



AS I SEE IT:


# A Review of Wisconsin Regulatory Reform as Applied to Emerging Contaminants





**Neonics are chemicals often used in Wisconsin to protect corn and soybeans from insects. They pose contamination threats to the environment, and thus their use potentially should be regulated. However, the speed with which chemical producers can create new generations of a product outpaces the ability of the scientific community to assess the impacts of any single chemical compound in the environment. This lag creates a lack of scientific and political consensus needed to act in the interests of society and the economy. This article considers the operation of administrative law in the context of regulation of neonics in Wisconsin.**

BY MARK A. HERMAN

 ver the last 15 years, there has been a relatively rapid evolution in the field of administrative law, at both the federal level and the state level. At the state level, in Wisconsin, legislation has attempted to change who makes and interprets public policy, how administrative rules are enacted, and which factors are considered when making administrative rules. However, these efforts are not conducive to addressing the challenges posed by lack of regulation of chemical products placed into the environment.

Where there is a lack of scientific or political consensus, a more effective approach might be to create a regulatory scheme that is focused on “steering rather than ordering.”<sup>1</sup> Ideally, a steering approach seeks to guide end users to make choices that are more protective of both health and the environment. In the case of neonics, choosing to use fewer chemical products is often revenue neutral for the end users, agricultural producers, while shielding them from the economic impacts of chemical contamination. In the case of neonics, a steering approach would better enable administrative agencies to act on important issues by reducing stakeholder opposition and reducing regulatory burdens. When state agencies seek to steer rather than order, co-equal branches of government may also find the exercise of legislatively delegated powers to be less objectionable.

This article considers the operation of administrative law in the context of regulation in Wisconsin of an emerging contaminant, neonicotinoids (neonics). Recent changes in Wisconsin administrative law are discussed. The article closes by considering the advantages of a steering approach to the problems posed by neonics.

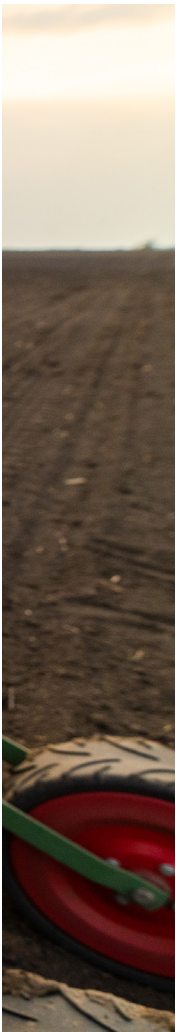
### Neonics Regulation in Wisconsin to Date

Neonics are a class of insecticides, which are agents that are designed to kill one or more specific species of insects. Although neonics can be found in other forms, in Wisconsin they are most commonly deployed as a seed coating for corn and soybean seed. Neonics are highly water transmissible.

When used as seed coating, a neonic is taken up by the plant and is present in every part of it. However, most of the neonic coating on any given seed will be blown off or washed off the plant instead of being used by it.<sup>2</sup> The challenges posed by neonics are their effects on non-targeted species, groundwater, and human health and balancing those concerns against the benefits gained by their use, real or perceived.<sup>3</sup>

The U.S. Environmental Protection Agency (EPA) is responsible for regulating insecticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>4</sup> Three of the most commonly used chemicals in the class are imidacloprid, thiamethoxam, and clothianidin (common neonics). Approval for their use was granted by the EPA in 1994, 2000, and 2003, respectively.<sup>5</sup> None of these common neonics were classified as restricted-use chemicals; they can be used by any person. Under FIFRA, approval is renewed after 15 years.<sup>6</sup> The renewal process for these common neonics began in 2008 and 2011.<sup>7</sup> More than a decade later, these reviews are ongoing.<sup>8</sup>

Within Wisconsin, multiple agencies play a role in regulation of chemicals. The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) has authority to regulate common neonics and as part of this regulation can ban their use.<sup>9</sup> The DATCP has found all common neonics in potable water and irrigation wells in Wisconsin.<sup>10</sup> Consequently, the DATCP requested



that the Wisconsin Department of Health Services (DHS) set standards for the presence of these three common neonics in drinking water before publication of the report *Neonicotinoid Pesticides In Wisconsin Groundwater and Surface Water* in 2019.<sup>11</sup> The DHS proposed standards in 2019 and referred them to the Wisconsin Department of Natural Resources (DNR) for incorporation into the administrative code.<sup>12</sup> The DNR began the rulemaking process in 2019. However, in February 2022, the Natural Resources Board did not approve the proposed standards for the presence of these common neonics (along with other substances, including perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA)) in ground water.<sup>13</sup> The DNR has briefed the Wisconsin Legislature on this issue.<sup>14</sup> In the last session, the legislature did consider bills banning the use of neonics. However, the bills would have barred only the DNR from using neonics.<sup>15</sup> No further attempts to regulate neonics have been made to date.

