EMERGENCY AUTHORISATIONS OF PROHIBITED CHEMICALS: CONCERNS RELATING TO THE DECISION-MAKING PROCESS

I. INTRODUCTION

1. This complaint is submitted to the Office for Environmental Protection ("the OEP") by Leigh Day on behalf of The Wildlife Trusts.

2. Our client, The Wildlife Trusts, is the largest UK voluntary organisation dedicated to conserving the full range of the UK's habitats and species, with more than 870,000 members. The Wildlife Trusts is a charitable organisation made up of 46 local Wildlife Trusts across the UK and Crown Dependencies. The Wildlife Trusts looks after more than 2,300 nature reserves as well as visitor and education centres in every part of the UK. The Trusts also campaigns at national and local level, among other things, for the protection of the natural environment.

3. This is a formal complaint to the Office for Environmental Protection ("the OEP") by The Wildlife Trusts about the repeated (annual) use of emergency authorisations under Article 53 of Regulation 1107/2009 to authorise prohibited chemicals for use on farmland in England [and Wales]. The complaint is made by reference to the detailed case study of the authorisation of Cruiser SB (which contains the Neonicotinoid Thiamethoxam), which is particularly harmful to bees.

4. However, it is illustrative of wider concerns relating to decision-making of this kind. In particular, those concerns relate to: (i) a lack of transparency, and therefore public participation, in decision-making; (ii) the rolling use of "*emergency*" authorisations; and (iii) the use of (or, rather, the repeated departure from) scientific advice from independent bodies.

5. The OEP is invited to investigate this complaint insofar as it relates to both the specific example of Cruiser SB and the wider strategic implementation issues it identifies.

II. CRUISER SB EMERGENCY AUTHORISATION: CASE STUDY

6. We are concerned about the repeated decisions by the Secretary of State for Environment, Food & Rural Affairs to grant emergency authorisations to farmers to use Cruiser SB (which contains the Neonicotinoid Thiamethoxam). The most recent

authorisation was granted on 30 January 2023 to the National Farmers Union and British Sugar for the use of Cruiser SB on beet crops. In addition to Thiamethoxam, Cruiser SB contained Poncho Beta, which makes a pyrethroid/ neonicotinoid combination (beta-cyfluthrin/ clothianidin), which are substances known to be harmful to the environment and, in particular, to pollinating insects. Pollinators are vital for the survival of food crops and other wild plants that support the UK's wildlife. They pollinate £690 million worth of crops annually, which would otherwise cost an estimated £1.8 billion a year[1].

7. Following the authorisation grant, the application of Cruiser SB to the seed each year is subject to the outcome of a virus forecast model developed and run by Rothamsted Research, which is run on 1 March. If the predicted virus level exceeds the set threshold, the authorisation is available for that season. The virus threshold in 2023 was set at 63%. The threshold was met and so the NFU and British Sugar (or, more particularly, farmers working under their auspices) have been permitted to use Cruiser SB this year.

Relevant legal framework

8. Regulation (EC) No. 1107 / 2009, 21 October 2009 (as amended), regulates the use of plant protection products within the EU ("the PPP Regulation"). In the UK, the PPP regulation is now EU retained law under the European Union (Withdrawal) Act 2018 ("the EU Withdrawal Act"). The Secretary of State has used his power under s. 8 of the EU Withdrawal Act to make certain modifications to the PPP regulation in domestic law. This has been done via the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 556/2019) ("the Plant Protection Regulations").

9. Article 28 (1) of the PPP Regulation states that "*A plant protection product shall not be placed on the market or used unless it has been authorised in the Member State concerned in accordance with this Regulation*".

10. The concept of a "*plant protection product*" is defined in Article 2 of the PPP Regulation as "*products in the form in which they are supplied to the user, consisting of or containing active substances, safeners or synergists*" and intended to certain defined

[1] Save bees and pollinators | The Wildlife Trusts

uses, including relevantly "*protecting plants or plant products against all harmful organisms or preventing the action of such organisms*…".

