

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,
Plaintiffs,
v.
ENVIRONMENTAL PROTECTION
AGENCY, et al.,
Defendants,
and
CROPLIFE AMERICA, et al.,
Intervenor Defendants.

Case No. [23-cv-02714-SI](#)

**ORDER RE: CROSS MOTIONS FOR
SUMMARY JUDGMENT, MOTION TO
STRIKE EXTRA-RECORD
EVIDENCE, AND MOTION TO SEAL
PORTIONS OF ADMINISTRATIVE
RECORD**

Re: Dkt. Nos. 61, 68, 69, 77, 86

The parties in this case dispute the appropriate level of regulatory oversight for seeds treated with neonicotinoid pesticides. Under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),¹ the Environmental Protection Agency (“EPA”) requires that neonicotinoid pesticides be registered. The registration process calls for the EPA to collect data and analyze whether the benefits of the pesticide exceed any costs to the environment or human health. While neonicotinoid pesticides can be sprayed over crop fields, by far the most common way these pesticides are used is to coat seeds before they are distributed and planted.

The parties agree that, once treated, the seeds themselves become “pesticides” under the FIFRA definition. But the EPA currently exempts treated seeds from going through a separate registration process, reasoning that the registration for the treating pesticides provides sufficient data about the overall impact of the pesticides, including through their application to treated seeds.

¹ FIFRA is codified at 7 U.S.C. § 136 et seq.

1 Plaintiffs, a pair of environmental advocacy organizations, believe the existing layer of review is
 2 inadequate. They argue that treated seeds cannot be exempted under the language of the statute and
 3 EPA’s regulations. Plaintiffs want the treated seeds to be subject to FIFRA registration, which
 4 would force specific study and cost-benefit analysis of seeds treated with neonicotinoid pesticides.
 5 Plaintiffs presented these requests to the EPA via petition in 2017, which the EPA denied in 2022.
 6 Plaintiffs now make two claims to this Court: first, that the EPA’s petition denial was arbitrary and
 7 capricious; second, that the EPA exceeds its statutory authority when it exempts neonicotinoid
 8 treated seeds from going through their own registration process.

9 In this order, the Court considers the parties’ cross motions for summary judgment. As
 10 explained below, the Court GRANTS the defendant EPA’s motion for summary judgment on
 11 plaintiffs’ first claim and DISMISSES plaintiffs’ second claim for lack of subject matter jurisdiction.

12 **BACKGROUND**

13 **I. Statutory and Regulatory Framework**

14 Congress first enacted FIFRA in 1947 as primarily “a licensing and labeling statute.”
 15 *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990-91 (1984). Twenty-five years later, Congress
 16 “transformed FIFRA from a labeling law into a comprehensive regulatory statute” due to “mounting
 17 public concern about the safety of pesticides and their effect on the environment.” *Id.* at 991. Since
 18 1970, the EPA has been responsible for implementing these regulations. *Id.*

19 FIFRA prohibits the distribution or sale of pesticides² unless they are registered, with certain
 20 exceptions. 7 U.S.C. § 136a(a). Among other requirements, a pesticide may only be registered if
 21 “it will perform its intended function without unreasonable adverse effects on the environment; and
 22 [] when used in accordance with widespread and commonly recognized practice it will not generally
 23 cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(b)(5)(C)-(D). This
 24 standard requires assessing the “economic, social, and environmental costs and benefits of the use
 25

26
 27 ² “The term ‘pesticide’ means (1) any substance or mixture of substances intended for
 28 preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances
 intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer. . . .” 7
 U.S.C. § 136(u).

1 of [the] pesticide.” 7 U.S.C. § 136(bb). “In order to register a new pesticide, a manufacturer must
2 submit an application for registration, describing how the pesticide will be used, the claims made of
3 its benefits, the ingredients, and a description of all tests and studies done and the results thereof,
4 concerning the product’s health, safety, and environmental effects.” *Pollinator Stewardship*
5 *Council v. U.S. E.P.A.*, 806 F.3d 520, 523 (9th Cir. 2015) (citations omitted). Registered pesticides
6 must also undergo a registration review process, initially by the later of October 1, 2022 or 15 years
7 after registration, then subsequently every 15 years. 7 U.S.C. § 136a(g). “[T]he ‘registration
8 review’ process serves as a backstop to ensure that pesticides do not remain registered once new
9 data has shown them to be harmful to humans or the environment.” *Nat’l Fam. Farm Coal. v. U.S.*
10 *Env’t Prot. Agency*, 966 F.3d 893, 918 (9th Cir. 2020). For the pesticides at issue in this case, the
11 registration review process began in 2008 and 2011 but remains in progress. AR 56; Dkt. No. 68
12 (“EPA Opp’n”) at 28. Congress has pushed back EPA’s statutory deadline for completing these
13 initial registration reviews to October 1, 2026. Consolidated Appropriations Act, 2023, Pub. L. No.
14 117-328, Div. HH, § 711, 136 Stat. 6083 (2022).

15 In FIFRA, Congress granted the EPA Administrator the authority to “exempt from the
16 requirements of this Act by regulation any pesticide which the Administrator determines either (1)
17 to be adequately regulated by another Federal agency, or (2) to be of a character which is
18 unnecessary to be subject to this Act in order to carry out the purposes of this Act.” 7 U.S.C.
19 § 136w(b). If an unregistered pesticide is exempted, the EPA Administrator may still “limit [its]
20 distribution, sale, or use” by regulations, the violation of which is an unlawful act. 7 U.S.C.
21 §§ 136a(a), 136j(a)(2)(S).

22 Pursuant to its authority under section 136w, subdivision (b), the EPA in 1988 created the
23 “Treated Article Exemption” in 40 C.F.R. § 152.25. 53 Fed. Reg. 15977 (May 4, 1988). The
24 Administrator’s exemption authority and this regulation are central to the current litigation. In full,
25 the exemption states:

26 **§ 152.25 Exemptions for pesticides of a character not requiring FIFRA regulation.**

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

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

5 40 C.F.R. § 152.25(a). In subsections (b) through (f), section 152.25 lists other exempted pesticides,
6 including “Pheromones and pheromone traps,” “Preservatives for biological specimens” like
7 embalming fluids, “Foods,” “Natural cedar,” and a long list of “Minimum risk pesticides” like
8 citronella, garlic, peppermint, and zinc. 40 C.F.R. § 152.25(b)-(f). Plaintiffs asserted in their
9 petition and the EPA agreed “that the codified regulatory text and the proposed and final rule
10 preambles do not discuss whether the exemption applies to pesticide-treated seed.” AR 68.

11 FIFRA contains a section allowing for judicial review of EPA decisions under the statute’s
12 regulatory regime. 7 U.S.C. § 136n. Circuit courts of appeals are granted jurisdiction to hear a
13 challenge to the validity of orders issued by the Administrator after a hearing. *Id.*, subd. (b). Federal
14 district courts may review any other final actions of the Administrator “not committed to the
15 discretion of the Administrator by law.” *Id.*, subd. (a).

16 **II. FIFRA As Applied To Neonicotinoid Treated Seeds**

17 Plaintiffs challenge how the EPA has decided to apply this regulatory framework to seeds
18 treated by a particular kind of pesticide called neonicotinoids. Neonicotinoids are “systemic”
19 pesticides, which means they are, in the terms of plaintiffs’ 2017 citizen petition, “pesticide delivery
20 devices.” AR 11. When applied to a seed, the active ingredient of the pesticide circulates through
21 the systems of the resulting plant. *Id.*; AR 59 n.37. Various types of neonicotinoids have been
22 registered under FIFRA and they can be sprayed over fields or applied directly on seeds before
23 planting; seed treatment accounts for approximately ninety-five percent of the land affected by
24 neonicotinoids.³ AR 6.

25 Once neonicotinoids have been applied to seeds, the EPA agrees with plaintiffs that the
26 treated seeds themselves become “pesticides” as defined by FIFRA. AR 76-77; 7 U.S.C. § 136(u).

27
28 ³ Spraying neonicotinoids onto planted fields or applying it directly to the soil results in
higher pesticide residues than the use of seed treatments. AR 2439.

1 There is no dispute that the treated seeds are unregistered pesticides. The central dispute here is
2 whether the treated seeds, as unregistered pesticides, are properly exempted from FIFRA’s
3 restrictions on unregistered pesticides by the Treated Article Exemption.

4 Neonicotinoid treated seeds are currently subject to some regulatory requirements. Under
5 FIFRA’s framework, neonicotinoids must be applied to seeds in a manner consistent with the EPA’s
6 parameters for the registered pesticide. AR 87. The requirements for the registered neonicotinoid
7 might include printing a seed bag tag that tells the end users how to appropriately use the treated
8 seed. *Id.* If a company applies the treating neonicotinoid to a type of seed not approved for that
9 neonicotinoid in its registration, or distributes and sells the treated seed without seed bag tags
10 required by the neonicotinoid’s registration, then the pesticide is considered unregistered and its
11 distribution and sale is subject to possible enforcement action. AR 87-88. At this point the treated
12 seed is also an unexempted pesticide, because the Treated Article Exemption only applies “if the
13 pesticide is registered for such use.” 40 C.F.R. § 152.25(a); AR 87-88.