### Barriers to Regulation

Barriers to regulatory action generally are significant. Among the barriers at

both the federal and the state levels is the cumbersome nature of the administrative rulemaking process. The lack of scientific and political consensus also deters taking action.

**Federal Level.** Under FIFRA, a person seeking approval of a new pesticide provides the scientific data on which EPA approval is based.<sup>16</sup> This might be the only workable way for the EPA to begin the process of reviewing a new pesticide, but systemically it gives the pesticide producer the initiative. At the same time, it takes years for other stakeholders to accumulate evidence of the adverse effects of a given chemical to the degree required to achieve a level of scientific consensus. Without scientific consensus it is difficult to reach a political consensus to regulate a given chemical. This is likely what has made FIFRA recertification of the common neonics such a lengthy process.

Nor have producers paused development of new neonics since the initial approval of their products at the end of the last century. Producers are now on their fourth generation of the neonic family of chemicals. Other stakeholders haven't caught up to the first generation of neonic chemicals yet.

The same hydra-like problem repeats itself with other chemicals, whether they are pharmaceuticals (for example, opioids) or intended for use in consumer goods (for example, the PFAS family of chemicals). The regulatory system is ill equipped to prevent the problems a chemical might pose by preventing its release to the market on the front end.

**Wisconsin Level.** On the back end, the DNR has more flexibility to order the clean-up of chemical contaminants under Wisconsin's Spills Law than perhaps most regulatory agencies in other states.

"Wis. Stat. § 292.01(5) sets forth an explicitly broad definition to identify substances that are deemed hazardous under the Spills Law. No language in the definition states or even suggests that determinations of hazardousness must be done through rulemaking."<sup>17</sup>

However, the DNR's ability to require the clean-up of problem chemicals without rulemaking is at issue in a pending Wisconsin Supreme Court case. The Wisconsin Court of Appeals decision (2-1) would require the DNR to go through the rulemaking process regarding regulation of emerging contaminants as hazardous substances.<sup>18</sup>

What this means in application is that rather than being able to order a clean-up based on observed effects, clean-ups could only be ordered for chemicals where a scientific and political



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consensus has already been reached. But as we have seen in the case of neonics, this process can take decades.

When consensus is reached for regulatory action, an agency is hampered by statutory rulemaking requirements. The rulemaking process has never been simple. 2011 Wis. Act 21 created substantial new procedural requirements for the promulgation of administrative rules.<sup>19</sup> This included the requirements for all agencies to submit proposed scope statements for administrative rules to the Department of Administration for review and to the governor for approval and for the governor to sign the final rule before submitting the rule to the legislature.<sup>20</sup> Executive oversight of executive branch agencies is redundant.<sup>21</sup>

These and other changes to the process gave the legislature no additional control over policymaking, but the formal completion of these steps added

to the complexity and time required to complete the administrative rulemaking process. Wisconsin Statutes chapter 227 now requires at least 25 steps to enact an emergency rule and at least 35 steps to enact a permanent rule.

Promulgation of a permanent rule following all required steps will take at least 24 months, but, since enactment of 2017 Wis. Act 39, scope statements expire after 30 months. Steps must be completed in a given order and on schedule or the process must be completely restarted. This makes it difficult to incorporate stakeholder input, even though this is a required part of the process at various points. In the case of neonics standards for drinking and groundwater, once the Natural Resources Board rejected the proposed rule, there was likely insufficient time to amend the rule via statutorily required procedures before expiration of the scope statement.<sup>22</sup> The result was that

no action has been taken in Wisconsin to limit the impacts of neonics and other known contaminants.

### The Costs of Doing Nothing

The potential economic costs of doing nothing to address neonics are high. As discussed above, seed-applied neonics are taken up by plants as they grow. Some scientists and researchers contend that this causes pollinators to be directly exposed to neonics. They note a correlation between a substantial rise in the use of neonics in the mid-2000s and the drop in pollinator populations.<sup>23</sup> Meanwhile, neonics producers only dispute the degree to which they are to blame for the loss of bee colonies.<sup>24</sup>

While the degree of harm suffered by pollinators might be subject to debate, the economic value of pollinators is not. Bayer Global produces two of the three common neonics, clothianidin and imidacloprid.<sup>25</sup> Bayer estimates that

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the global economic value of pollinators such as bees, butterflies, and flies is between \$235 and \$577 billion.<sup>26</sup>

Advocates for regulating neonics put the global value of pollinators at a more modest \$190 billion and the domestic value at \$16 billion.<sup>27</sup> This does not account for other potential economic costs of using neonics, including the value of the effects on the environment caused by the loss of predatory insects and birds, possible effects on mammals that eat treated seed or consume products

grown with treated seed, and possible effects on the health of mammals that consume water that contains neonics; and future clean-up costs if clean-up ultimately is deemed necessary to protect human health and the environment.