The Prohibition on the use of Thiamethoxam

11. Annex A to Regulation (EC) No. 540 / 2011 provides for the implementation of the PPP Regulation. This Regulation has been amended on several occasions, including to severely limit the use of Thiamethoxam and Clothianidin in pesticides because of their harmful effects on the environment.

12. In 2013, the European Food Safety Authority ("EFSA") conducted a detailed peer review assessment of the pesticide risk to bees from certain neonicotinoid chemicals.[2] This report identified "*high acute risks*" for bees from plant protection products containing the active substances Clothianidin, Thiamethoxam or imidacloprid. This is explained in Recital (6), Commission Regulation 485 / 2013 ("the 2013 Regulation"). As a result, the 2013 Regulation prohibited the use of Thiamethoxam and other neonicotinoids on certain crops, such as oilseed rape, which are attractive to bees.

13. Following a detailed review of data by the EFSA at the Commission's request[3], Regulation (EC) No. 540 / 2011 was again amended in 2018 by Commission Implementing Regulation (EU) 2018/785 – the effect of which was to prohibit the placing on the market of Thiamethoxam, save for use as an insecticide in permanent greenhouses. An identical prohibition was imposed on the use of Clothianidin, for the same reasons by Commission Implementing Regulation (EU) No 2018 / 784 (together "the 2018 Regulations"). These regulations, and the general prohibition contained in them, continue to form part of retained EU law by virtue of Schedule 1, Part 2, paragraph 5 of the Plant Protection Regulations. The EU prohibition on the general use of Thiamethoxam has therefore been retained into UK law following Brexit.

14. As explained in Recital 3 to the 2018 Regulations, in considering how to regulate Thiamethoxam and Clothianidin, the Commission (on advice from the EFSA) fully considered the risks posed by the pesticide, including:

[2] European Food safety Authority. (2013) Conclusion on the peer review of the pesticide risk assessment for bees for the active substance thiamethoxam. EFSA Journal 2013;11(1):3067. Available here

[3] Evaluation of the data on data on clothianidin, imidacloprid and thiamethoxam for the updated risk assessment to bees for seed treatments and granules in the EU. Available here.

(a) the risk to pollinators other than honey bees;
(b) the risk to honey bees foraging in nectar or pollen in succeeding crops;
(c) the potential uptake via roots to flowering weeds;
(d) the risk to honey bees foraging on insect honey dew;
(e) the potential guttation exposure and the acute and the long-term risk to colony survival and development, and the risk to bee brood resulting from such exposure;
(f) the potential exposure to dust drift following drill and the acute and the long term risk to colony survival and development, and the risk to bee brood resulting from such exposure; and
(g) the acute and long-term risk to colony survival and development and the risk to bee brood for honeybees from ingestion of contaminated nectar and pollen.

15. Following detailed review and taking on board the EFSA's report, the Commission concluded that these risks had not been shown to be acceptable for the purposes of approval and that it was necessary to prohibit all outdoor uses (Recital 11, 2018 Regulations).

Emergency Authorisation Procedure

16. The PPP Regulation permits – but only in very limited circumstances – derogation from the prohibition in Article 28 on placing items on the market. This derogation is provided for in Article 53 of the PPP Regulation. The Plant Protection Regulation maintains this as UK law (with certain modifications) following the UK's EU Exit:

> (1) By way of derogation from Article 28, in "*special circumstances*" a competent authority may authorise, for a period not exceeding 120 days, the placing on the market of plant protection products, for limited and controlled use in its constituent territory, where such a measure appears "*necessary*" because of "*a danger which cannot be contained by any other reasonable means*".
> (2) The competent authority concerned shall immediately inform the other competent authorities of the measure taken, providing detailed information about the situation and any measures taken to ensure consumer safety.

17. In other words: (a) there must be "*special circumstances*" justifying derogation; (b) the measure must be "*necessary*"; (c) the necessity must arise from a "*danger which cannot be contained by any other reasonable means*"; (d) the authorisation must only be for "*limited and controlled use*"; and (e) the authorisation period must not exceed 120 days.