14 However, while FIFRA prohibits the distribution and sale of unregistered pesticides,
15 plaintiffs assert and the EPA agrees that FIFRA does not contemplate enforcement to curtail any
16 improper *use* of unregistered pesticides.⁴ AR 88. A neonicotinoid may be applied to seeds within
17 the parameters of its registration and the seed bag tag could have the instructions required by the
18 EPA, but farmers may ignore those instructions. If they do, there are no current legal repercussions.⁵

19 20 **III. Impact of Neonicotinoid Treated Seeds**

21 The petition and the briefing papers focus on three particular active ingredients:
22 imidacloprid, thiamethoxam, and clothianidin. *See, e.g.*, AR 17. These pesticides were registered
23 by the EPA in 1994, 2000, and 2003, respectively. Dkt. No. 1 (“Compl.”) ¶ 37. The agricultural
24 use of neonicotinoids grew slowly from 1994 to 2003, then increased exponentially from
25

26 ⁴ FIFRA prohibits the “use of any registered pesticide in a manner inconsistent with its
27 labeling.” 7 U.S.C. § 136j(a)(2)(G). Treated seeds are unregistered pesticides.

28 ⁵ In its petition denial, the EPA stated that it has no evidence showing that labeling
instructions on treating pesticides or seed bag tags are being ignored. AR 92.

1 approximately 500,000 pounds in 2003 to nearly 8,000,000 pounds in 2014. *Id.* As noted above,
2 these pesticides have not yet completed their first registration review process.

3 The impact these neonicotinoids have on the environment and agricultural yield is hotly
4 contested by the parties. Plaintiffs argue that neonicotinoid treated seeds come with heavy costs
5 and few benefits. They stress a finding from one study that 80-98% of the pesticidal treatment falls
6 off the seed into the surrounding environment. AR 3968. In their petition, plaintiffs cited studies
7 published in 2015 and 2016 that conclude that neonicotinoids weaken honey bee colonies,
8 contaminate nearby vegetation and aquatic ecosystems, and poison birds. AR 20-24, 31-33. The
9 petition noted the European Union prohibited neonicotinoid seed treatments for most crops and that
10 the U.S. Fish and Wildlife Service (“FWS”) banned neonicotinoids in all National Wildlife Refuges.
11 AR 18-20. The FWS singled out neonicotinoid treated seeds as a factor in the listing of three species
12 on the endangered species list, one bee species and two butterfly species. AR 27. On the other side
13 of the cost-benefit equation, the petition cited a Center for Food Safety review of published scientific
14 articles that concluded neonicotinoid treated seeds offer “no net yield benefit to farmers across the
15 majority of crop-planting contexts.” AR 30. The petition also cited a 2014 study by the EPA that
16 determined these treated seeds produced “limited to no benefit” for soybean growers. AR 31.⁶

17 Unsurprisingly, the intervenor defendants reach a very different conclusion.⁷ Several
18 representatives of the intervenor defendants submitted comments in response to the petition. They
19 assert that seed treatment reduces the overall amount of pesticides used compared to spraying and
20 “minimize[s] off-target exposure.” AR 235. Further, seed treatment increases crop yields across
21 numerous crops, including 4% and 13-20% increases for soybean and corn yields, respectively. AR
22

23 ⁶ Intervenor defendants, a group of agricultural industry associations, contend that the EPA
24 changed these findings in 2017 to conclude that treated seeds provided \$4 to \$23 in benefit per acre.
25 Dkt. No. 69 (“Intervenor Defs.’ Opp’n”) at 13 (citing AR 2660-67). Plaintiffs acknowledge “EPA
26 amended certain findings from its original report in 2017 under the Trump Administration, to reflect
27 industry comments about regional findings.” Pls.’ Reply at 46 n.44.

28 ⁷ As a regulating agency, the EPA in its petition denial emphasizes that it “quantitatively and
qualitatively characterizes the possible transport routes and exposures of non-target organisms” and
“conducts thorough assessments of the seed treatment uses.” AR 58-59. After pointing to its data
in registration and registration review documents, the agency notes that “in summary, EPA disagrees
with the Petition claims relating to the adequacy of EPA assessments.” AR 58.

1 under the FIFRA’s Treated Article Exemption. AR 5. The Petition requested the EPA either amend
2 40 C.F.R. § 152.25(a) “to clarify that it does not apply to seeds for planting coated with systemic
3 pesticides, such as the neonicotinoids, that are intended to kill pests of the plant instead of pests of
4 the seed itself” or by publishing a “final, formal, agency interpretation in the Federal Register stating
5 that EPA interprets the exemption in 40 C.F.R. § 152.25(a) not to apply to seeds for planting coated
6 with systemic pesticides, such as the neonicotinoids. . . .” AR 8. The Petition further requested the
7 EPA “[a]ggressively enforce FIFRA’s numerous pesticide registration and labeling requirements
8 for each separate crop seed product that is coated with a neonicotinoid or other systemic insecticidal
9 chemical.” *Id.*

10 In December 2021, having not yet received a response from the EPA, plaintiffs filed an
11 undue delay lawsuit. Compl. ¶ 104; *Center for Food Safety v. EPA*, No. 21-cv-9640 (N.D. Cal. Dec.
12 14, 2021). As a result, EPA agreed to respond to the Petition by September 30, 2022. Compl. ¶
13 104. On September 27, 2022, the EPA denied the requests in the Petition. AR 48-103. Plaintiffs
14 filed this lawsuit in May 2023 against the EPA and its administrator, Michael Regan (collectively,
15 “defendant”). *See generally* Compl. In October 2023, the Court granted intervenor defendant status
16 to a group of agricultural industry associations. Dkt. No. 45.

17 Plaintiffs, defendant, and intervenors have filed cross motions for summary judgment. Dkt.
18 Nos. 61, 68 and 69.

19 20 **V. Requested Relief and Proposed Alternatives**

21 The Petition requested that EPA either amend or interpret the Treated Article Exemption so
22 that it would not apply to seeds treated with a systemic pesticide intended to kill pests of the plant,
23 not the seed. AR 8. The Petition also requested that EPA aggressively enforce registration and
24 labeling requirements for seeds treated with systemic pesticides. *Id.*

25 In their complaint in this litigation, plaintiffs assert two claims for relief. First, plaintiffs
26 contend under the Administrative Procedure Act (“APA”) that the EPA’s formal decision in the
27 Petition denial to apply the Treated Article Exemption to neonicotinoid treated seeds was “arbitrary,
28 capricious, an abuse of discretion, or otherwise not in accordance with law.” Compl. ¶¶ 149-161

1 (quoting 5 U.S.C. § 706(2)(A)). Second, plaintiffs argue that the EPA’s application of the
 2 exemption to neonicotinoid treated seeds exceeds its statutory authority under FIFRA, which limits
 3 the EPA’s authority to exempt only those pesticides “of a character not requiring registration under
 4 FIFRA.” Compl. ¶ 165 (quoting 7 U.S.C. § 136w(b)). Under the APA, a court shall set aside agency
 5 actions “in excess of statutory jurisdiction [or] authority.” 5 U.S.C. § 706(2)(C). In essence, the
 6 first claim says the Treated Article Exemption as written cannot cover neonicotinoid treated seeds,
 7 while the second claim says the EPA cannot ever exempt neonicotinoid treated seeds from FIFRA’s
 8 requirements, no matter how the agency crafts its exemptions regulations.

9 In its Petition denial, the EPA stated its intention to issue a notice of proposed rulemaking
 10 that would (1) seek information about whether treated seeds are being used inconsistently with the
 11 labeling instructions for the registered treating pesticide; and (2) using its authority under 7 U.S.C.
 12 § 136a(a), explore issuance of a rule to regulate pesticide-treated seed to ensure it is used according
 13 to the labeling instructions for the treating pesticide and the treated seed.⁸ AR 50. In their filing
 14 papers, both the EPA and intervenor defendants also maintain that plaintiffs’ impact concerns are
 15 more properly considered in the ongoing registration review processes for the treating pesticides,
 16 not by creating a new registration for the treated seeds. *See* EPA Opp’n at 28-30; Intervenor Defs.’
 17 Opp’n at 7-8. Alternatively, the EPA suggests that plaintiffs could submit a petition to cancel or
 18 suspend the registration of any of the treating pesticides. EPA Opp’n at 31 n.12.