Currently, all or nearly all corn seeds planted in Wisconsin are coated with neonics. Approximately 50% of soybean seeds are coated with neonics. Seed companies offer guarantees to farmers who purchase neonic-coated seeds; these same crop-loss guarantees are not

offered for non-coated seeds.

Despite the widespread use of seeds coated with neonics, there is evidence that there is no net financial benefit to agricultural producers from their use, particularly with respect to soybeans.<sup>28</sup> Consequently, the failure to engage with this issue could have substantial economic consequences in Wisconsin, while providing little to no financial benefit for most agricultural producers.

**Interplay of Neonics' Economic Effects and the REINS Act.** Notably, Wisconsin's REINS Act (Regulations from the Executive in Need of Scrutiny) (2017 Wis. Act 57) does not bring these economic challenges into focus. The original purpose of an economic impact analysis under the law was to assess the impact of a rule on the "economy, sectors of economy productivity, jobs, or the overall competitiveness of the state." However, since enactment of 2017 Wis. Act 57 the operative provision in the law has focused solely on implementation and compliance costs.<sup>29</sup> Under the REINS Act, if any administrative rule has implementation and compliance costs to businesses that exceed \$10 million per year, then the agency must stop the rulemaking process and seek specific legislative authority to promulgate the rule.<sup>30</sup> The REINS Act conflates concepts of economics and accounting. Even for subjects for which regulation would be economically beneficial to Wisconsin, the REINS Act would hamper the ability of an agency to address the subject of the regulation if compliance costs exceed the threshold. This problem can be solved by the legislature taking the lead in determining appropriate regulation, but that still leaves unanswered the question of what is a more palatable form of regulation.

### Steering Versus Ordering

Ontario, a Canadian province, has taken an approach to neonics regulation that presents an example of administrative law that is more steering than ordering. In Ontario, to buy seed coated with a neonic,



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an agricultural producer must 1) complete a course in integrated pest management (IPM), 2) complete a pest risk assessment and report, and 3) sign a declaration stating that the agricultural producer has considered using IPM principles.

Additionally, to use neonic-coated seed, an agricultural producer must 1) only plant in areas identified in the report created by the agricultural producer, 2) use the product in accordance with the directions on the label, 3) maintain a record of where the agricultural producer planted treated seed, and 4) retain records for two years. Quebec takes a more restrictive approach – prescription by an agronomist is required to buy and use neonics.

By limiting neonic use to areas where agricultural producers (or their agronomists) determine it is needed, these provinces have reduced usage to less than 1% of acres planted.<sup>31</sup>

**Benefits of Steering.** The advantages of a steering approach to regulation are well demonstrated when placed in

contrast to the Wisconsin experience. First, the problem of waiting for scientific consensus is avoided. The focus of the inquiry is on when the use of neonics is necessary, rather than a numeric standard that must be developed and approved through a legislative process separately for every individual neonic compound.

Second, agricultural producers retain the right to use neonics where needed. In Ontario, agricultural producers are even the ones to determine *whether* a neonic is needed. While some administrative rulemaking would be required to implement this system, the regulatory effects on agricultural producers are greatly reduced. As noted above, in most cases, this limited set of regulations will save money by reducing the amount unnecessarily expended on seed coatings.<sup>32</sup> This is because the value of the increase in yield is offset by the additional costs of the chemical compounds themselves in most cases. A regulatory system that emphasizes self-determination will also inherently create a greater level of

acceptance and compliance.

Third, because a steering approach is less determinative of outcomes, it is possible that the political tension around such regulations will be substantially reduced. As various cases make their way through the Wisconsin Supreme Court, a new understanding of constitutional principles may emerge.<sup>33</sup> A steering approach can likely be taken regardless of the future relationship between the co-equal branches of government.

## Conclusion

A steering approach to regulation is not a cure-all. It will not be appropriate in all circumstances. To the extent that there is a consensus that a chemical compound poses an undue risk to human health and the environment, its use should be restricted. However, when regulating mutable chemical substances, a steering approach offers advantages of more immediate action and the prospect of greater public acceptance and compliance. **WL**

## ENDNOTES (33)

<sup>1</sup>Maria De Benedetto, *Effective Law from a Regulatory and Administrative Law Perspective*, J. Risk Reg. 9 No. 3: (2018): 391-415, <https://jstor.org/stable/26614486>.