18. The requirement of "*necessity*", and the duty to consider and exclude the possibility of all reasonable alternatives reflects the fact that authorisation must be proportionate. In addition, as with any derogation within or derived from EU law, the scope of the rules permitting the derogation must be strictly and narrowly construed.

19. The process for approval is also subject to domestic policy, published on the Health and Safety Executive ("HSE") website. In particular, this guidance[4] requires that:

    - there must be no effective alternative chemical or non-chemical treatment available (emerging resistance thus being an acceptable reason to allow treatment);
    - there must be adequate evidence of human and environmental safety available;
    - the proposed use of the compound must be limited in scale;
    - the proposed use must be controlled, allowing perhaps for additional conditions of authorisation to be required;
    - the long-term economic and environmental benefits from granting a temporary emergency authorisation must outweigh any potential adverse effects resulting from the authorisation; and
    - there is evidence of a permanent solution to the problem being developed.

20. The guidance identifies one of the factors that is unlikely to support the existence of special circumstances as "*multiple repeat emergency applications*".

21. It follows that emergency authorisations are to deal with emergency situations and should be temporary, limited in scale, and controlled. An assessment will need to rely on existing information that is both relevant to the proposed emergency use and of adequate quality.

[4] https://www.hse.gov.uk/pesticides/resources/a/article-53-emergency-authorisation-applications.pdf

Authorisations to date

22. The 2023 authorisation is the third successive year that an Emergency Authorisation has been sought and granted for the use of Cruiser SB. In 2021, the virus threshold was not met, so Cruiser SB was not actually placed on the market / used.

Decision making process in 2023

Expert advice

23. The HSE guidance referred to in paragraph 19 above states that the HSE is responsible for "*undertaking expert assessments of applications*" (p19) and may consult the UK Expert Committee on Pesticides ("ECP") on "*scientific aspects of applications for emergency authorisation*" (p20).

24. The Secretary of State was provided with advice from the HSE[5] and the ECP[6] . Both bodies found that the criteria for emergency authorisation (in Article 53) were not satisfied.

25. The HSE advised that "*the potential adverse effects to honey bees (and other pollinators) which could arise if an authorisation was to be granted, outweigh the likely agronomic benefits of granting the emergency authorisation*" (p222). Specific concerns related to wider impacts at the colony level and the HSE advised that, taking into account the precautionary principle, the potential adverse effects were too great (p222). It also noted that proposed mitigation measures were insufficient and there were "*no obvious practical solutions for mitigating against the unquantified risks to bees*" (p4-5).

26. The ECP agreed with the HSE's conclusion that the requirements were not met. A new chronic honey bee toxicity study did not alter previous advice and a reduction in survival of honey bees and impacts on homing flight ability (which also influences survival of foragers) could occur following use of Cruiser SB on sugar beet.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1129486/Final_Cruiser_eRR_2023_Post_ECP_REDACTED_INITIAL_VERSION_BB.pdf

[6] https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/the-uk-expert-committee-on-pesticides-ecp-advice-2023-use-of-cruiser-sb-on-sugar-beet

27. In contrast, the Secretary of State's in-house Chief Scientific Adviser produced an advice which supported the authorisation grant. It downplayed concerns about the 3 pathways by which bees would be exposed to the toxic chemicals but it did not disagree that some harm could occur [7]. It noted that a new partially resistant variety of sugar beet (Maruscha KWS) was available for the first time but this "*has a low yield and is not favoured by farmers*". While the advice referred to the threshold for use of Cruiser SB being set at a level which predicts when the use of Cruiser SB will be "financially beneficial", it did not analyse or weigh harm against benefits.

Minister's Reasoning

28. Mark Spencer MP, Minister for Food, Farming and Fisheries, considered the application on behalf of the Secretary of State and made a decision on 30 January 2023.

29. The Minister's Statement of Reasons[8] concluded that the "*tests [for emergency authorisation] are met and that there are clear and substantial benefits to crop production from the use of Cruiser SB in a year with high pest pressures*" and the risks of authorisation "*(including potential risks to bees) are outweighed by the benefits of use in these circumstances*".