19 20 LEGAL STANDARD

21 Claims under FIFRA are reviewed under the standards of the APA, 5 U.S.C. § 701 et seq.
 22 *See Ellis v. Housenger*, 252 F. Supp. 3d 800, 808 (N.D. Cal. 2017). In APA cases, “the district court
 23 acts like an appellate court, and the entire case is a question of law.” *Tolowa Nation v. United States*,
 24 380 F. Supp. 3d 959, 963 (N.D. Cal. 2019) (internal quotation marks and citation omitted). “Because
 25 this is a record review case, we may direct that summary judgment be granted to either party based
 26 upon our de novo review of the administrative record.” *Pit River Tribe v. U.S. Forest Serv.*, 469

27
 28 ⁸ The EPA issued its advanced notice of proposed rulemaking on October 13, 2023. 88 Fed. Reg. 70625.

1 F.3d 768, 778 (9th Cir. 2006) (internal quotation marks and citation omitted); *Riddell v. Unum Life*
 2 *Ins. Co. of Am.*, 457 F.3d 861, 864 (8th Cir. 2006) (explaining that judgment on the administrative
 3 record is “a form of summary judgment”). Under the APA, the court “shall” set aside any agency
 4 decision that the Court finds is “arbitrary, capricious, an abuse of discretion, or otherwise not in
 5 accordance with law,” or “in excess of statutory jurisdiction [or] authority.” 5 U.S.C. § 706(2)(A),
 6 (C).

7 DISCUSSION

8 I. Subject Matter Jurisdiction

9 “A court’s [s]ubject-matter jurisdiction can never be waived or forfeited . . . and courts are
 10 obligated to consider *sua sponte* requirements that go[] to subject-matter jurisdiction.” (*Kwai Fun*
 11 *Wong v. Beebe*, 732 F.3d 1030, 1035-36 (9th Cir. 2013) (internal quotation marks and citations
 12 omitted). Federal district courts generally have jurisdiction to hear challenges to federal agency
 13 action under federal question jurisdiction, 28 U.S.C. § 1331. *Axon Enter., Inc. v. Fed. Trade*
 14 *Comm’n*, 598 U.S. 175, 185 (2023); *Owner-Operators Indep. Drivers Ass’n of Am., Inc. v. Skinner*,
 15 931 F.2d 582, 585 (9th Cir. 1991). But Congress sometimes precludes such jurisdiction through
 16 “[a] special statutory review scheme,” often by transferring jurisdiction directly to the circuit courts
 17 of appeal. *Id.*⁹

18 FIFRA provides for judicial review of the EPA’s actions in 7 U.S.C. § 136n. Subsection (a)
 19 states in full:

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

24 Subsection (b) states in relevant part:

25 ⁹ The APA frames the same conclusion a different way: “The form of proceeding for judicial
 26 review is the special statutory review proceeding relevant to the subject matter in a court specified
 27 by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including
 28 actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus,
 in a court of competent jurisdiction.” 5 U.S.C. § 703. “Agency action made reviewable by statute
 and final agency action for which there is no other adequate remedy in a court are subject to judicial
 review.” 5 U.S.C. § 704.

1 In the case of actual controversy as to the validity of any order issued by the Administrator
 2 following a public hearing, any person who will be adversely affected by such order and
 3 who had been a party to the proceedings may obtain judicial review by filing in the United
 4 States court of appeals for the circuit . . . , within 60 days after the entry of such order, a
 petition praying that the order be set aside in whole or in part. . . . Upon the filing of such
 petition the court shall have exclusive jurisdiction to affirm or set aside the order complained
 of in whole or in part.

5 This Court requested that plaintiffs and defendant EPA submit supplemental briefing on whether
 6 section 136n precludes district court jurisdiction under the circumstances of this case. Dkt. No. 79.

7 After reviewing the parties' briefing and relevant law, the Court determines that it has subject
 8 matter jurisdiction over plaintiffs' first claim, but not their second. The Court's jurisdiction is
 9 granted by FIFRA's jurisdictional statute, which precludes general jurisdiction under the APA.

10
 11 **A. The FIFRA statutory review scheme precludes general federal question
 12 jurisdiction under the APA.**

13 Plaintiffs argue this Court has federal question jurisdiction under the APA. Dkt. No. 84
 14 ("Pls.' Suppl. Br.") at 1-3. While the APA "embodies a basic presumption of judicial review,"
 15 review is not available when "a relevant statute precludes it." *Dep't of Com. v. New York*, 588 U.S.
 16 752, 771 (2019) (internal quotation marks and citations omitted). "[W]hen two jurisdictional
 17 statutes draw different routes of appeal, the well-established rule is to apply only the more specific
 18 legislation." *Ctr. for Biological Diversity v. Env't Prot. Agency*, 847 F.3d 1075, 1089 (9th Cir. 2017)
 19 (internal quotation marks and citation omitted). Plaintiffs do not directly address this preclusion
 20 argument.

21 The Eighth Circuit has held that "the APA does not operate separately from FIFRA, but
 22 instead as a part of FIFRA." *Defs. of Wildlife v. Adm'r, E.P.A.*, 882 F.2d 1294, 1303 (8th Cir.
 23 1989).¹⁰ In that case, the plaintiffs challenged a FIFRA-related decision through two other statutes
 24 that lacked a private right of action, so the plaintiffs relied on the APA and federal question
 25 jurisdiction. *Id.* at 1302. The court concluded that "[b]ecause FIFRA provides a framework for

26
 27 ¹⁰ Legislative history for the comprehensive 1972 FIFRA revisions suggests that Congress
 28 anticipated an incorporation of APA procedures in FIFRA review: "Judicial review in district courts
 will be in accordance with the law generally applicable to administrative procedure." S. Rep. No.
 92-838, at 28 (1972).

1 obtaining judicial review, the district court had no jurisdiction to consider these claims.” *Id.*; see
2 also *Rural & Migrant Ministry v. United States Env't Prot. Agency*, 565 F. Supp. 3d 578, 597
3 (S.D.N.Y. 2020) (holding no cause of action under the APA for challenges to agency actions under
4 FIFRA). The Ninth Circuit has not directly addressed the interaction between the APA and FIFRA,
5 but consistently has found that specific jurisdictional provisions override more general statutes. See
6 *Coos County Board of County Commissioners v. Kempthorne*, 531 F.3d 792, 801 (9th Cir. 2008)
7 (interaction of Endangered Species Act (“ESA”) and APA); *Center for Biological Diversity v. EPA*,
8 847 F.3d at 1089 (interaction of ESA and FIFRA); *American Bird Conservancy v. F.C.C.*, 545 F.3d
9 1190, 1194 (9th Cir. 2008) (interaction of ESA and Communications Act).

10 Plaintiffs’ reliance on *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d 1006
11 (9th Cir. 2008) works against them. In that case, plaintiffs challenged an exemption the EPA granted
12 under the Clean Water Act to certain marine discharges. *Id.* at 1010. Like here, the plaintiffs
13 asserted two causes of action under the APA, 5 U.S.C. § 706(2)(A) and (C). *Id.* at 1014. On appeal,
14 the Ninth Circuit acknowledged that the district court would have general federal question
15 jurisdiction “unless some other statute divested the district court of jurisdiction.” *Id.* at 1015. The
16 court reviewed the Clean Water Act’s jurisdictional provisions providing for direct circuit court
17 review, but found that neither of the two potentially relevant categories applied. *Id.* at 1015-18. As
18 such, the district court was not divested of jurisdiction. *Id.* at 1015. However, had the Clean Water
19 Act’s jurisdictional provisions applied, the Ninth Circuit acknowledged the district court would have
20 lacked general federal question jurisdiction. *Id.* Whereas the Clean Water Act provides only that
21 specific decisions must be reviewed by the courts of appeal, FIFRA’s jurisdictional provisions
22 broadly cover “any order” or “other final actions.” 7 U.S.C. § 136n.

23 From this review, the Court concludes that FIFRA’s comprehensive provision for judicial
24 review divests this Court of general federal question jurisdiction under the APA. Plaintiffs must
25 therefore establish jurisdiction under the terms of 7 U.S.C. § 136n, FIFRA’s jurisdictional
26 framework.

1 **B. FIFRA provides jurisdiction to district courts over “other final actions” of the**
 2 **EPA Administrator, including this rulemaking response.**

3 The parties dispute whether the EPA’s denial of the Petition was an “order issued by the
 4 Administrator following a public hearing” or an “other final action[] of the Administrator not
 5 committed to the discretion of the Administration by law” under the terms of FIFRA’s jurisdictional
 6 statute. *See* 7 U.S.C. § 136n(a) and (b). If the Court finds the denial to be an “other final action,”
 7 subsection (a) grants the district court jurisdiction. If the denial was an “order . . . following a public
 8 hearing,” the statute provides exclusive review to the court of appeals.¹¹ 7 U.S.C. § 136n(b). Since
 9 plaintiffs filed this lawsuit after the 60-day appeal period in subsection (b) expired, considering the
 10 denial an “order . . . following a public hearing” would in essence prevent plaintiffs from seeking
 11 any judicial review of the Petition denial. The Court looks at FIFRA’s text and legislative history
 12 and relevant case law to decide this question.

