadly requires registration of all
17 pesticides prior to sale or use, allowing EPA to exempt pesticides if certain criteria are met. *Id.*;
18 7 U.S.C. §§ 136a, 136w(b). EPA "follow[ed] with regulations" like the treated article
19 exemption, which exempts articles treated with already-registered pesticides when used only "to
20 protect the article or substance itself." *Appalachian Power*, 208 F.3d at 1020; 40 C.F.R.
21 § 152.25(a). EPA then issued "guidance or memoranda, explaining, interpreting, defining and
22 often expanding the commands in the regulations." *Id.* While the 2003 Harmonization Paper did
23 not improperly expand the regulation, the 2013 Guidance did, expanding the treated article
24 exemption to include pesticidal products whose pesticidal protection extends beyond the seeds
25 themselves: seeds coated with systemic neonicotinoids and the seeds' pesticidal dust-off. AR
26 109. "Law [was] made, without notice and comment, without public participation, and without
27 publication in the Federal Register or the Code of Federal Regulations." *Appalachian Power*,
28 208 F.3d at 1020. EPA may have seen an advantage in "issu[ing] or amend[ing] its real

1 rules...without following any statutorily prescribed procedures,” and it may also have seen
 2 “another advantage—immunizing its lawmaking from judicial review.” *Id.*

3 **2. EPA’s Blanket Exemption for Coated Seeds and Dust-Off Is Final.**

4 An agency action must be final to be actionable. *Bennett v. Spear*, 520 U.S. 154, 177-78
 5 (1997). Finality has two conditions: the agency action must (1) “mark the ‘consummation’ of the
 6 agency’s decisionmaking process;” and (2) “be one by which ‘rights or obligations have been
 7 determined,’ or from which ‘legal consequences will flow.’” *Id.* The finality element is
 8 interpreted “in a pragmatic and flexible manner.” *Grand Canyon Trust*, 38 F. Supp. 3d at 1078
 9 (citation omitted). On the second condition, the Supreme Court explained that the “core
 10 question” is whether the result of the action “is one that will directly affect the parties,” while the
 11 Ninth Circuit elaborated that courts should consider whether the statement “amounts to a
 12 definitive statement of the agency’s position” with a focus “on the practical and legal effects of
 13 the agency action.” *Id.* (citations omitted)

14 Even when not accompanied by APA notice and comment procedures, an agency’s
 15 interpretive rule or statement of policy can be a reviewable “rule” within the meaning of the
 16 APA:

17 If an agency acts as if a document issued at headquarters is controlling in the
 18 field, if it treats the document in the same manner as it treats a legislative rule, if it
 19 bases enforcement actions on the policies or interpretations formulated in the
 20 document, if it leads private parties or State permitting authorities to believe that
 it will declare permits invalid unless they comply with the terms of the document,
 then the agency’s document is for all practical purposes “binding.”

21 *Appalachian Power*, 208 F.3d. at 1021 (citation omitted). And an agency’s rule, even one that
 22 the agency does not hold out as having the force of law, may still be considered to have the force
 23 of law if it is inconsistent with a prior rule that does have the force of law, or if it amends a prior
 24 regulation. *Hemp Indus. Ass’n*, 333 F.3d at 1988; *see also Am. Trucking Ass’ns*, 531 U.S. at
 25 477-79 (finding interpretive rule was reviewable).

26 The 2013 Guidance is a final agency action because it represents the final word by EPA
 27 on its decision to exempt neonicotinoid-coated seeds and pesticidal dust-off from the
 28 requirements of FIFRA. Practical and legal consequences flow from that exemption, namely that

1 sellers and users of neonicotinoid-coated seeds (and any treated seed with associated pesticidal
2 dust-off) do not have to comply with the registration and approval provisions in FIFRA for these
3 products, EPA does not and will not enforce FIFRA against the sale or use of
4 neonicotinoid-coated seeds, and the beekeepers harmed will have less recourse for their injuries.