30. Danger: As explained above, to rely on a derogation from Article 28(1) of the PPP Regulation, Article 28(1) PPP Regulation, there must be a danger (Article 53(1)). Here the danger the threshold calculator seeks to avoid is farmer profit impact (i.e. a loss of income at a level which financially justifies the use of Cruiser SB). The 2023 Economic Analysis Report[9] makes clear that in determining the point at which farmers are allowed to use Cruiser SB (63%), the benchmark was pure profitability and nothing else. To be clear: no reliance was placed on wider supply or production impacts or issues relating to sugar beet, the only question was whether farmers were predicted to continue to

[7] https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/defras-chief-scientific-advisers-advice-on-the-use-of-cruiser-sb-on-the-2023-sugar-beet-crop#alternatives-to-use-of-cruiser-sb

[8] https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/statement-of-reasons-for-the-decision-on-the-application-for-emergency-authorisation-for-the-use-of-cruiser-sb-on-sugar-beet-crops-in-2023

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1132818/Defra_economic_analysis_report_adjustments_to_the_breakeven_threshold_and_impacts_of_virus_yellows_on_sugar_beet_production_2023.pdf

make profit by growing sugar beet. There are, of course, many other ways other than by growing sugar beet that farmers can make profits.

31. The method used to assess that profit imperative is described as follows: "*This adjusted breakeven threshold is calculated based on the balance between the: (1) Additional cost of using treated seed vs untreated seed YV management plans; (2) Avoided crop loss from using treated seed vs untreated seed YV management plans*" (p5). It is also clear from Figure 7, which shows the "*Net benefit to the sugar beet industry from Cruiser SB use*" (p6). The threshold of 63% was set at the point at which, in general, farmers break even (i.e. when it makes financial sense for them to use Cruiser SB).

32. Necessity: The Minister recognized the unavoidable risk Cruiser SB creates for bees and other pollinators but said that risks to bees would be minimised by measures including: (a) limitations on the amount of seed treatment applied and on the sowing density of the crop; (b) a ban on planting flowering crops within 32 months of the treated sugar beet; (c) a requirement for the control of weeds in the crop; and (d) a ban on the subsequent use of Cruiser SB on the same field within 46 months. Notably neither he, nor the CSA, claimed that risks/harms would be removed. There is no dispute that, despite the mitigating measures, harm would be caused to bees and other pollinating insects by the use of Cruiser SB. In any event, the mitigating measures are meaningless in practice as we are not aware of any monitoring by DEFRA or requirement on farmers to demonstrate compliance. DEFRA has allocated no additional resources to monitoring or enforcing compliance with the measures.

33. Other reasonable alternatives: The Minister concluded that alternative control measures (both chemical and non-chemical), even when used in combination, would not be sufficient to contain the danger identified. That, of course, assumed that the 'danger' (i.e. an impact on farmer profit) could only be addressed by solutions involving the growing of sugar beet.

34. Special circumstances: The Minister considered sugar beet to be an "*economically important domestic crop*". He relied on the general decline of sugar beet production (which has been in decline since the mid-1990s) and the fact that crop losses might result in growers turning their back on the crop.

Concerns with the decision

35. Failure to consider environmental harm. We are concerned that – despite asserting that he did so - the Minister failed to consider (by way of proportionality analysis) whether the environmental harm from Cruiser SB was outweighed by the benefit of addressing the identified danger (i.e. farmer profit). Just above the 63% threshold (i.e. the tipping point for farmer profit), the benefit to farmers is negligible but all the harm occurs to bees. The harm arises regardless of whether the use of Cruiser SB was triggered at 63% or by a much higher predicted level. There is no evidence from the Minister's reasons (or accompanying documents) that he analysed whether, close to the tipping point, the benefits outweighed the risks. That approach is contrary to the precautionary principle, which supports a careful approach towards environmental risk when the benefits are negligible.