13 **1. Textual Analysis**

14 FIFRA does not define the term “order.” *See* 7 U.S.C. 136. In the absence of a definition,
 15 plaintiffs point to how the term “order” is specifically used in other parts of FIFRA. Pls.’ Suppl.
 16 Br. at 6-7. For example, FIFRA uses the term “order” in sections regarding cancellations (7 U.S.C.
 17 § 136a-1(d)(5)), suspensions (§ 136d(c)), stop sale orders (§ 136k(a)), and recall orders (§ 136q(b)).
 18 Plaintiffs contrast this usage—which focuses on individual pesticidal product determinations—with
 19 the EPA’s actions in issuing the Treated Article Exemption and denying the Petition, which they
 20 argue is more akin to rulemaking. Pls.’ Suppl. Br. at 6-8. For its part, the EPA argues that the APA
 21 definition of “order” should apply. Dkt. No. 83 (“Def.’s Suppl. Br.”) at 4-5. The APA defines an
 22 order as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or
 23 declaratory in form, of an agency in a matter other than rule making but including licensing.” 5
 24 U.S.C. § 551(6). An earlier draft of the 1972 FIFRA bill explicitly referred to the APA definition
 25

26
 27 ¹¹ The Ninth Circuit has held that publication of notice in the Federal Register with an
 28 opportunity for comment constitutes a public hearing. *Ctr. for Biological Diversity v. Env’t Prot.*
Agency, 847 F.3d at 1088-89 (citing *United Farm Workers of Am., AFL-CIO v. Adm’r, E.P.A.*, 592
 F.3d 1080, 1082-84 (9th Cir. 2010). The EPA filed a notice and solicited comments on the petition.
 AR 1. Consequently, there was a public hearing in this matter.

1 of order, although that language was subsequently removed. *See* H.R. 10729, 92nd Cong. § 16 (as
2 introduced in House, Sept. 16, 1971).

3 The APA’s definition of “order” is useful because it highlights the contrast within the APA
4 between adjudicatory functions and rulemaking functions.

5 Two principal characteristics distinguish rulemaking from adjudication. First, adjudications
6 resolve disputes among specific individuals in specific cases, whereas rulemaking affects
7 the rights of broad classes of unspecified individuals. Second, because adjudications involve
8 concrete disputes, they have an immediate effect on specific individuals (those involved in
the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on

9 *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (citations omitted). By
10 the APA’s definition, an “order” cannot result from rulemaking. *See* 5 U.S.C. § 551(6).

11 The EPA’s analysis that its Petition denial qualifies as an “order” under the APA definition
12 is unpersuasive. The Petition addresses the interpretation of the Treated Article Exemption, an
13 agency regulation. The Petition asked for a change in the rule text or the publication of an
14 authoritative interpretation of the rule. AR 8. This request was “prospective, and has a definitive
15 effect on individuals only after the rule subsequently is applied.” *See Yesler Terrace*, 37 F.3d at
16 448. Even though EPA denied the Petition, the action under consideration was within the bucket of
17 rulemaking, not adjudication. Moreover, FIFRA’s use of the term “order” aligns with the distinction
18 between adjudication and rulemaking. Cancellation orders, suspension orders, and stop sale orders
19 concern the EPA’s decision-making regarding specific pesticide product registrations. In contrast,
20 the decision about whether to exempt neonicotinoid treated seeds affects a broader category of
21 pesticide, not a specific registration.

22 23 **2. Legislative History**

24 Taken as a whole, the relevant legislative history of the 1972 FIFRA bill establishing these
25 jurisdictional provisions does not point to a contrary result. In reviewing this history, the Ninth
26 Circuit concluded

27 that Congress did intend to limit review of the agency's administrative decisions issued after
28 hearing to the Circuit Courts. Congress' purposes in adopting this technique can be
enumerated as follows: (1) A desire to limit the number of conflicting decisions to the

1 smallest possible number; (2) To obtain finality of decision as rapidly as possible. . . . [T]he
2 main thrust of Congress was to have final decisions of the Administrator passed on to the
3 Court of Appeals where there was an adequate administrative record for the Court of Appeals
4 to review the propriety of the action. Such a record, of course, is developed by a “hearing.”
5 This is the rationale of the bifurcated judicial review provision enacted by Congress.

6 *AMVAC Chem. Corp. v. U.S. E.P.A.*, 653 F.2d 1260, 1263, 1265 (9th Cir. 1980). But that court also
7 noted that “Congress . . . specifically provides for review by the District Court of ‘other final agency
8 actions not committed to agency discretion by law.’” *Id.* at 1263.¹² It is unclear whether Congress
9 considered the broader meaning of “public hearing”—including any action after notice and public
10 comment—that courts do today. The final enacted bill appears to distinguish between “public
11 hearings” and “solicitation of views,” requiring that the Administrator publish notice of “public
12 hearings” in the Federal Register. Pub. L. No. 92-516, § 21, 86 Stat. 996 (1972).

13 Further, earlier versions of the bill indicate a distinction between “orders” and “rule making”
14 actions. When introduced in 1971, subsection (a) of what is now section 136n incorporated the
15 procedures of the APA and subsection (b) called for circuit court review of any order following a
16 public hearing. H.R. 10729, 92nd Cong. § 16 (as introduced in House, Sept. 16, 1971). Subsection
17 (a) noted that APA procedures applied to “rules, rule making, orders, adjudication, licensing,
18 sanctions, agency proceedings, and agency actions” as the terms were defined in the APA, with the
19 exception for orders following a public hearing. *Id.* Later, when considered by the Senate, the
20 language referring to the APA was replaced with the current language about district court review.
21 *See* H.R. 10729, 92nd Cong. § 16 (as reported in Senate, July 19, 1972). Reasons for the change
22 are sparse in the legislative record. A senate report tersely explained the new language “simplified
23 the procedures for judicial review” and “provides for judicial review by the court of appeals in all
24 cases where there has been an administrative hearing and by the district court in all cases where
25 there has not been an administrative hearing.” S. Rep. No. 92-838, at 12, 28 (1972). Nothing in the
26 record suggests Congress intended to define “order” differently in FIFRA than in the APA.

27
28 ¹² In the *AMVAC* case, the court of appeals determined that the district court had jurisdiction
over the question of whether the agency erred in not holding a hearing. *Id.* at 1265.

3. Case Law

1
2 Plaintiffs cite several cases where district courts exercised jurisdiction to review EPA actions
3 under FIFRA, although none of them are directly on point. The most helpful is *Reckitt Benckiser*
4 *Inc. v. E.P.A.*, 613 F.3d 1131, 1136 (D.C. Cir. 2010), where a company challenged EPA’s
5 interpretation of its authority under FIFRA to initiate a pesticide misbranding enforcement action
6 without first cancelling the pesticide’s current registration. The D.C. Circuit determined EPA’s
7 interpretation was not an order following a public hearing that would channel jurisdiction to the
8 court of appeal under section 136n, subdivision (b). *Id.* at 1141. Instead, the appellate court
9 determined the district court had jurisdiction to consider a challenge to the EPA’s interpretation of
10 its authority under the “other final action[.]” language in section 136n, subdivision (a). *Id.* However,
11 there does not appear to have been any notice and comment period that could amount to a public
12 hearing, distinguishing *Reckitt* from this case.

13 Cases that might suggest the Court lacks jurisdiction are likewise distinguishable. In *Ellis*
14 *v. Housenger*, 252 F. Supp. 3d at 816, the court determined it lacked jurisdiction to consider a
15 challenge to pesticide product registrations that followed a notice and comment period, but a
16 registration decision, similar to a license, falls more easily into the APA’s definition of “order.” *See*
17 5 U.S.C. § 551(6). The EPA also directs the Court to *Silberstein v. U.S. Securities and Exchange*
18 *Commission*, 153 F. Supp. 3d 233, 237 (D.D.C. 2016), where that district court characterized a
19 potential response to a petition for rulemaking as a “final order” that was only appealable at the
20 circuit court. But the statutory scheme at issue there, 15 U.S.C. § 78y, specifically called for judicial
21 review in the circuit courts of “a final order” or, separately, “a rule of the Commission.” Therefore,
22 whether the court called a response to a rulemaking petition an order or a rule, the result would have
23 been the same: review was only allowed in the circuit court. Similarly, in *F.C.C. v. ITT World*
24 *Communications, Inc.*, 466 U.S. 463, 468 (1984), the Supreme Court considered a denial of a
25 rulemaking petition to be a final order, which was appealable exclusively in the circuit court per the
26 statutory scheme. The district court thus lacked jurisdiction to hear a claim that the federal agency
27 acted ultra vires, as this claim “sought to enforce the same restrictions upon agency conduct as did
28 the petition for rulemaking.” *Id.* Again, though, the statutory scheme in that case only refers to

1 “final orders” and did not present the central juxtaposition in this case: what is an order versus what
2 is another final action.