5 **a. The 2013 Guidance Is the Consummation of EPA's**
6 **Decisionmaking Process.**

7 An agency's action is the consummation of its decisionmaking process if it represents the
8 agency's "last word on the matter" and is not "of a merely tentative or interlocutory nature." *Or.*
9 *Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) (quoting *Bennett*, 520
10 U.S. at 178, and *Whitman*, 531 U.S. at 478). The 2013 Guidance is clearly the consummation of
11 EPA's decisionmaking process: it is explicitly "a supplement to the national [FIFRA] Inspection
12 Manual," intended to be distributed to and implemented by state and tribal pesticide programs,
13 with the goal of "[s]trengthening our investigation of bee incidents," which is described as "an
14 important element of the [EPA's] Pollinator Protection Strategic Plan." AR 99. It is not a draft
15 or preliminary document, but rather a final document published by the agency. AR 97-100.
16 Development of the Guidance was through a process initiated by EPA that sought input and
17 participation from state regulators, industry representatives, and members of the public. *Id.*

18 The 2013 Guidance represents EPA's last word for the purposes of the *Bennett* test even
19 though the agency *could* take some other action in the future. *Grand Canyon Trust*, 38 F. Supp.
20 3d at 1078 (citing *Alaska v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (finding "decision
21 consummated agency process even if agency could adopt new position in response to changed
22 circumstances.")). Nothing in the record indicates that EPA has taken, or is contemplating
23 taking, any other action with regards to its exemption stated in the 2013 Guidance. *See Or. Nat.*
24 *Desert Ass'n*, 465 F.3d at 984-86 (examining whether the agency "ha[d] rendered its last word
25 on the matter" and finding the administrative record established that Forest Service annual
26 operating instructions were its last word as to amount of grazing allowed on particular
27 allotments). In contrast, the record demonstrates that since the 2013 Guidance was published,
28 EPA has approved for sale at least four liquid seed-coating products while at the same time

1 exempting the resulting coated seeds themselves from FIFRA’s requirements for pesticides.
2 Jenkins Decl. ¶ 5, Ex. D (indicating that of the fifteen seed coating products EPA approved since
3 2010, the agency registered Helix Vibrance (for canola seeds); CruiserMaxx Potato Extreme
4 (potato seed pieces); CruiserMaxx Vibrance (soybean seeds); and Dyna-Shield Foothold Virock
5 (barley and wheat seeds) after the May 9, 2013 release of the 2013 Guidance); AR 99; *see also*
6 EPA’s Answer ¶¶ 2, 34, 54, ECF No. 67 (admitting twenty-five seed coating products containing
7 neonicotinoids were approved by EPA in last six years and 142 million acres are planted
8 annually with such seeds).

9 In its Motion to Dismiss, EPA argued that the language in the 2013 Guidance was
10 equivocal (and therefore not a definitive statement of the agency’s position), focusing on the
11 word *may* in “may be exempted from registration under FIFRA” and on the third sentence that
12 mentions treated seeds: “However, if the inspector suspects or has reason to believe that a treated
13 seed is subject to registration (*i.e.*, the seed is not in compliance with the treated article
14 exemption), plantings of that treated seed may nonetheless be investigated.” Defs.’ Mem. Law
15 Supp. Mot. Dismiss Compl. 10-12 and n.3, ECF No 21. Given that one of the core purposes of
16 the 2013 Guidance is to aid in determining whether the use of a pesticide, and treated seeds in
17 particular, was in violation of FIFRA, AR 103, 136, 168, the language stating that the planting of
18 treated seeds and its resulting dust-off “is not considered a ‘pesticide use’” is particularly
19 important. The word “may” in the sentence does not modify or make conditional the definitive
20 statement that concludes the sentence “...and as such its planting *is not considered* a ‘pesticide
21 use.’” AR 109 (emphasis added).