36. Availability of alternatives. The Minister's approach to whether the identified danger could "*not be contained by any other reasonable means*" is also flawed. The basis for rejecting the new alternative of Maruscha KWS was its impact on yield. However, that is not logically relevant to the identified danger, which was impact on farmer profit. The Minister failed to consider the potential impact of the alternative on farmers' profitability, so there was no logical consideration of its potential as an alternative to addressing the identified danger.

37. Limited impact on yield in 2022. The Minister did not take into account that in 2022 the yield of farmers who did not use Cruiser SB was not significantly affected. The 2023 Economic Analysis Report[10] said that an "*official actual virus incidence*" for 2022 was not yet available, but that initial results from crop surveys suggested that actual virus incidence was low for growers who had not used Cruiser SB (p2). Notably, figure 4 of the 2023 Economic Analysis Report shows that 29% of growers did not apply Cruiser SB. The Report states that those growers who did not apply Cruiser SB experienced an actual virus incidence of less than 10% on average, significantly lower than the model forecast of 68.9% (p3). Then: "*this indicates that seed treatment may not have been necessary to control YV infections this year*" (p10). This information ought to have been relevant to the cost benefit analysis undertaken by the Minister.

[10] Defra economic analysis report explaining adjustments to the breakeven threshold and impacts of virus yellows on sugar beet production 2023 (publishing.service.gov.uk)

38. Rolling "*emergency*" authorisations. We are concerned that these "*emergency*" authorisations will continue for many years into the future (something the EU Commission would not have tolerated while the UK was within the EU) with a continued absence of appropriate scrutiny. In light of the lack of actual or emerging alternatives that are considered suitable or profitable for farmers, the purported "*special circumstances*" are likely to persist. The approach adopted removes any incentive for the industry and others to find alternative ways of dealing with the sugar beet issues in play (something they have repeatedly said would happen but without obvious progress) let alone look to alternative ways of farmers generating the equivalent profit. Applications in previous years indicated that suitable alternatives would have been developed by 2023, but that was notably absent from the 2023 application.

39. The Secretary of State has made repeated authorisations in other instances (detailed below at [45]-[48]) without – apparently – taking into account that the applications are effectively for rolling authorisations without any exceptional or emergency circumstances. That appears to be contrary to the HSE guidance about "*multiple repeat*" authorisations.

40. Environmental regression. Notably, this is the first clear example of post-Brexit environmental regression. On 19 January 2023, the European Court of Justice ruled that EU countries can no longer allow temporary exemptions for banned bee-toxic neonicotinoid pesticides[11]. The applicants in that case relied on the fact that "*the European Parliament and the Commission have expressed concerns as to the increasing use of the derogation provided for in Article 53(1) of Regulation No 1107/2009 by Member States, which wrongfully grant emergency authorisations for several years in a row without any proven danger to crops with the aim of regulating the growth of plants or facilitating their harvest or storage. In the light of new scientific data on the toxic effects of clothianidin and thiamethoxam on bees, the Commission prohibited the sale and outdoor use of seeds coated with plant protection products containing those active substances*" [25]. The ECJ observed that derogations must be interpreted strictly [35] and the provisions are based on the precautionary principle in order to "*prevent active substances or products placed on the market from harming human or animal health and the environment*" [47]. It relied, in particular, on the evidence highlighting the "*risks to bees from seeds treated with plant protection products containing thiamethoxam*" [52].

[11] https://curia.europa.eu/juris/document/document.jsf?text=&docid=269405&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1

41. By contrast, in the UK, the emergency authorisations continue to not only be permitted but routinely granted.

42. Role of scientific advice. This example also raises a concern about the government's ability to avoid clear advice/ warnings from independent expert bodies (i.e. the HSE and the ECP), by accepting the advice of the CSA. It is surprising that the (in-house) CSA was able to take such a different view to the (independent) HSE and the ECP when faced with the same scientific evidence. It is concerning that the view of the CSA, as an employed adviser, gives credibility to a position that is otherwise difficult to understand. The problem here is exacerbated by the fact that (as above) the CSA did not actually even advise on "proportionality" such that the Minister's disagreement with the independent advisers on that point could not even be said to be a choice between advisers. That is in stark contrast to the decision-making on dangerous pesticides in the EU, where there is no equivalent in-house adviser who can be relied on to counter the independent experts. This reinforces concerns about potential and actual environmental regression.