3 4 **4. Conclusion**

5 Considering the statutory text, history, and jurisprudence, the Court holds it has subject
6 matter jurisdiction over this litigation under the “other final actions” clause of 7 U.S.C. § 136n(a).
7 The EPA’s Petition denial was not an adjudicatory order, but rather a form of interpretative
8 rulemaking, even though no changes to the agency’s rules resulted. Consequently, this action is
9 more appropriately considered an “other final action” and the Court retains jurisdiction.

10 11 **C. The statutory registration review process implicitly precludes jurisdiction on 12 plaintiffs’ second claim.**

13 As a separate argument, EPA asserts that the Court lacks jurisdiction to hear plaintiffs’
14 second claim because it is in effect “a direct attack on EPA’s ongoing registration review for
15 pesticides used to treat seeds.” EPA Opp’n at 25-27; Dkt. No. 78 (“EPA Reply”) at 1-2. The proper
16 forum for plaintiffs’ challenge, in the EPA’s view, is an appeal of the registration review processes
17 once they have finalized. *Id.* Since that process involves a “public hearing,” the appropriate court
18 to hear a subsequent challenge would be the court of appeals. *Id.* (citing 7 U.S.C. § 136n).

19 While a statute may explicitly foreclose avenues of judicial review, Congress can also
20 preclude review “implicitly, by specifying a different method to resolve claims about agency
21 action.” *Axon*, 598 U.S. at 185. The primary question for courts is “whether the particular claims
22 brought were of the type Congress intended to be reviewed within this statutory structure.” *Id.* at
23 186 (internal quotation marks and citation omitted). Courts consider three factors in this inquiry,
24 known as the *Thunder Basin* factors: “First, could precluding district court jurisdiction foreclose all
25 meaningful judicial review of the claim? Next, is the claim wholly collateral to [the] statute’s review
26 provisions? And last, is the claim outside the agency’s expertise?” *Id.* (internal quotation marks
27 and citations omitted). Affirmative answers to these questions suggest that Congress did not intend
28 to limit jurisdiction. *Id.* In *Axon*, the Supreme Court held that a constitutional separation-of-powers

1 claim against agency administrative law judges belonged in the district court because it was
2 fundamentally distinct from claims against substantive agency decisions. *Id.* at 195-96.

3 Arguably, a consideration of the first *Thunder Basin* factor weighs in favor of district court
4 jurisdiction. The EPA asserts that plaintiffs have an opportunity for “meaningful judicial review”
5 of their ultra vires claims through the registration review process. EPA Opp’n at 26. But plaintiffs
6 insist their challenge “has nothing to do with the outcome of EPA’s registration review of the three
7 major neonicotinoid active ingredients.” Dkt. No. 74 (“Pls.’ Reply”) at 4. Plaintiffs note that that
8 the registration review process cannot produce the outcome they seek: the removal of the exemption
9 applied to neonicotinoid treated seeds. *Id.* at 7. As in *Axon*, plaintiffs argue the agency is acting
10 beyond the limits of its authority.

11 The second *Thunder Basin* factor—whether the ultra vires claim here is “wholly collateral”
12 to the registration review process—weighs against district court jurisdiction over this claim.
13 Plaintiffs argue that neonicotinoid treated seeds are “of a character” requiring registration for several
14 reasons. Dkt. No. 61 (“Pls.’ Mot.”) at 21-24; Pls.’ Reply at 10-14. First, seed treatment has grown
15 to now account for the vast majority of neonicotinoid application. Second, most of the treatment
16 sloughs off the seed into the surrounding environment. Third, neonicotinoid treated seeds have
17 unreasonable adverse effects on the environment. And fourth, treated seeds do not share many
18 characteristics with the other pesticides that EPA has determined it is unnecessary to regulate. The
19 first three arguments overlap significantly with a potential challenge to a registration review
20 decision. These arguments are not “wholly collateral” to the registration review process.

21 The third factor also weighs in favor of the EPA’s argument against jurisdiction. The EPA
22 clearly exercises substantive expertise in assessing the character of neonicotinoid treated seeds.

23 At least two of the three *Thunder Basin* factors suggest that Congress implicitly precluded
24 this backdoor, ultra vires challenge to registration decisions when it enacted FIFRA. The Court
25 finds that the registration review process and subsequent opportunities for judicial appeal will
26 address the “character” of neonicotinoid treated seeds. As such, the Court lacks subject matter
27 jurisdiction to consider plaintiffs’ second claim.

28

II. Motion to Strike Extra-Record Evidence

Plaintiffs have submitted two declarations from Dr. Pierre Mineau attached to their briefing papers. Dkt. Nos. 61-5 and 74-6. The EPA argues that the first Mineau declaration is inadmissible extra-record evidence and untimely, because the Court had established a deadline for putting forward extra-record evidence before filing summary judgment motions. EPA Opp'n at 32-34 (citing Dkt. No. 50); EPA Reply at 12-14. The intervenor defendants filed a motion to strike the second Mineau declaration. Dkt. No. 77. The EPA joined this motion, agreeing that the second declaration was not admissible for any reason other than remedy. Dkt. No. 80.

"[T]he Supreme Court has expressed a general rule that courts reviewing an agency decision are limited to the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)). This rule has a few exceptions that are to be "narrowly construed and applied," including "if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision," or "when supplementing the record is necessary to explain technical terms or complex subject matter." *Id.* (internal quotation marks and citation omitted).

The "relevant factors" exception allows a court to review extra-record evidence "to develop a background against which it can evaluate the integrity of the agency's analysis," but not "to judge the wisdom of the agency's action" or "as a basis for questioning the agency's scientific analyses or conclusions." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Given the nuance of this distinction, this exception has been deemed "the most difficult to apply." *Id.* Courts have disallowed expert declarations that "quibble with the data," *W. Watersheds v. U.S. Forest Serv.*, No. C 08-1460, 2012 WL 1094356, at *7 n.3 (N.D. Cal. Mar. 30, 2012), or an additional study that considers "the same subject matter as evidence already in the record," *Oceana, Inc. v. Pritzker*, No. 16CV06784LHKSVK, 2017 WL 2670733, at *8 (N.D. Cal. June 21, 2017). *See also Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013) ["[T]he document in question must do more than raise 'nuanced points' about a particular issue; it must point out an 'entirely new' general subject matter that the defendant agency failed to consider. [Citation.]"].

1 A declaration may be admitted as an explanation of technical subject matters when it “truly
2 assists the court in understanding” such matters, not when it “merely attempts to argue the
3 sufficiency of the record.” *Alsea Valley All. v. Evans*, 143 F. Supp. 2d 1214, 1216 (D. Or. 2001).
4 The Ninth Circuit has affirmed admission of supplemental declarations when they “condensed and
5 explained existing material in the record.” *W. Watersheds Project v. United States Forest Serv.*,
6 753 F. App'x 465, 467 (9th Cir. 2019).

7 Considering the contours of these exceptions, the Court finds that the majority of the
8 statements in the Mineau declarations do not meet the narrow criteria described above. While the
9 declarations point to gaps in EPA analyses, they do not raise “an ‘entirely new’ general subject
10 matter that the defendant agency failed to consider.” *See Pinnacle Armor*, 923 F. Supp. 2d at 1234.
11 At multiple points, Dr. Mineau refers to additional studies considering “the same subject matter as
12 evidence already in the record.” *See Oceana, Inc. v. Pritzker*, No. 16CV06784LHKSVK, 2017 WL
13 2670733, at *8. And the declarations appear to “attempt[] to argue the sufficiency of the record”
14 more than they condense or explain existing material in the record. *See Alsea Valley All.*, 143 F.
15 Supp. 2d at 1216; *W. Watersheds Project*, 753 F. App'x at 467.

16 However, at least one court in this circuit has allowed parties to submit extra-record material
17 for the purpose of determining an appropriate remedy. *See Oregon Nat. Desert Ass'n v. Bureau of*
18 *Land Mgmt.*, 143 F. Supp. 3d 1064, 1072 (D. Or. 2015). In addition to plaintiffs’ Mineau
19 declarations, the EPA has submitted its own extra-record declarations to comment on the
20 consequences of vacatur. The Court finds this use of extra-record material would be appropriate.

21 The Court therefore GRANTS in part and DENIES in part the intervenor defendants’ motion
22 to strike the Mineau declarations.