<sup>2</sup>*Center for Food Safety v. U.S. EPA*, No. 3:23-CV-02714 (N.D. Cal. Nov. 20, 2024).

<sup>3</sup>For more information, see Clean Wisconsin Neonicotinoid Forum pts. 1-4 on YouTube [hereinafter Clean Wisconsin]. Wisconsin Neonic Forum Part 1; Wisconsin Neonic Forum Part 2; Wisconsin Neonic Forum Part 3; Wisconsin Neonic Forum Part 4.

<sup>4</sup>U.S.C. §§ 136-136y; see also 40 C.F.R. pt. 152.

<sup>5</sup>*Center for Food Safety*, No. 3:23-CV-02714.

<sup>6</sup>U.S.C. § 136a(g).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>Wis. Stat. § 94.69; see also Wis. Legis. Council, *Issue Brief, Pesticide Regulation* (Oct. 2019), [https://docs.legis.wisconsin.gov/misc/lc/issue\\_briefs/2019/agriculture/ib\\_pesticides\\_el\\_2019\\_10\\_01](https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/agriculture/ib_pesticides_el_2019_10_01) (providing broad overview of pesticide regulation in Wisconsin).

<sup>10</sup>DATCP, *Neonicotinoid Pesticides In Wisconsin Groundwater and Surface Water* (July 2019), <https://datcp.wi.gov/Documents/NeonicotinoidReport.pdf>.

<sup>11</sup>*Id.* at 31.

<sup>12</sup>See Wis. DHS, *Drinking Water: Groundwater Standards*, <https://www.dhs.wisconsin.gov/water/gws.htm> (last revised Feb. 4, 2025).

<sup>13</sup>*Id.*

<sup>14</sup>*Wisconsin Groundwater Coordinating Council Report to the Legislature - 2024*, <https://dnr.wisconsin.gov/sites/default/files/topic/Groundwater/GCCGWQuality/Pesticides.pdf>.

<sup>15</sup>See 2023 S.B. 360.

<sup>16</sup>See 40 C.F.R. § 152.42, 40 C.F.R. § 152.50 (f) (applicant must provide specified data and inform EPA of any adverse effects on health or the environment “of which [the applicant] is aware”).

<sup>17</sup>*Wisconsin Manufacturers & Com., Inc. v. Wisconsin Dep’t of Nat. Res.*, 2024 WI App 18, ¶ 81, 411 Wis. 2d 462, 5 N.W.3d 903 (review granted).

<sup>18</sup>*Id.*

<sup>19</sup>See Ronald Sklansky, *Changing the Rules on Rulemaking*, 84 Wis. Law. 10 (July/August 2011).

<sup>20</sup>Wis. Stat. §§ 227.135(2), 227.185.

<sup>21</sup>See *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (holding this portion of Act 21 unconstitutional as applied to a non-cabinet agency).

<sup>22</sup>The author played no role in any of the DNR cases or matters discussed in this article. In some cases, pending litigation is not referenced or discussed in this article because the author participated to some extent in legal representation of the DNR.

<sup>23</sup>Sierra Alvernaz, *The Price of Pesticides: Environmental and Economic Impacts of Using Neonicotinoids in Agriculture*, J. Env’t L. & Litig. Vol. 38, at 33.

<sup>24</sup>Bayer, *Neonicotinoids: Bayer’s Systematic Risk Mitigation & Portfolio Evolution* 18 (April 2024), <https://www.bayer.com/sites/default/files/bayer-neonicotinoids-report-2024-5-29singlepages.pdf>.

<sup>25</sup>*Id.* at 4

<sup>26</sup>Bayer Global, *The Value of Pollinators*, <https://www.bayer.com/en/agriculture/article/economic-value-pollinators> (last updated Jan. 10, 2025).

<sup>27</sup>Alvernaz, *supra* note 23, at 234

<sup>28</sup>Clean Wisconsin, *supra* note 3, pt. 1 (presentation of Dr. Shawn Conley; the work of Dr. Conley is funded in part by the Wisconsin Soybean Growers Association).

<sup>29</sup>Compare Wis. Stat. section 227.139 with Wis. Stat. section 227.137(3).

<sup>30</sup>Wis. Stat. § 227.139 (requirement); see also Wis. Stat. § 227.137(3)(b)(1).

<sup>31</sup>Clean Wisconsin, Wisconsin Neonic Forum Part 4, presentation of Daniel Raichel Wisconsin Neonic Forum Part 4.

<sup>32</sup>Clean Wisconsin, *supra* note 3, Conley presentation.

<sup>33</sup>The author has played a minor role in some of these cases and declines to discuss them further. **WL**