III. WIDER CONCERNS

43. We are concerned that the issues identified in the Cruiser SB example are widespread in this area of decision-making, with serious potential implications for wildlife and the environment.

Transparency and Participation

44. The UNECE Aarhus Convention places particular importance on ensuring that environmental information is available and accessible. Article 5(2) requires Parties to "*ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible*" (emphasis added). Article 5(3) requires Parties to "*ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public*". This includes information where its accessibility "*would facilitate the application of national law implementing this Convention*" (Article 5(3)(d)). Article 6 outlines obligations on Parties relating to ensuring public participation in environmental decision-making.

45. Before Brexit, when the UK remained subject to the EU approach to derogations under the PPP Regulation, the Commission published all Member State derogations in an accessible, searchable database[12]. Following the UK's exit from the EU on 31 January 2020, UK derogations are no longer in the EU database and there does not appear to be an equivalent UK version. It is not clear to us how to access derogations from the Regulations or emergency authorisations.

46. While there are some pesticide authorisation databases[13], they are difficult to navigate and do not allow a user to search by authorisation (e.g. to search for all emergency authorisations). It is possible to search the ECP's minutes to review the advice they provided to the government but some minutes are not published in full (i.e. only the agenda is online). This is further exacerbated by the fact that the ECP is not always consulted in relation to emergency authorisations[14] (as to which see below at [50]-[52]).

47. It is also then difficult to trace where/ how that advice was considered and/or applied in the decision-making process. The advice provided by the HSE is not routinely available or published on its website. We have not been able to find Statements of Reasons for other emergency authorisations that have been granted.

48. This raises concerns about accountability and transparency in decision-making. It means that it is prohibitively difficult for interested organisations, charities or individuals to trace government decision-making of this kind (unless they know precisely what they are looking for). That prevents the public from understanding or participating in the process (contrary to the obligations in Article 6 of the Aarhus Convention). It is possible that similar emergency authorisations are being made on a routine basis in a way that raises comparable concerns.

Examples of other "rolling" emergency authorisations

49. As explained above, it is not straightforward to find other emergency authorisations which have been made. The authorisations (and accompanying documentation/ scientific advice) are not available on the government website. HSE advice on particular applications is not available on the HSE website. However, we have identified some other examples of emergency authorisations being granted that raise

[12] https://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/ppp/screen/home
[13] See e.g. https://www.hse.gov.uk/pesticides/databases/index.htm
[14] See p3 and 5, ecp-full-minutes-7Jun22 (publishing.service.gov.uk)

similar concerns to the Cruiser SB case study. Without all the relevant documentation, the examples below are not exhaustive but simply illustrate the wider issues.

Exirel 10SE

50. In 2021, the ECP advised on an application for emergency authorisation under Article 53 of Regulation 1107/2009 for the use of '*Exirel 10SE'* containing cyantraniliprole intended for control of spotted wing drosophila on outdoor wine grapes[15]. Cyantraniliprole is highly toxic to honey bees, moderately toxic to earthworms and most aquatic species[16]. Despite noting that: (i) this was the fourth consecutive application for this use; (ii) it was no longer an '*emergency'* but an established pest and there had been three seasons to gather data to support the application; and (iii) the applicant had failed to provide that data, the authorisation was granted.

51. In 2021, an emergency authorisation was granted for '*Exirel 10SE'* containing cyantraniliprole for use on plum, cherry, blackberries and raspberries in England and Scotland[17]. The authorisation was granted despite the fact that the ECP did not support it. The ECP raised concerns that: (i) this was the seventh consecutive application for use in cherry and the 6th consecutive application for all other uses; (ii) there was no evidence the use was controlled; and (iii) there was no evidence that growers have complied with conditions of use in previous authorisations. A further emergency authorisation was granted in June 2022[18].