23 24 **III. Plaintiffs’ Arbitrary and Capricious Claim**

25 In their first claim, plaintiffs ask the Court to set aside the EPA’s petition denial as “arbitrary,
26 capricious, an abuse of discretion, or otherwise not in accordance with law.” *See* 5 U.S.C.
27 § 706(2)(A); Compl. ¶ 151. Under the arbitrary and capricious standard, the Court must determine
28 whether the agency decision “was based on a consideration of the relevant factors and whether there

1 has been a clear error of judgment.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416
2 (1971), *abrogated on other grounds in Califano v. Sanders*, 430 U.S. 99 (1977). The Supreme Court
3 has explained that “the agency must examine the relevant data and articulate a satisfactory
4 explanation for its action including a rational connection between the facts found and the choice
5 made.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)
6 (internal quotation marks and citation omitted). An agency action is arbitrary and capricious if “the
7 agency has relied on factors which Congress has not intended it to consider, entirely failed to
8 consider an important aspect of the problem, offered an explanation for its decision that runs counter
9 to the evidence before the agency, or is so implausible that it could not be ascribed to a difference
10 in view or the product of agency expertise.” *Id.*

11 Plaintiffs make three different arguments in support of their claim that the EPA’s Petition
12 denial was arbitrary and capricious. First, plaintiffs argue that the EPA improperly interprets the
13 Treated Article Exemption to include neonicotinoid treated seeds. Pls.’ Mot. at 10-19; Pls.’ Reply
14 at 22-32. Second, they contend the Petition denial should be set aside because the EPA ignored
15 documents and evidence in its review. Pls.’ Mot. at 19-20; Pls.’ Reply at 34-35. Third, they say
16 that the Petition denial is arbitrary and capricious because the EPA lacks important impact
17 assessments of neonicotinoid seeds. Pls.’ Mot. at 24-29; Pls.’ Reply at 14-22. For the reasons that
18 follow, all three arguments fall short.

19 20 **A. Interpreting the Treated Article Exemption**

21 Federal courts have traditionally deferred to agency interpretations of their own regulations.
22 *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410
23 (1945). In its 2019 decision *Kisor v. Wilkie*, the Supreme Court clarified when this deference does
24 and does not apply. 588 U.S. 558. An agency interpretation is given deference only if the regulation
25 is “genuinely ambiguous,” a finding which first requires the reviewing court to “exhaust all the
26 traditional tools of construction.” *Id.* at 575 (internal quotation marks and citation omitted). Even
27 then, the agency’s interpretation must be reasonable or “within the zone of ambiguity.” *Id.* at 575-
28 76. And finally, the “character and context” of the interpretation must entitle it to “controlling

1 weight.” *Id.* at 576. Namely, the interpretation must be the authoritative statement of the agency,
 2 it must implicate the agency’s substantive expertise, and it must be a “fair and considered” judgment,
 3 not an after-the-fact rationalization. *Id.* at 576-79. If all of these requirements have been met, a
 4 court should defer to the agency’s interpretation.

5 The critical question here is whether the language of the Treated Article Exemption— “[a]n
 6 article or substance treated with, or containing, a pesticide to protect the article or substance itself”—
 7 applies to neonicotinoid treated seeds. 40 C.F.R. § 152.25(a). The EPA says of course it does—it
 8 is unambiguous. Plaintiffs say of course it does not, finding it unambiguous in the opposite respect.
 9 Following *Kisor*, utilizing all the tools of statutory interpretation, the Court finds the regulation to
 10 be ambiguous. The EPA’s definitive interpretation in the formal Petition denial is a “fair and
 11 considered” judgment and “within the zone of ambiguity” allowed by the text. Thus, the Court
 12 defers to the agency’s interpretation.

13

14 1. Text

15 To reiterate, the Treated Article Exemption states in full:

16 **§ 152.25 Exemptions for pesticides of a character not requiring FIFRA regulation.**

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

19 (a) ***Treated articles or substances.*** An article or substance treated with, or containing, a
 20 pesticide to protect the article or substance itself (for example, paint treated with a pesticide
 21 to protect the paint coating, or wood products treated to protect the wood against insect or
 fungus infestation), if the pesticide is registered for such use.

22 40 C.F.R. § 152.25(a).

23 Plaintiffs present two arguments from the text. First, that a seed is not an “article.” Second,
 24 that the phrase “to protect the article or substance itself” should be read to exclude neonicotinoid
 25 treated seeds when the treating pesticide is intended to protect the plant rather than the seed, and
 26 because much of the treating pesticide runs off the seed into the surrounding environment.

1 Opp'n at 18. Plaintiffs reply that this would lead to absurd results, like the exemption of a shower
2 curtain treated with an antimicrobial where 95% of the pesticidal treatment washed down the drain.
3 Pls.' Reply at 28.¹⁴ However, as a purely textual matter, the language of the Treated Article
4 Exemption supports the EPA's view that the regulation considers the intent of the treatment. This
5 reading of the regulation is entirely reasonable.

6 The Court returns to plaintiffs' first argument, which is that the Treated Article Exemption
7 cannot be read to apply to seeds treated with pesticides designed to protect the growing plant, not
8 the seed. This argument presupposes that the seed and the growing plant are not the same article
9 within the meaning of the regulation. The EPA does not explicitly argue that the seed and the
10 growing seedling or plant need to be considered the same article. AR 81 n.85; EPA Opp'n at 17.
11 Instead, the EPA argues that the regulation "expressly allows the form of the treated article to change
12 and the benefit of the protections to flow through that changed form." EPA Opp'n at 17. Referring
13 to the example of treated wood listed in the text of the regulation, the EPA argues that the treatment
14 there is not for stacked piles of wood "but for the benefit of the wood in use." *Id.* The Petition
15 denial also refers to the example of antimicrobial treatments of plastic products, which start as fibers
16 or threads and then, when combined, become fabric and textile products. AR 80.

17 The Court does not fully agree with plaintiffs that the seed and the growing plant are two
18 separate articles. To be sure, in considering whether the Treated Article Exemption should include
19 a "downstream" form of the product, *see* AR 80, the Court finds a meaningful distinction between
20 the inanimate examples provided the EPA and the case of a seed that transforms into a plant. In the
21 EPA's examples, numerous discrete treated articles combine to form a product, like a fabric or a
22 wooden wall. The articles have not transformed into something new; they have taken on a new use
23 by virtue of a collective form. The transformation from seed to plant, by contrast, involves a small
24 article flourishing into a complex living organism. But if a seed is not the same article as the plant,

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26 ¹⁴ The EPA does not directly dispute plaintiffs' assertions that so much treatment falls off
27 the seed, but the intervenor defendants do. Intervenor Defs. Opp'n at 17-18. They attack the source
28 article of plaintiffs' claim, asserting the source "ignores that the active ingredient metabolizes and
degrades both inside and outside the plant." *Id.* Plaintiffs respond by pointing to EPA data that
shows one of the primary neonicotinoid ingredients, clothianidin, "dissipate[s] very slowly under
terrestrial field conditions." Pls.' Reply at 11-12 (citing AR 1702-03).

1 plaintiffs have not clearly articulated at what point a seed becomes a different article—something
 2 other than a seed. In its life cycle, a seed becomes a seedling and then a plant, but the Court cannot
 3 say with certainty when those transformations occur. And when these lines are blurred, it is
 4 reasonable to question whether a seed is truly a separate article from the plant it becomes.

5 For this reason, the Court concludes from the text that whether the language “to protect the
 6 article . . . itself” excludes seeds treated with neonicotinoids that protect the growing plant is
 7 ambiguous.¹⁵

8

9 2. Structure

10 To argue that the structure of the regulation supports their position, plaintiffs draw
 11 comparisons between the nature of neonicotinoid treated seeds and the other exemptions in 40
 12 C.F.R. § 152.25. Pls.’ Mot. at 15-16. The other subsections promulgated under the EPA’s
 13 exemption authority cover “Pheromones and pheromone traps,” “Preservatives for biological
 14 specimens” like embalming fluids, “Foods,” “Natural cedar,” and a long list of “Minimum risk
 15 pesticides” like citronella, garlic, peppermint, and zinc. 40 C.F.R. § 152.25(b)-(f). These other
 16 exempted pesticides, plaintiffs argue, “are far more innocuous than neonicotinoid-treated seeds” or
 17 used in more limited quantities than treated seeds planted across 150 million acres. Pls.’ Reply at
 18 32 (emphasis removed). The EPA acknowledges that the Treated Article Exemption is different
 19 from the other exemptions in the section as it is the only exception that requires the EPA to make a
 20 registration determination that the use (of the treating pesticide) will not have an unreasonable
 21 adverse effect on the environment. EPA Reply at 11. As such, the exemption “is consistent with
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23 ¹⁵ Even if the Court agreed with plaintiffs that the language excludes seeds treated to protect
 24 the growing plant, that conclusion would not neatly settle the matter. The parties dispute whether
 25 the treating pesticides are registered for the protection of the seed, seedling, or the plant. In the
 26 Petition, plaintiffs claim that thirteen of fifteen listed treating pesticides “lack a clear label claim
 27 that the neonicotinoid ingredient protects the planted seed itself; the labels generally state that the
 28 neonicotinoids are to kill ‘chewing and sucking insect pests’ of the growing *plants*, not of the seeds.”
 AR 13-14; *see also* Pls.’ Reply at 25-27. EPA reviewed the labels and concluded they “permissibly
 refer to the seed and the growing seedling.” AR 81. The intervenor defendants also argue that the
 seed treatments “offer significant protections to the seed,” primarily citing record comments from
 agricultural industry leaders and the EPA. Intervenor Defs.’ Opp’n at 10-11.

