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NEWSLETTER

More "Bee Protection" Courtroom Activity Is Coming in 2014

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Neonicotinoid pesticides disrupt the nervous systems of insects. They can be used as substitutes for a number of insecticides that present harsher environmental profiles, and at much lower use rates. Increasingly, however, they have come under attack as a potential cause of the substantial reductions in honey bee and other pollinator insect populations in the last few years. That reduction has coincided with the expanded use of the neonicotinoids, leading many to assume causation, even though a number of other potential causes of the decline also have been identified. (These include disease and the concentration of suppliers in the pollination industry, among others.) Moreover, scientific opinion remains divided.

There seems to be no dispute, however, that pollinator population declines are real and potentially quite significant. Aesthetics aside, bees and other pollinators play an important role in commercial agricultural production. But the U.S. Environmental Protection Agency (EPA or the Agency) and the U.S. Department of Agriculture (USDA) have taken much more cautious approaches to the further limitation of the neonicotinoids' use (that is, beyond already-imposed label restrictions) than has the European Union (EU). This has dismayed a number of activist groups, who have mobilized a number of campaigns to limit or eliminate the products' usage.

An announcement by EPA just before Christmas, and arguments set for January 24, 2014, on a lawsuit pending in California, promise to add more fuel to this fire in the new year. Another suit, not likely to be heard before midyear, may draw further attention to it. This article provides an update on these developments.

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2013 Activities

The activist groups first wrote EPA seeking the suspension of the neonicotinoid clothianidin in December 2010. After EPA declined that request, the Center for Food Safety (CFS), Beyond Pesticides, the Pesticide Action Network North America (PANNA), and a number of others filed in March 2012 an "emergency citizens petition" with the Agency seeking the suspension of and other limitations on sale of products employing clothianidin. Four months later–in July 2013–EPA denied the portion of the petition that sought immediate action on the grounds that the petition did not demonstrate the statutorily required existence of an "imminent hazard." But the Agency also opened a docket to receive further public comment on other elements of the petition. The Agency also made clear its intention to consider the risks to pollinators presented by other neonicotinoids in the course of the regularly scheduled 15-year "registration review" of those products. The current round of that review is scheduled to be completed in 2018.

A considerable amount of administrative activity, formal and informal, followed. Perhaps the most important single event, however, was a "Pollinator Summit" convened by EPA and USDA in early March 2013 at the University of Maryland. It focused on the use of the neonicotinoids in seed treatment–a use in which the products had begun replacing a number of pesticides considered more environmentally threatening–and the scientific issues associated with bee declines. EPA remained confident, however, with its fundamental conclusion underlying its original approval of the use of these products: on balance, use of neonicotinoid products is better for the environment than older products, and that neonicotinoid pesticides could safely be continued to be used.

Two weeks after the summit, a suit was filed in U.S. District Court in San Francisco. *Ellis v. Bradbury* (No. C-13-1266LB), filed March 21, 2013, was an eight-count complaint challenging EPA's inaction on the petition and asserting a wide range of claims against EPA's continued registration of two neonicotinoids: clothianidin and thiamethoxam. The plaintiffs filed an amended complaint in May 2013 restating their claims as 14 counts–a challenge to EPA's failure to grant the emergency suspension sought by the March 2012 clothianidin "emergency citizens petition" described above, along with a miscellany of additional claims against the registrations of both that product and thiamethoxam. These include challenges to the products' conditional registrations, alleged failures to comply with the Endangered Species Act (ESA) and several Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) notices and other procedural violations. That amended complaint was also met, later in the year, with new motions to dismiss. (More on those below.)

In the meantime, EPA followed up the pollinator summit with several exercises of its regulatory authority under FIFRA. These included mandates to neonicotinoid pesticide product registrants in July and August 2012 to provide additional efficacy data and pollinator stewardship plans, and to include a new "Pollinator Protection Box" on product labels. That box includes the graphic shown adjacent to this story and notes specific restrictions to protect bees and other pollinators.The mandated amendments, EPA concluded, would ensure that the products meet the FIFRA standard of "not generally caus[ing] unreasonable adverse effects on the environment." FIFRA, Sec. 3(c)(5)(D). Notably, however–and much to the dismay of many activists–the statutory FIFRA standard requires EPA consideration of not only risk, while also taking into account "the economic, social and environmental costs and benefits" of the pesticides' usage.[1] In contrast, EU regulators give far

more weight to the "precautionary principle"–essentially, the rule that if effects are not well defined, limit product usage.

As a consequence, action in Europe against neonicotinoids has been more dramatic. In May 2013, after a critical European Food Safety Authority (EFSA) report and a series of inconclusive votes by intermediate bodies, the European Commission adopted a regulation banning for two years the use of three neonicotinoids–clothianidin, thiamethoxam, and imidacloprid–on any seeds except those used in greenhouses. Although challenged in court, that ban went into effect last month.

Then, in late November 2013, the EFSA's Panel on Plant Protection Products and Their Residues adopted another report, this one finding that mammalian exposure to two neonicotinoids (acetamiprid and imidacloprid) produced harmful developmental effects on the nervous system. This action was announced publicly on December 17, 2013.