Benevia 10OD

52. In 2022, an emergency authorisation was granted for the use of '*Benevia 10OD'* on leek to control onion thrips[19], which contains cyantraniliprole. This was the sixth consecutive application for such an authorisation[20].

[15] Full Minutes of the meeting of the UK Expert Committee on Pesticides (ECP) 27 April 2021.pdf at p7-8
[16] http://sitem.herts.ac.uk/aeru/ppdb/en/Reports/1662.htm
[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1130014/UK_competent_authorities_for_pesticide_residues_in_food_annual_report_for_2021.pdf ; Full Minutes of the meeting of the UK Expert Committee on Pesticides (ECP) 27 April 2021.pdf at p9-10
[18] Approval20221053.pdf
[19] https://www.agrii.co.uk/wp-content/uploads/2022/07/Benevia-Leeks-2022_00105_rec.pdf ; https://projectbluearchive.blob.core.windows.net/media/Default/Horticulture/EAMUS/2022_00105_LEEK%20-%20Benevia%2010OD%20-%20Emergency%20Authorisation.pdf
[20] Full Minutes of the meeting of the UK Expert Committee on Pesticides (ECP) 27 April 2021.pdf at p22-23

53. In 2021, the ECP advised on an application for emergency authorisation for the use of '*Benevia 10OD'*, for use on outdoor kale and collard and oriental brassicas to control Diamond-back moth[21]. The ECP noted that: (i) this was the sixth consecutive application for this use; (ii) the risk to aquatic invertebrates was unacceptable and no appropriate mitigation measures could ameliorate the risks; (iii) there was an inadequate case for need; and (iv) there was evidence that use had been neither limited nor controlled. Despite that advice, the emergency authorisation was granted[22].

Concerns

54. These examples demonstrate that repeated "*emergency*" authorisations for various pesticides that are banned for being harmful to wildlife are routinely granted. It is striking that these examples include so many consecutive authorisations. This supports the concerns that Article 53 derogations are not being used for circumstances that are truly emergencies and there is a real danger that the law (and the HSE guidance) is not being implemented correctly. As explained above, this approach to repeat emergency authorisations would not be lawful if the UK were still in the EU.

Scientific advice

55. A related concern identified by these examples is the granting of authorisations despite opposition from the HSE and/or the ECP. In authorisations of this kind, where the impact on wildlife and/or the environment is a central concern, it is worrying that the advice of the expert independent bodies is not being followed, with (potentially) adverse and long-term implications for biodiversity and the environment.

56. Moreover, as demonstrated by the Cruiser SB case study, there is an obvious and unsatisfactory difficulty with the government being able to rely on the advice of the employed CSA to avoid following the negative advice of the HSE and ECP. This means that in practice it is very difficult for individual authorisation decisions to be challenged, by way of judicial review brought by – for example - an environmental organisation, when there is at least some scientific support for the authorisation.

57. This raises a related concern about the unavailability of a substantive challenge to this kind of decision-making. Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention include a requirement for a review of substantive and procedural legality that provides

[21] Full Minutes of the meeting of the UK Expert Committee on Pesticides (ECP) 27 April 2021.pdf at p24-25
[22] https://projectblue.blob.core.windows.net/media/Default/Horticulture/EAMUS/Benevia%20Brassicas.pdf

for adequate and effective remedies. A claim for judicial review cannot address the underlying merits of a decision (such as the choice between competing scientific advice). At present, contrary to the requirements of the Aarhus Convention, in England [and Wales] there is no effective mechanism or remedy for a substantive complaint about the government's approach to environmental decision-making. That failure is particularly acute in this case.

58. Finally, it is particularly concerning that repeat derogation decisions are being made without seeking the advice of the ECP. As noted above, the ECP is not routinely consulted on emergency authorisation applications. Given the remit of the Committee and its obvious expertise, this appears to be a surprising and concerning failure to use that resource.

IV. CONCLUSION

59. The Wildlife Trusts therefore requests that the OEP investigates these concerns. We are willing to assist the OEP in this investigation and can provide any further details or information that may be helpful (and available to us).

5 June 2023