1 the statutory structure because the registration requirement, along with other features of the
2 exemption, support the finding that further regulation is unnecessary, and an exemption is
3 warranted.” *Id.*

4 The Court agrees with plaintiffs that the other categories of exemptions in the regulation are,
5 for the most part, seemingly more innocuous than neonicotinoid treated seeds in widespread
6 agricultural use. But the EPA persuasively counters that neonicotinoid treated seeds are exempted
7 not because they are innocuous, but because registering them would be redundant when the text of
8 the regulation requires the treating pesticide to be already “registered for such use.” *See* 40 C.F.R.
9 § 152.25(a).

10 Plaintiffs next compare the EPA’s exemption of neonicotinoid seeds with the EPA’s
11 treatment of plant incorporated protectants (PIPs). Pls.’ Mot. at 18-19; Pls.’ Reply at 33-34. A PIP
12 is defined as “a pesticidal substance that is intended to be produced and used in a living plant, or in
13 the produce thereof, and the genetic material necessary for production of such a pesticidal
14 substance.” 40 C.F.R. § 174.3. The ability of PIPs to “spread and increase in quantity in the
15 environment distinguish them from traditional chemical pesticides” and they are subject to special
16 regulations. 40 C.F.R. § 174.1. The EPA requires registration of the PIP, but the plant is exempt
17 from registration under the authority granted to the EPA to exempt pesticides regulated by a different
18 federal agency. EPA Opp’n at 23; *see* 7 U.S.C. § 136w. According to plaintiffs, the EPA
19 nonetheless regulates certain aspects of PIP plant usage but it does not do the same for neonicotinoid
20 treated seeds, despite notable similarities between the two. Pls.’ Reply at 34. At most, plaintiffs’
21 comparison suggests that some additional regulation may be appropriate for neonicotinoid treated
22 seeds, but does not lend support to the claim that the treated seeds need to be registered. In each
23 case, there is only one layer of registration, for either the PIP or the treating pesticide.

24 25 **3. History**

26 The EPA established the Treated Article Exemption in 40 C.F.R. § 152.25 in 1988. 53 Fed.
27 Reg. 15977. Prior to this rule, the government considered some pesticide-treated articles not to be
28 “pesticides,” and therefore not subject to registration under FIFRA. AR 68-69; *see also First Nat.*

1 *Bank in Albuquerque v. United States*, 552 F.2d 370, 374 (10th Cir. 1977) (commenting that treated
2 seed was not subject to regulation under FIFRA). In 1984, the EPA proposed a rule that declared
3 treated articles not to be pesticides because they did not have a “pesticidal effect.” AR 69-70; 49
4 Fed. Reg. 37937. Between 1984 and 1988, however, the EPA changed course and determined that
5 some treated articles may be pesticides but should be exempt from regulation, thus leading to the
6 creation of the Treated Article Exemption in section 152.25(a). AR 70.

7 In 2000, the EPA addressed treated seeds for the first time, publishing a draft discussion
8 paper “on how pesticide seed treatments are currently regulated in both Canada and the United
9 States” 65 Fed. Reg. 52752. The paper was finalized in 2003. AR 2793. The document
10 reiterated the position that treated seeds are themselves pesticides. AR 2796. The document
11 described the EPA’s position that “the risks of treated seeds . . . could adequately be regulated by
12 means of registration of the treating pesticide.” AR 2797. The paper further elaborated, “The term
13 ‘for the protection of the [seed] itself’ means that the pesticidal protection imparted to the treated
14 seed does not extend beyond the seed itself to offer pesticidal benefits or value attributable to the
15 treated seed.” AR 2797.

16 Plaintiffs argue this early interpretation excluded pesticides where the protection “extends
17 beyond the seed to the seedling and then larger plant.” Pls.’ Reply at 30. The EPA counters that
18 this language distinguished between pesticidal protection for the seed (and what it becomes) with
19 other uses, for example to address mosquitos in an effort to protect health. AR 83-84; EPA Opp’n
20 at 20. The EPA points to two other agency interpretative documents from 2000 and 2015 that
21 explain that products making public health claims do not qualify for the Treated Article Exemption.
22 EPA Opp’n at 20-21 (citing AR 2754-63 and AR 2778). In other words, EPA claims it has
23 consistently interpreted “to protect the article . . . itself” to distinguish products that are treated to
24 protect the product from those treated for a fundamentally different purpose like protection of the
25 product’s user. The Court finds the EPA’s explanation reasonable.

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4. Purpose

Citing a Senate Report, plaintiffs argue the legislative purpose behind FIFRA is to “protect man and his environment.” Pls.’ Mot. 16 (quoting S. Rep. No. 92-838 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3993). Considering this purpose, plaintiffs contend that exempting a widely used and harmful pesticide through the Treated Article Exemption produces absurd results. *Id.* at 17. The EPA points out that the same Senate Report notes that pesticides are “essential to man’s food supply both as to quality and quantity.” EPA Opp’n at 22 (quoting S. Rep. No. 92-838 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3995). The report later concludes, “Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.” S. Rep. No. 92-838 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3996. There can be no doubt that the 1972 FIFRA amendments were meant to expand its regulatory scope and came in response to “mounting public concern about the safety of pesticides and their effect on the environment.” *See Ruckelshaus*, 467 U.S. at 991. The overall regulatory scheme, however, remains one that attempts to balance benefits and harms. *See* 7 U.S.C. 136(bb) (taking into account benefits and costs when defining “unreasonable adverse effects on the environment”). The exemption of certain types of pesticides under such a scheme is not unthinkable.

Neither side speaks at length as to the purpose of the Treated Article Exemption itself. Plaintiffs, without citation, write that “it was adopted to reduce the burden of having to register pesticides that are ‘not of a character’ requiring registration, avoiding unnecessary registrations.” Pls.’ Mot. at 17. In its petition denial and briefs, the EPA explains *how* the regulatory exemption came to be, but not *why*. The preambles to the EPA’s proposed rule in 1984 and adopted rule in 1988 do not provide specific language about why the EPA exercises its exemption authority. *See* 49 Fed. Reg. 37916-18; 53 Fed. Reg. 15954-55.

1 **5. Concluding the *Kisor* Inquiry**

2 Utilizing the tools of statutory interpretation, the Court finds the answer to the question—
3 does the Treated Article Exemption apply to neonicotinoid treated seeds?—is “maybe, maybe not.”
4 Given this ambiguity, the Court proceeds to the final phase of the *Kisor* inquiry. The Court
5 determines that EPA’s interpretation is reasonable and “within the zone of ambiguity.” *See Kisor*,
6 588 U.S. at 575-76. And there is no doubt that the EPA’s decision was authoritative and implicated
7 its substantive expertise. *See id.* at 577-78. Finally, nothing in the record suggests that the EPA’s
8 decision was not a “fair and considered” judgment. *See id.* at 579. It has been the consistent, if not
9 fully articulated, position of the agency for two decades and did not create “unfair surprise” or
10 impose “retroactive liability” on longstanding conduct. *See id.* Since the EPA’s decision here falls
11 within the *Kisor* parameters, it must be accorded deference by this Court.

12 The EPA’s interpretation of its own regulation in the Petition denial is therefore not arbitrary
13 and capricious.

14
15 **B. Failing to Consider Relevant Evidence**

16 Plaintiffs argue alternatively that the EPA’s petition denial was arbitrary and capricious
17 because the agency ignored relevant documents in the record. Pls.’ Mot. at 19; Pls.’ Reply at 34-
18 35. The EPA counters that it directly or indirectly considered the principal documents cited by
19 plaintiffs, then reverts to the argument that these documents are more appropriately considered in
20 the registration review process. EPA Opp’n at 24; EPA Reply at 6.

21 An agency “must examine the relevant data” and its decision is arbitrary and capricious if it
22 “entirely failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43; *see*
23 *also E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 984 (9th Cir. 2020) (holding an asylum
24 rule invalid when did not consider the special protection granted to unaccompanied minors in statute,
25 “an important aspect of the problem”). In evaluating these claims, the Court reviews the “full
26 administrative record,” *Overton Park*, 401 U.S. at 420, which in this case includes documents
27 included in plaintiffs’ granted motion to complete the record. Dkt. No. 57.