The EFSA panel's conclusion was based on the findings of two rat studies. Although the panel noted a number of deficiencies in the studies, and recommended that further studies be undertaken, it also recommended a reduction of reference values used in risk analyses of the two chemicals. To date, presumably because of the recent holidays, reaction has been limited.

2014 Prospects

For its part, EPA responded promptly to the EFSA panel's recommendations in a December 20, 2013 press release. EPA emphasized the limitations of the principal study at issue, and the fact that, in contrast to European authorities, EPA has required high-quality developmental neurotoxicity studies since 1999. The Agency said that nothing it had seen in the cited evaluations changed its view that the products are safe when used in accordance with existing labels. EPA also noted that even if the EFSA risk assessment revisions were credited by EPA, they would not impact the Agency's regulatory positions. Again, reaction to the EPA position has been muted by virtue of the holiday season.

But this lull in attention to neonicotinoids cannot be expected to continue. In addition to the risk that EPA's December press release will trigger new litigation, several activist groups have made major commitments to publicizing this issue and mobilizing opposition. Moreover, further attention is likely to be focused by arguments now scheduled for January 24, 2014, in *Ellis v. Bradbury*.

As noted above, both the government and the principal registrants of the products who have intervened in the case have responded to the May amended complaint with motions to dismiss. Those motions address all but one of the suit's claims–the exception is a challenge to EPA's failure to take emergency action in response to the "emergency petition." Argument on the motions will be heard later this month.

The pending motions raise in part such jurisdictional issues as the lack of final agency action and the lack of ESA jurisdiction in Federal District Court for challenges of the sort advanced in the amended complaint. They also challenge (among other things) the applicability of several of the statutory provisions on which allegations rest, such as the requirement in some circumstances that EPA publish notice of receipt of an

application and EPA's purported obligation to suspend or cancel registration in the face of registrants' alleged failure to comply with registration conditions. In essence, the government's and intervenors' position is that the court should not interfere with an ongoing administrative process that is addressing a complex scientific issue.

While litigation is always unpredictable, these arguments are strong. Consequently, in a vivid example of the old adage "when you don't have the law, argue the facts," the *Ellis* plaintiffs' brief emphasizes their view of the purported massive threat neonicotinoids present to pollinators, and the disaster they believe likely to arise from EPA's failure to more aggressively restrict (if not completely prohibit) their use. Thus, the opening paragraph of their reply brief's "Factual Background" section declares:

"One of every three bites of food we eat is from a bee-pollinated crop. Yet, over the past decade, we have witnessed a steady and alarming decline in bee populations. This past winter was the worst in recent years for bee mortality ...."

Experience suggests we will see similar arguments made in the press surrounding the forthcoming arguments, and whenever the court rules. In this regard, it merits note that among the plaintiffs in the case are CFS, Beyond Pesticides, and PANNA, all of which have extensive anti-neonicotinoid advocacy programs underway.

Another hook for additional attention to these issues will occur somewhat later, when EPA takes final action on the remaining issues raised by pending clothianidin petition. (It seems unlikely EPA will make that decision while the current motions are undecided, however.) While the Agency has made clear its intention to defer decisionmaking on many issues that have been raised as to other neonicotinoids until registration review, action on the remainder of the petition may occur sooner. And depending on the action the Agency takes, this may trigger either a new round of judicial challenges from the petitioners and their supporters, or administrative proceedings of some sort against some or all of the challenged registrations.

One more forum for action in 2014 already has arisen: the challenge filed in the Ninth Circuit of EPA's May 2013 grant of registrations for pesticides containing the active ingredient sulfoxaflor for foliar uses. Sulfoxaflor is the first of yet another generation of pesticides that attack insects' nervous systems. As such, it is another replacement for older chemistries and, indeed, in some uses for neonicotinoids. Nonetheless, a number of the activist groups that have targeted neonicotinoids dispute the different scientific classification of the chemical.

Those groups challenged the sulfoxaflor registration in an action captioned *Pollinator Stewardship Council, et al v. USEPA* (Ninth Cir., Case No. 13-72346). Interestingly, however, despite dramatic characterizations of the product's risks similar to those quoted above, the petitioners have not pushed for prompt action in their case. Although the Petition for Review was filed in July 2013, the first briefs in the case were not filed until December, and all briefing is not scheduled for completion until late March 2014. Based on Ninth Circuit precedent, oral arguments may not be heard for some months thereafter, and a final decision could take some additional time, but the case nonetheless will provide a hook for further anti-neonicotinoid advocacy.

In fact, the *Pollinator Stewardship Council* challenge goes directly to the adequacy of EPA's analysis in determining that the label restrictions and advisories imposed by the Agency required are sufficient to protect honey bees and other pollinators. As such, and in contrast to the *Ellis* case (which does not appear likely to reach the core question of the soundness of EPA's neonicotinoid evaluations), it almost certainly will reach the merits of EPA's scientific and risk-balancing determinations.

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[1]At least one U.S. state has been less conservative, however. In late June 2013, after large bee kills in the areas of Wilsonville and Hillsboro, Oregon, the Oregon Department of Agriculture banned the use for six months of products containing the neonicotinoid dinotefuran.