22 **b. Practical and Legal Consequences Flow from EPA’s Coated**
23 **Seeds Exemption.**

24 The second part of the *Bennett* test for finality requires that “the action must be one by
25 which ‘rights or obligations have been determined,’ or from which ‘legal consequences will
26 flow.’” *Bennett*, 520 U.S. at 178 (citation omitted). Legal consequences clearly flow from the
27 2013 Guidance’s directive that the planting of treated seeds and any resulting dust-off are not
28 considered pesticidal uses under FIFRA: actions that previously might have been prosecuted as

1 violations of the law are now explicitly declared lawful, and the makers and sellers of
 2 neonicotinoid-coated seeds are not required to obtain FIFRA registration for the seeds or to label
 3 them in accordance with FIFRA requirements. AR 109; *see CropLife Am.*, 329 F.3d at 883;
 4 *Wyoming ex rel. Crank v. U.S.*, 539 F.3d 1236, 1243 (10th Cir. 2008) (agency letters had
 5 “definite legal consequences” regarding individuals’ ability to own or possess guns and the status
 6 of the state’s concealed carry permit).

7 The 2013 Guidance satisfies the second *Bennett* condition even if clear legal
 8 consequences do not flow from it: this part of the test “can be met through different kinds of
 9 agency actions,” including an effect on the “‘day-to-day business’ of the subject party.” *Or. Nat.*
 10 *Desert Ass’n*, 465 F.3d at 987 (citation omitted). By definitively stating that the planting of
 11 treated seeds and any resulting dust-off are not considered pesticide uses, the 2013 Guidance has
 12 made clear that the sale and planting of neonicotinoid-coated seeds could proceed with impunity,
 13 without any risk of sanctions or enforcement actions under FIFRA. The practical effect of the
 14 agency action has been the widespread use of neonicotinoid-coated seeds, which now cover
 15 nearly 150 million acres. EPA’s Answer ¶¶ 2, 34, ECF No. 67. And just as importantly, their
 16 widespread use resulted in direct and devastating effects to the nation’s beekeepers, making their
 17 legal rights to obtain inspection, enforcement, mitigation, and/or compensation from “upstream”
 18 actors in the coated seeds chain much more difficult, if not impossible. *See Adee Decl.*, ¶¶ 3,4;³
 19 *Or. Nat. Desert Ass’n*, 465 F.3d at 982. Like the determination as to mineral rights in *Grand*
 20 *Canyon Trust*, EPA’s blanket exemption for neonicotinoid-coated seeds and dust-off has the
 21 practical effect of allowing their ongoing sale and use and effectively precludes any possible
 22

23 ³ Mr. Adee’s Declaration states “[a]s shown in our massive 2015 bee kill, the exemption of toxic
 24 dust coming off of the neonicotinoid-coated corn seeds means there are no legal consequences
 25 for the seed coaters or pesticide manufacturers whose chemicals killed our bees. Neither the state
 26 enforcement agents nor EPA’s enforcement agents will take any action to stop or mitigate the
 27 harms. There are no enforceable labels on the seed bags that the farmer must follow to not cause
 28 dust-off that will kill honeybees. My direct experience is that whatever language EPA asks to be
 put on those seed bags is inadequate to protect bees. From my perspective, my right as a
 beekeeper to obtain pesticide law enforcement for such dust-off kills has become non-existent.
 That reduces not only my ability to protect my valuable livestock, but also my ability to make
 any civil or other claim that I might seek to bring against those in the chain of production and use
 of these pesticides.”

1 official enforcement actions against these coated seeds and their associated insecticidal dust as a
2 “pesticide use” in violation of FIFRA. *Grand Canyon Trust*, 38 F. Supp. 3d at 1078-80.

3 The “disclaimer” contained in the 2013 Guidance provides no support for the argument
4 that practical legal consequences do not flow from the document. AR 102 “This language is
5 boilerplate; since 1991 EPA has been placing it at the end of all its guidance documents.”
6 *Appalachian Power*, 208 F.3d at 1023. The Court is not required to accept the agency’s
7 boilerplate disclaimer of the nature and effect of the statements in the 2013 Guidance at face
8 value. *CropLife Am.*, 329 F.3d at 883; *see also Cal. ex rel. Harris v. Fed. Hous. Fin. Agency*,
9 No. 10-03084, 2011 WL 3794942, at *11 (N.D. Cal. Aug. 26, 2011) (“A court need not accept
10 an agency’s characterization of its rule at face value.”).