1 In the briefing, plaintiffs cite to multiple submitted comments, academic articles, and other
2 record materials that they assert EPA did not consider in its Petition denial. Pls.’ Mot. at 19 n.30-
3 31. The Court has reviewed the record materials cited by the plaintiffs and finds that they raise the
4 same areas of concern as the Petition, with most of these materials highlighting risks to pollinators
5 (*see, e.g.*, AR 148, AR 296, AR 308-09, AR 4270-4352, AR 4497, AR 4578-4609) or aquatic
6 contamination (*see, e.g.*, AR 167, AR 2861-68, AR 4476-77, AR 4497). The EPA’s Petition denial
7 addresses aquatic contamination (AR 60-61) and honey bee health (AR 64-65). While the plaintiffs
8 may not be satisfied with the EPA’s response, the agency has not “entirely failed to consider an
9 important aspect of the problem.” *See State Farm*, 463 U.S. at 43.

10 Plaintiffs’ also point to EPA’s admission that it did not examine the thirty-six original
11 exhibits that plaintiffs submitted with the Petition in 2017. Pls.’ Mot. at 19; Dkt. No. 53-1, Ex. 13;
12 Dkt. No. 54 at 10. Plaintiff CFS asserted that it hand-delivered hard copies of these exhibits to the
13 EPA, but the EPA found no trace of these documents in its files. Dkt. No. 57. This matter was
14 briefed and discussed by the Court on plaintiffs’ earlier motion to complete the administrative
15 record. *See id.* The Court could not resolve the factual issue of what happened to these exhibits
16 after they were hand-delivered to the EPA, but determined they should be deemed “indirectly
17 considered” by the agency and part of the administrative record. *Id.* Like the other record
18 documents noted above, these “missing exhibits”—primarily scientific journal articles and
19 reports—discuss the effects of neonicotinoid treated seeds on the surrounding environment, with
20 the focus again on aquatic contamination and pollinator health.

21 While an agency “must examine the relevant data,” *see State Farm*, 463 U.S. at 43, the Court
22 agrees with the EPA that this data is more relevant to the ongoing registration review process, not
23 the question of whether the Treated Article Exemption should be read to include or exclude
24 neonicotinoid treated seeds. For this reason, the Court does not find the EPA’s Petition denial
25 arbitrary and capricious on these grounds.¹⁶

26
27 ¹⁶ Even if the Court held the EPA acted arbitrarily and capriciously by failing to consider
28 this evidence, the proper remedy would be to remand the matter to the EPA for consideration of the
material in the context of its Petition denial. The Court believes the EPA’s resources would be
better spent considering this material in the context of the ongoing registration review.

1 However, there can be no dispute that these materials are now squarely before the agency.
2 The Court expects that the EPA will incorporate the findings of these reports and studies into its
3 ultimate conclusions in the registration review process for neonicotinoids. If the agency fails to do
4 so, plaintiffs may challenge whether the re-registration is supported by “substantial evidence.” *See*
5 7 U.S.C. § 136n(b).

6
7 **C. Lacking Impact Assessments**

8 Plaintiffs likewise point to several areas of potential neonicotinoid impact where the EPA
9 lacks data. Pls.’ Mot. at 24-29; Pls.’ Reply at 14-21. A gap in an agency’s analysis may lead to an
10 arbitrary and capricious decision. *See Center for Biological Diversity v. Bernhardt*, 982 F.3d 723
11 (9th Cir. 2020) (holding an environmental impact statement arbitrary and capricious under the APA
12 because the analysis lacked a key economic factor). Here, plaintiffs assert that the EPA lacks critical
13 information necessary to assess the impact of neonicotinoid seeds in several ways. First, plaintiffs
14 point to the EPA’s admission that it does not assess the risk of pesticidal seed dust on non-target
15 organisms like honey bees, having failed to develop a quantitative risk assessment. Pls.’ Mot. at 26
16 (citing AR 1835 n.12 and AR 2481); Pls.’ Reply at 16-17 (citing AR 59-60). Second, plaintiffs
17 highlight how the EPA has stated it “lacks information to understand the relative importance of”
18 other routes of exposure for pollinators, including surface water and contaminated soil. Pls.’ Reply
19 at 18 (citing AR 2453 and AR 2478). Third, plaintiffs disagree with the EPA’s conclusion that it
20 adequately assesses neonicotinoid contamination from surface water runoff from fields to nearby
21 waterways. Pls.’ Reply at 19-20.

22 In support of their argument that these data gaps led to an arbitrary and capricious decision,
23 plaintiffs cite *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, where
24 the Ninth Circuit vacated an interim registration for glyphosate, the active ingredient in the
25 weedkiller Roundup. 38 F.4th 34 (9th Cir. 2022). There, the EPA had stated in the record that it
26 could not reach a firm conclusion on whether glyphosate increased cancer risk, but then decided the
27 pesticide was “not likely to be carcinogenic to humans.” *Id.* at 45-47. Noting that the agency must
28 be “coherent and internally consistent,” the court vacated the agency’s conclusions and remanded

1 the matter to the agency. *Id.* at 46, 52. Similarly, in *Pollinator Stewardship Council v. U.S. E.P.A.*,
2 the circuit court vacated and remanded an unconditional registration of the pesticide sulfoxaflor.
3 806 F.3d at 532-33. There again, the agency had been inconsistent. It first conditionally registered
4 the pesticide so that it could receive more data, but then granted an unconditional registration less
5 than seven months later, even though the requested studies had not been submitted. *Id.* at 527. The
6 court concluded:

7 The EPA's basis for unconditionally registering sulfoxaflor in the absence of sufficient data
8 documenting the risk to bees does not hold up under its own rationale. Without sufficient
9 data, the EPA has no real idea whether sulfoxaflor will cause unreasonable adverse effects
on bees, as prohibited by FIFRA. Accordingly, the EPA's decision to register sulfoxaflor
was not supported by substantial evidence.

10 *Id.* at 532.


11 The Court finds the present case distinguishable from the two cases above. *NRDC* and
12 *Pollinator Stewardship Council* differ from this case because they involve challenges to registration
13 decisions, a separate question than what is before the Court. In plaintiffs' first claim, the Court has
14 been asked to determine whether the EPA's decision to apply the Treated Article Exemption to
15 neonicotinoid treated seeds is arbitrary and capricious, not whether the underlying registrations of
16 the treating neonicotinoid pesticides is supported by substantial evidence. Plaintiffs' arguments that
17 the EPA lacks important data has little to do with the language and application of the Treated Article
18 Exception. Plaintiffs' only bridge between this argument and the regulation text is to argue that the
19 EPA cannot determine whether treated seeds "have been determined to be of a character not
20 requiring regulation under FIFRA," as required by the introductory text of the regulation. 40 C.F.R.
21 § 152.25. But that introductory language mirrors the scope of the EPA's delegated authority under
22 FIFRA, so this argument begins to bleed into plaintiffs' second claim. *See* 7 U.S.C. § 136w(b). The
23 Court has already determined that it lacks jurisdiction to consider that. To the extent that plaintiffs'
24 arbitrary and capricious argument here relies on conclusions that would be contested in the
25 registration review process, the Court declines to rule for plaintiffs on those grounds.

1 The Court recognizes that its decision delays final resolution of the longstanding fight over
2 the use of neonicotinoids on this country's farmland. The three primary neonicotinoid active
3 ingredients were initially registered in 1994, 2000, and 2003, before the use of neonicotinoids
4 increased exponentially and their impact studied in greater detail. Compl. ¶ 37. While the
5 registration review process began in 2008 and 2011, it remains in progress and currently is not due
6 until 2026. AR 56; EPA Opp'n at 28; 136 Stat. 6083 (2022). For those convinced the harm of
7 neonicotinoid treated seeds outweighs their benefits, that is indeed a long time to wait, especially
8 since it is now two years past Congress' original due date for registration review. *See* 7 U.S.C.
9 § 136a(g). The Court shares frustration at the protracted pace of the EPA's registration review.¹⁷
10 But while administrative processes can move at a "glacial pace," "impatience [with the process]
11 does not provide a ground to ignore Congress' carefully crafted system of judicial review." *See*
12 *American Bird Conservancy v. F.C.C.*, 545 F.3d at 1195 (internal quotation marks omitted). Any
13 judicial decisions about the unreasonable adverse effects of neonicotinoids must come in a later
14 forum.

15 As EPA itself suggested, plaintiffs have two options to keep this issue before the courts.
16 They can either wait to challenge the results of the registration review process, or they can use
17 emerging science to immediately question the cost-benefit equation of neonicotinoids via a petition
18 to cancel or suspend their registration, as CFS previously has done. *See Ellis v. Housenger*, 252 F.
19 Supp. 3d at 805.

20
21 **IT IS SO ORDERED.**

22 Dated: November 20, 2024

23 
24 SUSAN ILLSTON
25 United States District Judge
26

27
28 ¹⁷ At the summary judgment hearing, counsel for EPA admitted the agency was statutorily
required to finish the registration review process by 2026, but he stated that he did not know if the
agency would meet that deadline.