11 **C. EPA’s Blanket Exemption of Treated Seeds and Pesticidal Dust-Off Failed to**
12 **Comply With the Rulemaking Requirements of the APA.**

13 EPA’s statement in the 2013 Guidance amended EPA’s prior legislative rule regarding
14 treated articles, 40 C.F.R. § 152.25(a), extending the treated article exemption to all treated seeds
15 (including neonicotinoid-coated seeds) and to treated seeds’ pesticidal dust-off. But EPA failed
16 to follow the APA’s rulemaking procedures for legislative rules, including the APA’s
17 requirements for notice by publication in the Federal Register and an opportunity for public
18 comment. 5 U.S.C. § 553. EPA does not dispute that it did not engage in formal rulemaking in
19 issuing the 2013 Guidance, Defs. Mem. Law Supp. Mot. Dismiss Compl. 10, ECF No. 21, and
20 the administrative record does not contain any evidence of any such compliance with these
21 procedures. As this Court stated previously, “[i]f the 2013 Guidance did consummate a new
22 rule, and thus a final agency action, then defendants clearly violated federal law by failing to
23 comply with rulemaking requirements.” Order Denying Mot. Dismiss 4, ECF No. 62.

24 **D. EPA’s Blanket Exemption of Coated Seeds and Dust-Off Was Ultra Vires.**

25 EPA did not have the authority under FIFRA to extend the treated article exemption to
26 include neonicotinoid-coated seeds and pesticidal dust-off. FIFRA permits EPA to exempt
27 certain pesticides provided EPA determines that they are either (1) adequately regulated by
28 another federal agency; or (2) “of a character which is unnecessary to be subject to” FIFRA in

1 order to carry out the purposes of FIFRA. 7 U.S.C. § 136w(b). Neither neonicotinoid-coated
2 seeds nor pesticidal dust-off satisfy either of these conditions.

3 First, coated seeds and their pesticidal dust-off are not registered or regulated by any
4 other federal agency. Second, neither are of a character which is unnecessary to be regulated.
5 FIFRA imposes several requirements on EPA's regulation of pesticides, including that EPA
6 determine that the pesticide, "when used in accordance with widespread and commonly
7 recognized practice it will not generally cause unreasonable adverse effects on the environment."
8 *Id.* § 136a(c)(5)(D). EPA has not, and cannot, make this determination because the widespread
9 practice of the planting of neonicotinoid seeds has caused highly unreasonable adverse effects on
10 the environment. As described in the Factual Background section, *supra* pp.4-5, these effects
11 include high bee mortality. For example, commercial beekeeper Randy Oliver stated to EPA
12 during its preparation of the 2013 Guidance:

13 Exposure to planting dust kills the "pollen hogs"—newly-emerged workers and
14 drones that are feeding heavily on beebread. Next would be effects upon the
nurse bees, who also consume the bulk of pollen in the hive.

15 AR 183. Other effects include sublethal effects, such as queen failure, sterility, inability to
16 navigate, loss of vigor, lethargy, and shortened lifespan. AR 182-194. Effects foreseen by EPA
17 since 2003 include: "potential for toxic chronic exposure to honey bees, as well as other
18 nontarget pollinators ... and has potential to leach to ground water, as well as runoff to surface
19 waters." Jenkins Decl, Ex. G, at 2.

20 The APA requires courts to "hold unlawful and set aside agency action, findings, and
21 conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of
22 statutory right." 5 U.S.C. § 706(2)(C). As EPA's extension of the treated article exemption to
23 include neonicotinoid-coated seeds and pesticidal dust-off was in excess of its statutory authority
24 and limitations, it must be found unlawful and be set aside. *Pollinator Stewardship Council*, 806
25 F.3d at 532-33 (explaining that vacatur is the presumptive remedy and appropriate in cases
26 regarding improper EPA registration of neonicotinoid-like pesticides harmful to bees).

1 Dated: September 16, 2016.

Respectfully submitted,

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